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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM HAMPTON COUNTY

Court of Common Pleas

Walter H. Sanders, Jr., Special Referee

Case No. 2023-001001

Donald Youngblood,……...Respondent,

v.

Sheila Wright,...……...……...Appellant.

FINAL REPLY BRIEF OF APPELLANT

Respectfully submitted,

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I. THE APPELLANT'S AFFIDAVIT OFFERED IN SUPPORT OF THEMOTION TO SET ASIDE DEFAULT WAS NOT HEARSAY EVIDENCE. THE ISSUE WAS RAISED AT THE HEARING AND RULED UPON BY THE SPECIAL REFEREE. A POST JUDGEMENT MOTION JUDGMENT RULE 59(e), SCRCP IS NOT REQUIRED.

At the beginning of the hearing on May 2, 2023, the Special Referee invited arguments on the Appellant's Motion to Set Aside Default. The attorney for the Appellant summarized the procedural history of the case as set forth in his Affidavit of Defendant's attorney which was submitted in support of the Motion to Set Aside Default. The Appellant's attorney then proceeded to discuss "good cause" as discussed and defined in South Carolina law. Sundown Operating Co., Inc. v. Intedge Industries Inc.,383 S.C. 601, 681 S.E. 2d 885 (2009). The homeowner insurance company of the Appellant made a mistake with its new, electronic case management system. The attorney for the Appellant then discussed the Wham factors:

(1) Timing of the Motion for Relief:

(2) Defendants meritorious defense;

(3) Prejudice if any to the opposing party;

Wham v. Shearson Leaman Bros., Inc., 298 S.C. 462, 381 S.E. 2d 499 (Ct. App. 1989

The attorney for the Appellant concluded by arguing that allowing the case to proceed on the merits would serve the interests of justice.

The Special Referee then turned to the legal counsel for the Respondent John E. Parker, Esquire. Mr. Parker argued that the Affidavit contained hearsay evidence and should not be admitted or relied upon by the Special Referee in making a decision on the Motion to Set Aside the Default. The attorney for the Respondent should be judicially estopped from arguing that an

issue was not raised before the trial court when he, himself, raised that issue at the hearing before the Special Referee. The Special Referee did not raise hearsay evidence issue *sua sponte*.

The Affidavit of the Appellant's attorney offered in support of the Motion to Set aside the Default states in the very first paragraph that the Affidavit is based upon his own knowledge and information and on the "business records" of the Defendant's homeowner insurance company (R. p. 017, Section 1). The Statement goes further to say that these business records were entrusted to the Affidavit for the purposes of litigation. That very statement raises the issue of business records and hearsay evidence. The Special Referee heard arguments from both sides on hearsay evidence and the business records exception found in Rule 803 (6), SCRE. When the decision of the Special Referee was issued on June 1, 2023, a month after the hearing, the issue was addressed by the trial court.

The South Carolina Supreme Court has stated that a motion under Rule 59 (e), SCRCP is not an absolute prerequisite to an appeal. "Post-trial motions" are not necessary to preserve issues which have been ruled upon at trial; they are used to preserve those that have been raised to the trial court, but not yet ruled upon by it." Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E. 2d 731 (1998). Here, the issue of hearsay and the exception for business records was argued by counsel for the Appellant and by legal counsel for the Respondent. The Special Referee made a ruling on that issue in the final Order. In this case, under these procedural facts, the Appellant did not have to make a motion for a new trial or amendment of the final judgment in order to appeal the final decision of the Court below.

II. A. THE APPALLENT OFFERED THE SPECIAL REFEREE A "SATISFACTORY EXPLANATION" FOR WHY AND HOW THE DEFAULT OCCURRED AND THE APPELLANT ARGUED IN HER MOTION TO SET ASIDE THE ORDER OF DEFAULT THAT THERE WERE SEVERAL DEFENSES IN THIS CASE AND JUSTICE WOULD BE SERVED BY A FULL LITIGATION AND DEVELOPMENT OF THE FACTS AND LEGAL ISSUES IN THIS CASE.

In addressing a party's motion to set aside an Order of Default, the moving party should offer a "satisfactory explanation" for how and why the default occurred. The moving party must then show the trial court that setting aside the Order of Default would serve the interests of justice. Sundown, *supra,* at 601. This is not a case in which the Defendant or her homeowner insurance company received the pleadings and simply did nothing.

Legal counsel for the Respondent was communicating with the Appellant's homeowner insurance company for a year, well before this lawsuit was filed. When the Respondents claims were not settled, the Respondent filed his lawsuit on January 25, 2022. After this civil action was filed and served on the Appellant, the Respondent's attorney did not send the homeowner insurance company a copy of the Summons and Complaint until July 21, 2022, almost six months after the pleadings were filed and served on the Appellant (R. p. 006). It was not unreasonable for the Appellant to believe that legal counsel for the Respondent was communicating directly with the insurance carrier. It was also not unreasonable for the insurance company to expect good faith communications from Respondent's legal counsel.

Once the Appellant's insurance company received a copy of the filed Summons and Complaint directly from Respondent's attorney, the insurance company immediately retained legal counsel for the Appellant. When the Appellant's homeowner insurance company retained legal counsel for the Appellant in July 2022, after receipt of the Summons and Complaint, the Appellant was already in default (R. pp. 009-010). At that point, the attorney for the Appellant could not simply file a late responsive pleading. Such a pleading would not be valid because the Defendant

was already in default. Stark Truss Company Inc. v. Superior Const. Corp., 360 S.C. 503, 602 S.E. 2d 99 (Ct. App. 2004).

B. THE APPELLANT OFFERED THE SPECIAL REFEREE AN AFFIDAVIT AND LEGAL ARGUMENTS WHICH DID SATISFY THE WHAM FACTORS.

Having offered the Special Referee a satisfactory explanation for the events and conditions which led to the Order of Default, the Appellant also offered facts and law to satisfy the Wham factors.

After negotiating with the Appellant's homeowner insurance company for a year, the Plaintiff's slip and fall lawsuit was filed in the Hampton County Court of Common Pleas on January 25, 2022. The Respondent then waited for almost a full calendar year before moving for and Order of Default.

As stated above, legal counsel for the Appellant was of the opinion that an untimely filed Answer would not be effective or valid without consent of Respondent's attorney. The Respondent moved for default in January 2023, but did not provide opposing counsel the professional courtesy of notice or a copy of that matter. It is true that the attorney for the Appellant had not formally appeared in the lawsuit at that time. Only because the Appellant's attorney decided to check the public record did he learn that the motion for an Order of Default had been filed. The Appellant's attorney filed a Motion to Set Aside the Order of Default within a few days after learning about the Motion and Order. The timing of the Appellant's Motion to Set Aside the Default was certainly more timely than the Respondent' Motion for Default.

The Appellant could, if given the opportunity, raise several meritorious defenses. (R. pp. 023-024). In Appellant's motion to Set Aside the Order of Default, the attorney for the Appellant advised the Special Referee that there was a dispute about whether the Respondent was a licensee or invitee. It was also explained to the court that the Respondent had walked across this front yard

on previous visits. He would therefore be knowledgeable about the condition of the yard, truck tracks and other depressions. The Appellant also suggested to the Special Referee that the Respondent admitted to an insurance investigator that he was not paying attention to the surface of the ground at the time of the incident. If the Order of Default were reversed, along with the subsequent Judgement, further legal issues and evidence would certainly arise around medical procedures and services and a discussion of proximate cause. The Affidavit of the Appellant's attorney and the Motion to Set Aside the Order of Default clearly raised meritorious defenses to the Special Referee.

The Appellant disagrees with the Respondent's allegation of prejudice because of legal expenses, subpoenas, depositions, mediation, filing fees, etc. The Respondent took over two years to bring this matter to the point of a Default Judgement. There is no offering or allegation that setting aside the Default Judgement and allowing the Appellant a trial on the merits would be a problem because of a deceased witness, lost documents, or other impediments to the Respondent's case. The prejudice to the Appellant, on the other hand, is great. The Special Referee, exercising discretion, should weigh the equities and seek justice for all parties.

III. THE RECORD IN THIS CASE DOES NOT CONTAIN ANY COMPETENT TESTIMONY THAT THE INJURY TO THE RESPONDENT'S SHOULDER WAS "PERMANENT" AND THE CONCLUSION OF THE SPECIAL REFEREE THAT THERE WAS SUCH A CONDITION IS SUBJECT TO APPEAL.

The only person to testify at the damages hearing was the Respondent himself. He testified that in his home improvement business (mostly porches and decks), he had to lift heavy items from time to time. He also testified that he had limited mobility in his right shoulder after surgery. If the Respondent had testified that this condition of his right shoulder was "permanent," because his doctor told him that, the Appellant would certainly have objected to the hearsay evidence and the

Special Referee would have granted that motion. However, there was no such expert evidence offered.

The Respondent testified about lost wages for 34 weeks and the Appellant's legal counsel did not object. The Respondent offered, as Plaintiff's Exhibit #1, a summary of his medical bills following the accident (R. pp. 031-048). Legal counsel for the Appellant did not object to those medical bills. The word "permanent" does not appear anywhere in the medical bills submitted by the Respondent.

The Appellant only learned of the Special Referee's finding of a "permanent" injury when the Special Referee filed and published his final order one month after the damages hearing. A post-trial motion under Rule 59 (e), SCRCP "are used to preserve those [issues] that have been raised to the trial court but not yet ruled upon by it" Wilke, *supra*, at 734. Post-trial motions are not necessary to preserve issues that have been ruled upon at the trial level. The finding and conclusion of the Special Referee that the Respondent suffered from a "permanent" injury is subject to appeal. The record in this case does not include any competent evidence to that effect.

IV. WHILE FUTURE DAMAMGES NEED NOT BE PROVEN TO A MATHEMATICAL CERTAINTY, THERE MUST BE SOME COMPETENT EVIDENCE WITH "RESONABLE CERTAINTY" THAT A DISABILITY WILL BE PERMANENT.

The Respondent testified to the Special Referee at the damages hearing that he was 58 years old. The Respondent's attorney asked the court to take judicial notice of life expectancy set forth in S.C. Code Ann. 19-1-150 (1976). The Appellant's legal counsel did not object to judicial notice of that South Carolina statute because the statute itself provides that the statutory tables are admissible in civil trials when life expectancy is an issue. Based on that statute, the Respondent has a life expectancy of 22 years. However, there was no testimony or evidence in the record that the Respondent would be able to work full time in the construction business until the age of 80.

In fact, the Respondents testimony was that he lost $1,000.00 per week in income for 34 weeks. The Respondent is not totally or permanently disabled based on the evidence in this matter. The Respondent relies on a case which involved conflicting opinions of two medical doctors. Haltiwanger v. Barr, 258 S.C. 27, 186 S.E. 2d 819 (1972)

The Respondent goes on to cite a more recent case in which the Plaintiff testified, without supporting evidence from a physician, that she continued to suffer back pain after standing or sitting. Wilder v. Blue Ribbon Taxicab Corp., 396 S.C. 139, 719 S.E. 2d 703, 708 (Ct. App. 2011). In that case, the trial court awarded $15,000.00 for pain and suffering past, present, and future. While a jury has wide latitude, future damages still must have "reasonable certainty and probability." Blue Ribbon, *supra*, at 148. In this case, the Special Referee found that the Plaintiff's total medical treatment costs was $68,773.80 (R. p. 027, Section 7). The Special Referee also found lost income of $34,000.00. Based on those two findings, the Respondent suffered $102,733.80 in medical expenses and lost income. The Special Referee then issued a judgement for $632,773.80. (R. p. 028, Section 12). The Respondent testified that he has returned to work, but he has some limitation lifting heavy loads because of limited mobility in his right shoulder. The Appellant calculates that the damages awarded by the Special Referee above and beyond medicals and lost income is $530,040.00. That number is beyond "wide latitude." Even though the Respondent's life expectancy is 80 years, no one is likely to be doing heavy home construction work at that age. This verdict is excessive and unsupported by competent evidence to a quote "reasonable certainty."

CONCLUSION

The Appellant offered the Special Referee a logical and truthful explanation of how the default occurred in this case. The Appellant also showed the Special Referee that the "Wham factors" were satisfied. The Appellant filed a Motion to Vacate the Order of Default a mere 30 days after it was entered while the Respondent waited one full year after filing and serving the Complaint before he moved for default. The Court should be equitable to all parties. The final judgement of the Special Referee is not supported by a competent, expert, medical opinion. The dollar amount is many, many times greater than the income lost at the time of injury. The Order of Default should be reversed, and this matter remanded for a trial on the merits or, in the alternative, a full hearing on all damages alleged and requested by the Respondent.

January 18, 2024

Respectfully submitted,

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v.

Sheila Wright,.....Appellant.

CERTIFICATE OF SERVICE

I certify that I have served the Final Reply Brief of Appellant on Donald Youngblood by sending a copy via e-mail, on January 18, 2024, to his attorneys of record John E. Parker, Jr. and John E. Parker, at their email addresses jparker@parkerlawgroupsc.com and jayparker@parkerlawgroupsc.com.

Respectfully submitted,

January 18, 2023

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January 18, 2024

FOR ELECTRONIC FILING VIA EMAIL (ctappfilings@sccourts.org):
The Honorable Jenny Abbott Kitchings
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Re: Donald Youngblood vs. Sheila Wright
Appellate Case No.: 2023-001001

Dear Ms. Kitchings:

On behalf of Appellant Sheila Wright, please find enclosed for filing the following:

1. Final Brief of Appellant with Proof of Service; and
2. Final Reply Brief of Appellant with Proof of Service.

We would greatly appreciate your filing these on our behalf and returning a date-stamped copy to us.

With best regards, I am

Sincerely,

/s/ F. Truett Nettles, II

F. Truett Nettles, II

FTN/kn
Enclosures
cc: John E. Parker, Esq. (via email w/ encls.)
Jay Parker, Esq. (via email w/ encls.)