

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS**

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Unpublished Opinion No. 2014-UP-192 (S.C. Ct. App. filed May 7, 2014)

Allen University,

Respondent,

v.

Lawrence Terry,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI

Lawrence Terry
Post Office Box 24138
Columbia, South Carolina 29224
(803) 414-0760
Petitioner Pro Se

Other Counsel of Record:
Debbie Whittle Durban
Post Office Box 11070
Columbia, South Carolina 29211
(803) 255-9465
Attorney for Respondent

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CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on June 25, 2014.

QUESTIONS PRESENTED

1. Did the Circuit Court err in dismissing the case when Plaintiff properly showed the Defendant's Default prior to the Order of Dismissal?
2. Did the Court of Appeals err in considering documents that were not presented to the Circuit Court during the rendering of its Orders?
3. Did the Court of Appeals err in basing its Opinion on arguments not presented by the Appellant?
4. Did the Court of Appeals err in considering documents that were previously stricken from the Record on Appeal and Briefs by two prior Orders of the Appeals Court?

STATEMENT OF THE CASE

On July 16, 2012, Lawrence Terry brought this action alleging LIBEL, NEGLIGENCE, INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS, CONSTRUCTIVE FRAUD, AND SILENT FRAUD against Allen University. Allen was served the Original Complaint, Summons, and Initial Requests For Admissions on July 30, 2012 and one day later on July 31, 2012 Allen University responded by filing a Motion To Dismiss.

On August 10, 2012 the Petitioner properly filed and served an Amended Complaint to only allege Negligence and Intentional Infliction Of Emotional Distress. On August 27, 2012 Petitioner filed a Motion For Summary Judgment.

An Affidavit Of Default was filed on September 11, 2012 after the Respondent failed to file any response to the Amended Complaint. On September 14, 2012 the Petitioner properly filed a Motion For Default Judgment. Without any prior notice or a hearing, The Honorable Judge L. Casey Manning abruptly filed a Form Order Dismissing the case With Prejudice on

September 17, 2012. A Motion For Reconsideration was filed on September 18, 2012 by the Petitioner and additional documents in support of said motion were also later filed. Petitioner made it clear in said motion that no notice was provided or a hearing. Reconsideration was denied February 11, 2013. Both Form Orders only stated that the case was dismissed but did not provide any explanation or reasoning.

The Petitioner filed the Notice of Appeal and Initial Brief on February 19, 2013. Copies were also served upon the Respondent that same day. After viewing the Petitioner's Initial Brief the Respondent contacted the lower court and persuaded them to add documents to the docket that would void the Petitioner's Affidavit of Default and Requests For Admissions. This was done without Order of the any court and without notice to the Petitioner. The Petitioner motioned the Appeals Court for clarification on the doctored documents. In the Appeals Court's Order dated August 9, 2013, it was stated that. "*We find the motions Respondent filed with the circuit court which were misfiled remained misplaced in another case file until after the circuit court issued its orders dismissing Appellant's action and denying reconsideration. Accordingly, we find those motions were "not presented to the lower court" and may not properly be included in either the Record on Appeal or Supplemental Record on Appeal in this matter.*" This Appeals Court further stated in its Order dated September 24, 2013 that, "*However, because the misfiled motions were stricken from the Record on Appeal by an order dated August 9, 2013, all references to the misfiled motions shall be omitted from Respondent's initial Brief. Accordingly, Respondent shall serve and file an Amended Initial Brief omitting any reference to the misfiled motions within thirty days.*" Those Orders would imply that Allen University did not file anything on the lower court docket in reply to the Amended Complaint and the Initial Requests for Admissions (Exhibit D)(R. p.12). After issuing those Orders the Court of Appeals still affirmed the judgment of the circuit court. Lawrence Terry vs. Allen University Unpublished Opinion No. 2014-UP-192 (S.C. Ct. App. filed May 7, 2014). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

1. THE CIRCUIT COURT SHOULD NOT HAVE DISMISSED THE CASE WITH DEFAULT OF THE DEFENDANT BEING SHOWN BY AFFIDAVIT PRIOR TO THE ORDER OF DISMISSAL.

I filed an Affidavit of Default based Allen University failure to respond to the Amended Complaint and it was filed 6 days prior to the abrupt Order of Dismissal. Rule 15(a) of SCRPC clearly states, “A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders.” I quote from Stark Truss Company v. Superior Construction Corporation Opinion No. 3859, *“Unless an extension is granted, a defendant must serve his answer within thirty days ‘after the service of the complaint upon him.’ Rule 12(a), SCRPC. If a party has failed to ‘plead or otherwise defend as provided by [the South Carolina Rules of Civil Procedure] and that fact is made to appear by affidavit or otherwise,’ the clerk of court will enter default. Rule 55(a), SCRPC. Entry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party. See Thynes v. Lloyd, 294 S.C. 152, 153-54, 363 S.E.2d 122, 123 (Ct. App. 1987) (holding that “whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit” of the moving party).*” Although not entered the Affidavit of Default was submitted 6 days prior to the Order of Dismissal. No extension of time was granted or any relief motion for.

2. THE APPEALS COURT SHOULD NOT HAVE CONSIDERED DOCUMENTS THAT WERE NOT PRESENTED TO THE CIRCUIT COURT.

Rule 210(c), SCACR (“The Record shall not...include matter which was not presented to the lower court or tribunal.”); see also Rule 210(h), SCACR (“Except as provided by

Rule 212 and Rule 208(b)(1)(C) and (2), the appellate court will not consider any fact which does not appear in the Record on Appeal.”). Allen University did not have a motion to dismiss on the docket when the trial court rendered its Order. In this Appeals Court’s Order dated August 9, 2013, it was stated that. *“We find the motions Respondent filed with the circuit court which were misfiled remained misplaced in another case file until after the circuit court issued its orders dismissing Appellant’s action and denying reconsideration. Accordingly, we find those motions were “not presented to the lower court” and may not properly be included in either the Record on Appeal or Supplemental Record on Appeal in this matter.”* This Appeals Court further stated in its Order dated September 24, 2013 that, *“However, because the misfiled motions were stricken from the Record on Appeal by an order dated August 9, 2013, all references to the misfiled motions shall be omitted from Respondent’s initial Brief. Accordingly, Respondent shall serve and file an Amended Initial Brief omitting any reference to the misfiled motions within thirty days.”* With those motions being affirmatively removed, it would confirm Allen University did not file a response to the Amended Complaint making it impossible for them to now have arguments for this court. So how can the Appeals Court then consider those documents anyway? Judge Cureton ruled on all of the motions but then a Staff Attorney writes the Unpublished Opinion? Then the Motion for Rehearing is done by a whole new set of Judges? It seems that the prior Appeals Court’s Orders were disregarded during the rendering of the Opinion.

3. THE APPEALS COURT’S OPINION IS BASED ON ARGUMENTS THAT WERE NEVER PRESENTED BY THE APPELLANT TO THE COURT OF APPEALS AND REFERENCES A MOTION TO DISMISS WHICH WAS STRICKEN FROM THE RECORD ON APPEAL AND BRIEFS BY TWO PRIOR ORDERS OF THE APPEALS COURT.

On page one of the Opinion the Appellant’s arguments were cited accurately and although some arguments were combined the argument that was used in the ruling of “1” and “3” on page two of the Opinion is unsubstantiated. That misinterpretation would completely change the dynamics of the Opinion, rulings, and the case as a whole. My original issues were as listed below:

1. DID THE TRIAL COURT ERR IN FAILING TO GIVE NOTICE OR HOLD A HEARING BEFORE MAKING A FINAL RULING?
2. WAS THE APPELLANT'S DUE PROCESS RIGHTS VIOLATED?
3. DID THE TRIAL COURT ERR IN DISMISSING THE CASE WITH PREJUDICE ALTHOUGH THE RESPONDENT FAILED TO FILE ANY RESPONSE TO THE AMENDED COMPLAINT AND REQUESTS FOR ADMISSIONS?
4. DID THE TRIAL COURT ERR IN FAILING TO ENTER A DEFAULT JUDGMENT AFTER THE PLAINTIFF PROPERLY FILED AN AFFIDAVIT OF DEFAULT?
5. DID THE TRIAL COURT ERR IN FAILING TO GIVE A CLEAR EXPLANATION ON ITS DISMISSAL?

Now those arguments were correctly cited on page one of the Appeals Court Opinion but and page two of the Opinion the Appeals Court used the following issues/arguments for its rulings:

1. AS TO WHETHER THE TRIAL COURT ERRED IN GRANTING ALLEN UNIVERSITY'S MOTION TO DISMISS.
2. AS TO WHETHER THE TRAIL COURT VIOLATED TERRY'S RIGHT TO PROCEDUARL DUE PROCESS.
3. AS TO WHETHER THE TRIAL COURT ERRED IN DENYING TERRY'S MOTION FOR DEFAULT JUDGMENT.

As I previously stated and the two Orders of the Court Appeals confirm, Allen University did not file a Motion To Dismiss in response to the Amended Complaint nor was it one of my issues. The Order of Dismissal by the Circuit Court contained two sentences and did not reference or mention a Motion To Dismiss as its basis for dismissal either (R. p.2). Argument number 1 of the

Opinion is the complete opposite of my basis for filing an Appeal. Allen University did not have a motion to dismiss on the docket during the rendering of the Circuit Court's Order to Dismiss (Exhibit D)(R. p.12). Again the Appeals Court already reviewed this issues upon motion of the Petitioner then issued two Orders confirming the material fact that no Motion to Dismiss was present but yet the Appeals Court then uses an unknown Motion To Dismiss as it reasoning for affirming the lower court's decision. Allen University was in Default and that Default was shown by Affidavit six days before the Order of Dismissal. I reference Rule 210(c), SCACR ("The Record shall not...include matter which was not presented to the lower court or tribunal.") as the Record does not contain a Motion To Dismiss the Amended Complaint which contained substantive changes from the Original Complaint(A.R. p 31). The Respondent attempted to add a Motion To Dismiss. The Appeals Court's two Orders had said motion stricken from the Record.

CONCLUSION

An abuse of discretion occurs when the order was controlled by an error of law or when the order is without evidentiary support. The Order of Dismissal by the trial court was controlled by an error of law in that Allen University was in Default at the time of the rendering of the Order. Based on Allen University's Default and Admitted Requests for Admissions, the Order is without evidentiary support. It would further imply that the trial court abused its discretion. The Petitioner would be deeply prejudiced if this Opinion is allowed to stand and not corrected. Once combined, the words and meanings of my original issues and arguments seem to have been omitted or transposed unintentionally. This is why I petition this graciously fair court for relief.

For the reasons stated, petitioner asks the Court to grant the petition for a writ of certiorari.

July 15, 2014

Respectfully submitted,

Lawrence Terry

Post Office Box 24138
Columbia, South Carolina 29224
Appellant, Pro Se

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TO THE COURT OF APPEALS**

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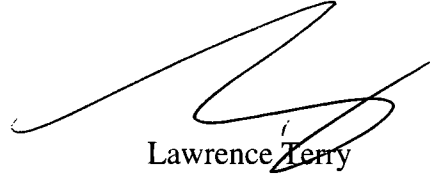
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PROOF OF SERVICE

I certify that I have served the PETITION FOR A WRIT OF CERTIORARI on Allen University by certified mailing copies on July 15, 2014, addressed to his attorney of record, Debbie W. Durban, Post Office Box 11070 Columbia, South Carolina 29211, Attorney for Respondent.

July 15, 2014



Lawrence Terry
Post Office Box 24138
Columbia, South Carolina 29224
(803) 414-0760
Appellant, Pro Se

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