

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Appellate Case No: 2014-000148
Civil Action No.: 2011-CP-07-04407

Alexander Pastene.....Appellant,

vs.

Thomas Trobaugh, Mr. and Mrs. Norman Ginsburg, W. Richard Beetle, Country
Club of Hilton Head, Club Corp of Dallas, Texas, Members of the CCHH Tennis
Committee.....Respondents.

INITIAL BRIEF OF RESPONDENTS

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Has the Appellant raised any issue of error in the orders on appeal as to the Respondents Beetle and Country Club of Hilton Head?

2. Did the Court err in dismissing the claims of the Plaintiff when the trial court granted the Respondents' Motion to Dismiss with leave to refile the Complaint and the Plaintiff failed to timely file a motion to reconsider or file or amend the Complaint?

STATEMENT OF THE CASE¹

The Appellant Pastene filed suit against the Respondents Richard Beetle, Country Club of Hilton Head, as well as Club Corp of Dallas TX and CCHH Tennis Committee Members alleging causes of action for assault, defamation and public policy wrongful termination. The Respondents Richard Beetle and Country Club of Hilton Head moved to dismiss these causes of action and raised to the Court's attention, by way of that same motion, that Club Corp of Dallas TX and CCHH Tennis Committee Members are not known legal entities subject to suit.

The Respondents Beetle and Country Club of Hilton Head moved to dismiss all causes of action arguing that the Complaint failed to make out causes of action against them. **[See Complaint of Plaintiff]** As to the assault claim, the Respondents asserted that Pastene failed to allege a cause of action against either Richard Beetle or Country Club of Hilton Head, as Mr. Beetle, nor any other employee of the Club other than Mr. Pastene, was pled to be present during the alleged assault.

Richard Beetle and Country Club of Hilton Head also moved for an Order dismissing the causes of action for defamation and wrongful termination against public policy. The Respondents argued that the Appellant failed to properly plead these causes of action. Specifically, it was asserted that the allegations

¹ The Statement of the Case in this Brief and the Facts and Arguments only address that part of the appeal which relate to the claims of the Appellant against the Respondents Richard Beetle and the Country Club of Hilton Head. A number of the issues raised in the Appellant's Initial Brief relate to other Respondents in this matter.

against the Respondents and facts as alleged did not give rise to the causes of action for assault, defamation and public policy wrongful termination.

Judge Kinard heard these motions on February 8, 2012 and by Order Dated March 2, 2012 and filed March 7, 2012, found the following:

This cause of action [for assault] is dismissed with prejudice as to Richard Beetle and Country Club of Hilton Head.

Richard Beetle and Country Club of Hilton Head also have moved for an order dismissing the causes of action for defamation and wrongful termination against public policy. The Defendants argue that the Plaintiff failed to properly plead these causes of action. I agree. However, I dismiss these causes of action without prejudice and with leave for the Plaintiff to refile within 30 days of the date of this Order. **[Order of Judge Kinard Dated March 2, 2012 and filed March 7, 2012]**

On April 10, 2012, the Appellant filed a document entitled "Answers to Honorable Judge Ernest Kinard's Order Granting Motion to Dismiss of 3-2-12 & Answer to Defendants Richard Beetle CCHH and Club Corp.'s Motion to Dismiss Dated 12-5-11." This document appeared to be a Motion for Reconsideration, but was in no way an Amended Complaint. **["Answers to Honorable Judge Ernest Kinard's Order Granting Motion to Dismiss of 3-2-12 & Answer to Defendants Richard Beetle CCHH and Club Corp.'s Motion to Dismiss Dated 12-5-11"]**. The Appellant subsequently asserted that it was not a Motion for Reconsideration. It was filed about 30 days after receipt of the Order of Judge Kinard.

The Plaintiff never refiled his Complaint or filed an Amended Complaint as he was given leave to do in the Order of Judge Kinard. However, because of the filing of the Appellant's entitled "Answers to Honorable Judge Ernest Kinard's

Order Granting Motion to Dismiss of 3-2-12 & Answer to Defendants Richard Beetle CCHH and Club Corp.'s Motion to Dismiss Dated 12-5-11," the case was never removed from the Court's roster. In order to get a final disposition in the matter, Counsel for the Defendant sent a letter to the Honorable Carmen Mullen, who was the Chief Administrative Judge at that time, raising to her attention the Order of Judge Kinard, the subsequent filing of indeterminate nature thirty days later by the Plaintiff, the fact that this document, which may have been construed to be a Motion for Reconsideration, was not filed as a Motion by the Clerk's office, the fact that no subsequent Complaint had been filed and seeking her guidance in how to proceed with the matter as it had become procedurally confusing. **[Letter from Lohr to Judge Mullen dated April 23, 2012]** The Appellant was copied on this correspondence and a few days later, made a reply to the letter setting forth his position regarding the case status and the dismissal of the matter by Judge Kinard. **[Letter from Pastene to Judge Mullen dated April 27, 2012]**

On May 15, 2012, the Court, via email correspondence, instructed counsel for the Respondents to prepare a short Order dismissing the case against the Respondents as no filing as set forth in the Order of Judge Kinard had been made and a Motion for Reconsideration was not timely filed. **[Email of May 15, 2012 from Clerk of Judge Mullen to Lohr]** The email was forwarded to the Appellant as instructed by the court and an Order was prepared by the Respondents. The Court signed this Order on May 21, 2012. **[Order of Mullen May 21, 2012]** The Order was not returned to the parties until mid-July 2012 and

the Plaintiff filed a Motion to reconsider that Order a few days later. **[Plaintiff's Motion for Reconsideration dated July 25, 2012]** The Plaintiff also filed what was styled as an "Amendment based on Rule 15 SCRPC and Memorandum in Support of Motion for Reconsideration dated 8-17-12. However, the Respondents can find no record of a Motion for Reconsideration dated 8-17-12. No hearing was ever held on the Plaintiff's Motion to Reconsider the Order of Judge Mullen dated May 21, 2012.

The case moved forward with numerous filings by Pastene and the remaining Respondents. Pastene subsequently filed a Notice of Appeal on September 23, 2013 and an Amended Notice of Appeal on October 14, 2013. The case was subsequently remitted to allow the Judge Mullen to rule on the Motion for Reconsideration of her May 21, 2012 Order. The Court denied the Motion for Reconsideration by Order dated December 11, 2013. This appeal follows.

ARGUMENTS

I. THE APPELLANT HAS FAILED TO ASSERT ANY ERROR IN THE ORDERS APPEALED FROM.

The Plaintiff has failed to assert any error with the actual ruling of the court. Rather the Appellant has made outrageous and disparaging comments about the hiring and conduct of opposing counsel, asserting fraudulent conduct toward the Court, the undue use of "influence", and the fact the counsel for the Respondents had previously successfully defended other cases against him. Moreover, he has failed to specifically support these outrageous and somewhat irrelevant allegations, with any specific evidence. Additionally, the Appellant contends that the Court was misled by counsel for the Respondents into filing an Order that differed from the ruling on the bench.

First, the ruling as set forth in the Order signed by the court reflected the ruling from the bench. **[See Transcript of Hearing p. 7-8, 10, 12 and 14]**. Even assuming arguendo that the order differed in any material way from the ruling from the bench, this would not be the basis for a finding of reversible error. It is well settled that when there is a discrepancy between an oral ruling of the court and its written order, the written order controls. See Ford v. State Ethics Comm'n, 344 S.C. 642, 646, 545 S.E.2d 821, 823 (2001); Corbin v. Kohler Co., 351 S.C. 613, 620, 571 S.E.2d 92, 96 (Ct.App.2002); Parag v. Baby Boy Lovin, 333 S.C. 221, 226, 508 S.E.2d 590, 592 (Ct.App.1998). See First Union National Bank of South Carolina v. Hitman, Inc., 306 S.C. 327, 411 S.E.2d 681 (Ct.App.1991), *aff'd*, 308 S.C. 421, 418 S.E.2d 545 (1992) (no order is final until it is written and

entered and the trial judge retains discretion to change his mind and amend his oral ruling accordingly); First Union National Bank of South Carolina v. Hitman, Inc., 308 S.C. 421, 418 S.E.2d 545 (1992) (a judge is not bound by a prior oral ruling and may issue a written order which conflicts with the prior oral ruling).

II. THE COURT PROPERLY DISMISSED THE APPELLANT'S COMPLAINT WITH LEAVE TO REFILE BUT THE APPELLANT DID NOT FOLLOW THE INSTRUCTIONS OF THE COURT AND ACT TIMELY TO EITHER CHALLENGE THE RULING OR TO MAKE THE APPROPRIATE FILING.

As stated previously, the Appellant does not appear to put forth any specific challenge of the Court's dismissal, but rather just alleges that his case should not have been dismissed. A review of the Complaint will show that the Appellant completely failed to plead facts that would give rise to the causes of action he had asserted against the Respondents. In subsequent filings the Appellant admits that he did not intend to allege assault against Country Club of Hilton Head or Beetle, but rather only against Trobough and Ginsburg. Instead he contends he meant to assert negligence. **[Amendment based on Rule 15 and Memo in support of Motion for Reconsideration]** The cause of action for assault was expressly pled against all Defendants and there is no reference to a cause of action for negligence in the Complaint. **[Complaint]** Additionally, with regard to the remaining causes of action, there are no allegations as to those causes of action that would support a prima facie showing against the Respondents Beetle and Country Club of Hilton Head. Rather they are allegations that a claim exists without any factual allegations to support the

claims. At the hearing on the Respondents' Motion to Dismiss, the Court explained this to the Appellant and advised him that his allegations were dismissed and would give him an opportunity within thirty days of the date of his order to re-plead his complaint to properly state his causes of action. **[See Transcript of Hearing p. 7]** The Order reflected this ruling. Instead of making any challenge to the ruling or attempting to correct his pleadings, the Plaintiff chose instead to file what he admits is not a Motion for Reconsideration but rather an "Answer to the Court's Order." In this document he specifically challenges the Court's ruling regarding the dismissal of the claim for assault and explains why he considered Beetle and Country Club of Hilton Head to have been part of the assault, restates many of the perceived wrongs done to him, and specifically requests Judge Kinard to reverse his order. **["Answers to Honorable Judge Ernest Kinard's Order Granting Motion to Dismiss of 3-2-12 & Answer to Defendants Richard Beetle CCHH and Club Corp.'s Motion to Dismiss Dated 12-5-11].**

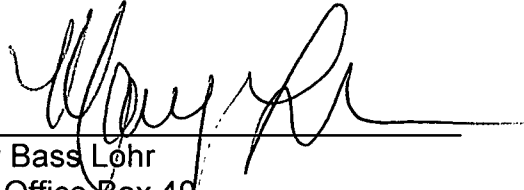
This document in no way could be considered to be an Amended Complaint or a re-filed Complaint. Rather it is most akin to a motion for Reconsideration, but was not timely filed. The Plaintiff quite simply refused the option specifically given to him by the Court to remedy the flawed pleading in his case. Given the fact that the Plaintiff had failed to re-file in the thirty day window proscribed to him by the order of the Court, Judge Mullen's later order dismissing the case was appropriate.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Appellant has failed to set forth grounds that would give rise to the reversal of the ruling of the lower court as he has set forth no basis for error in the rulings. Moreover, the orders of the Court dismissing the case against the Respondents were appropriate given the deficient nature of the Plaintiff's Complaint, as well as his refusal to comply with or properly challenge the Order of Judge Kinard granting the Motion to Dismiss.

HOWELL, GIBSON & HUGHES, P.A.

By: _____


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October 8, 2014

THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
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Civil Action No.: 2011-CP-07-04407

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Thomas Trobaugh, Mr. and Mrs. Norman Ginsburg, W. Richard Beetle, Country Club of Hilton Head, Club Corp of Dallas, Texas, Members of the CCHH Tennis Committee.....Respondents.

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that she has served the foregoing Initial Brief of Respondents upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on the 8th day of October, 2014 addressed to the following:

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October 8, 2014

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Re: Alexander Pastene vs. Thomas Trobough, Mr. and Mrs. Norman
Ginsberg, W. Richard Beetle, Country Club of Hilton
Head, Club Corp of Dallas TX. CCHH Tennis Committee Members
Civil Action No.: 2014-000148
Our File No: 11017 MBL

Dear Ms. Kitchings:

Please find enclosed herewith for filing the original and two (2) copies of the Initial Brief of Respondents and the original and two (2) copies of the Designation of Matter with regard to the above referenced matter. I would appreciate your filing the same and returning a filed clocked copy to me in the enclosed self-addressed, stamped envelope provided for your convenience.

With kindest regards, I am

Yours truly,

HOWELL, GIBSON AND HUGHES, P.A.



Mary Bass Lohr
MBL/ad

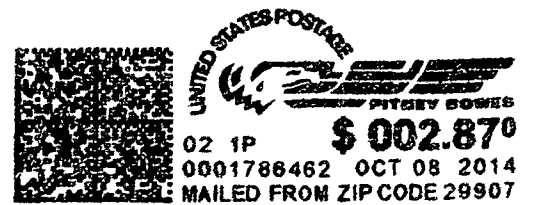
Enclosure

cc: Mr. Alexander Pastene
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