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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable R. Markley Dennis, Jr., Circuit Court Judge

App. Case No. 2015 - 000187

C. Holmes, M.D.

Appellant,

v.

East Cooper Community Hospital, Inc.; and
Tenet HealthSystem Medical, Inc.,

Respondents.

RULE 240(j), SCACR, MOTION

Pursuant to Rule 240(j), SCACR, Appellant timely files and serves this Motion. Any party aggrieved by an order of an individual justice or judge may seek review of that order by the appellate court. Rule 240(j), SCACR. See Toal *et al.*, *Appellate Practice in South Carolina* (2002), p. 259, regarding former Rule 224(j), SCACR, currently Rule 240(j), SCACR. Appellant respectfully seeks review of Judge Cureton's Order filed May 8, 2015. "The SCACR does not specify the procedure for this review. Custom provides that this review be sought by motion complying with rule 224 (*now 240*) SCACR. Wisdom recommends a review be sought within 15

days of the action by the single justice or Judge.”

The issue before the Court was Respondent’s motion to dismiss this appeal, based on its claim that the appeal was not properly filed. It was accompanied by a flood of affidavits from the offices of Respondents’ attorneys. Appellant filed a return, to which the Respondents replied. The Judge’s Order does not respond to the issues that were raised in the motion. Rather, the Judge has issued an order speaking to the merits of the issue on appeal. He has found that the entire controversy of this case, including the counterclaims which have never been dismissed, was ended with the dismissal of the Plaintiff’s case and remittitur after the Supreme Court upheld the dismissal, and that, therefore, there is no relief to be had. There are three grounds for Appellant’s request for review of this order. First, the Order exceeds the scope of the motion before the Court. Second, Judge Harrington dismissed Plaintiff’s claims for lack of jurisdiction, rather than on Summary Judgment. This is a mistake of fact in the Order. Third, the Plaintiff is requesting relief in the form of the right to a jury trial on the counterclaims which were brought against her.

I. The Order exceeds the scope of the Motion before the Court.

The motion before the Court in this matter is a motion by Respondent to dismiss based on alleged improper filing of the notice of appeal. The Order does not address this, but instead dismisses this case for lack of a controversy and remedy. In *Wells Fargo Bank, NA, v. Smith*, 398 S.C. 487, 730 S.E.2d 328 (S.C. App., 2012), the Court wrote "A reversal is required when the trial court's ruling exceeds the limits and scope of the particular motion before it. *Skinner v. Skinner*, 257 S.C. 544, 549–50, 186 S.E.2d 523, 526 (1972)....One of the basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefor. Ordinarily a court may not grant relief beyond the limits or scope of such notice. *Ford v.*

Calhoun, 53 S.C. 106, 30 S.E.2d 830; *Coogler v. California Ins. Co.*, 192 S.C. 54, 5 S.E.2d 459; *Wildhagen v. Ayers*, 225 S.C. 384, 82 S.E.2d 609." "For as former Chief Judge Alex Sanders famously wrote, '[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.' *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct.App.1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985)." *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282, fn. 4 (S.C., 2012). The Appellant recognizes, of course, that the Court has the authority to address issues not raised by the parties, by bringing its own motion. However, this process requires, as all motions do, notice and an opportunity to respond. Should the Court feel that the issues raised in its Order need to be addressed, the proper method of doing so would be through the filing of its own motion, giving the parties the opportunity to research, brief and argue the issues raised.

II. The Order is based on a mistake of fact. The case below was not dismissed on Summary Judgment. The Appellant's claim was dismissed for lack of jurisdiction.

The case below was actually dismissed on a motion to dismiss for lack of jurisdiction, rather than on Summary Judgment. The Plaintiff had produced an expert witness supporting her claim, her testimony in the form of an affidavit, and further evidence supporting her claim for breach of contract/bad faith. There was certainly more than a scintilla of evidence in the record to support the elements of her claim. Judge Harrington found that the Court did not have subject matter jurisdiction over the Plaintiff's claims. Materially, Rule 41(b), SCRCF, provides that "a dismissal under this subdivision and any dismissal not provided for in this rule, **other than a dismissal for lack of jurisdiction**, operates as an adjudication on the merits. Rule 41(b), SCRCF (emphasis supplied). That dismissal is in the nature of a discontinuance and is not an adjudication on the merits. *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App.

1983). The Defendant's counterclaims were never addressed or dismissed by any order in the case below or in the Supreme Court. This is undisputed. The fact that the case was never actually adjudicated or even considered on the merits is important, and appears to have been misapprehended by the Court.

There have been other cases in which a remittitur has been handed down and the case was not ended in the circuit court. An order dismissing some but not all of the claims in a case is immediately appealable. *Link v. School District of Pickens County*, 302 S.C. 1, 393 S.E.2d 176 (1990); *Anthony v. Padmar, Inc.*, 307 S.C. 503, 415 S.E.2d 828 (Ct. App. 1992). See Toal *et al*, *Appellate Practice in South Carolina* (2002), pp. 86-88, 98, 143. In *Pond Place Partners, Inc. v. Poole*:

“the Respondents, *et. Al*, answered and counterclaimed, alleging causes of action for slander of title and violation of the South Carolina Frivolous Civil Proceedings Sanctions Act. The trial court granted Pond Place's motion for summary judgment on Poole's declaratory judgment action. The court found the modification to the restrictive covenants was valid. We subsequently affirmed the trial court in our unpublished opinion *Poole, et. Al v. Pond Place Partners, Inc., et. Al*, Op. No. 1997-UP-129 (S.C. Sup.Ct.App. filed Feb. 12, 1997), *cert. denied* (Jan. 12, 1998). (*Remittitur was returned.*) Thereafter, the Pond Place group prosecuted their **actions for slander of title and violation of the South Carolina Frivolous Civil Proceedings Sanctions Act (FPA)**. After a multi-day trial, the jury found only Poole liable for slander of title and awarded actual and punitive damages to Pond Place Partners and Edwin P. Collins. Poole appeals. We reverse.” *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 567 S.E.2d 881 (S.C. App., 2002) (emphasis supplied).

After remittitur in that case, the pending FPA and other claims were heard by the jury.

Accordingly, remittitur is not necessarily dispositive. In fact, the Pond case sets forth the framework under which this case should have, ultimately, been handled.

Moreover, material from another case such as the December 2, 2009, *Doe v. Duncan* order is objectionable as hearsay. In *Mizell v. Glover*, the South Carolina Supreme Court stated: “We find persuasive the jurisprudence developed by the Fourth Circuit and other federal courts which have recognized that judicial findings of fact from one trial constitute hearsay when offered for admission in the context of another trial. See *Nipper v. Snipes*, 7 F.3d 415 (4th Cir. 1993); *U.S. Steel, LLC v. Tieco, Inc.*, 261 F.3d 1275 (11th Cir. 2001); *U.S. v. Jones*, 29 F.3d 1549 (11th Cir. 1994); *Blue Cross and Blue Shield v. Philip Morris, Inc.*, 141 F.Supp.2d 320 (E.D.N.Y.2001).[8] In *Nipper*, the Fourth Circuit held that judicial findings constitute hearsay and do not fall within any of the exceptions to the hearsay rule, including the exception for public records, Rule 803(8), FRE. *Nipper*. The Fourth Circuit made clear that its holding was firmly rooted in the common law. Id. (Citing 5 John H. Wigmore, *Wigmore on Evidence* § 1671a (James H. Chadbourn rev.1974) (citations omitted)).” *Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (S.C. 2002).

In addition, the Court appears to have mentioned, or possibly even be relying on an opinion which was cited in Order from a completely separate case. Appellant is referring to the *Doe v. Duncan* opinion, mentioned in Judge Cureton’s footnote to the May 8th Order. “The federal courts addressing this issue point to the great weight and obvious prejudicial effect that credibility assessments of witnesses by judges have on subsequent juries. See *Philip Morris*, 141 F.Supp.2d 320 (denying admission of a judge’s statement regarding credibility of expert witness for impeachment of that expert at a subsequent trial). Although *Philip Morris* involved the credibility assessment of a judge and not the assessment of a jury, the jury’s factual finding

introduced in this case is hearsay nonetheless, and we believe, is equally prejudicial. See *U.S. Steel v. Tieco* (finding appellants were prejudiced by the admission of a previous judge's factual opinion into a subsequent trial because appellees relied on the opinion throughout the trial and advised the jury during closing argument to use the opinion to make their own credibility determinations)." *Mizell v. Glover*, 351 S.C. 392, 570 S.E.2d 176 (S.C. 2002). It is not clear whether Judge Cureton was relying on this Opinion or just mentioning it as part of the history of the case. If he was relying on it, then doing so was in error.

III. The Appellant, in this case, is seeking relief, in the form of her right to a jury trial, one of the most, if not the most important right guaranteed to the citizens of this State and this Country.

The Court, in its Order, finds that there is no real remedy here for the Appellant. The remedy sought is the right to a jury trial on the merits of the counterclaims pending against her. A jury trial allows a person accused by allegation to be judged by her peers. Right to trial by jury is hardly academic and is certainly not valueless. Respondents have asserted, in this case (in a letter written to Judge Dennis) that Respondents **elected** to deprive the Appellant of the right to trial by jury. Appellant disputes there was any such election or that any such election would be proper, or even constitutional. Plaintiff's demand for jury trial on the counterclaims was timely made. She is entitled to a trial by jury, as the Plaintiff in the *Pond* case was. It is highly improper and fundamentally unfair with novel issues involving material revisions to a punitive statute and matters of public importance not to afford the benefit of a Record on Appeal with a decision on the merits. See S.C. Const. art. I, sec. 2, 3, 4, 10, and 14; S.C. Const. art. V, sec. 4; S.C. Const. art. V, sec. 5; U.S. Const., Article I, sec. 9 and 10; U.S. Const. amend. I, IV, V, VII, and XIV. *Hicks v. Feiock*, 108 S.Ct. 1423, 485 U.S. 624, 99 L.Ed. 721, 56 U.S.L.W. 4347 (1988).

Case law provides that inquiry will always be necessary on the part of the appellate court

considering an order, which is alleged to have deprived a party of a mode of trial to which he is entitled. *See Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000). Public policy and the State constitution mandate preservation of the right to trial by jury inviolate. *Senter v. Piggly Wiggly Carolina Co.*, 341 S.C 74, 533 S.E.2d 575 (2000). In *Shea*, this Court held that the trial court improperly granted summary judgment because the construction of a statute and its application to the parties was not clear, stating “[i]f the statute’s application is not absolutely clear as a matter of law, [the] question should not be decided without fully developing the *(record)*.” *Shea v. Dept. of Mental Retardation*, 279 S.C. 604, 611, 310 S.E.2d 819, 822 (Ct.App. 1983) (emphasis supplied), overruled on other grounds by *McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985).

CONCLUSION

The Appellant requests a review, by the Appellate Court, and reversal of the Order of May 8, 2015 pursuant to Rule 240(j) SCACR.

Respectfully submitted,

Dated 5-22-15



Chalmers C. Johnson
1029 Bay St., #7
Port Orchard, WA 98366
425.999.0900

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PROOF OF SERVICE

I certify that I have timely served the Amended Notice of Appeal and Rule 240(j), SCACR, Motion on the Respondents on this date by deposit in the United States Mail, postage prepaid, addressed to the attorney of record, Lindsay Smith-Yancey at 16 Charlotte St., P.O.D. 22247, Charleston, SC 29403.

Dated 5/23/15



Chalmers C. Johnson
1029 Bay St., #7
Port Orchard, WA 98366
425.999.0900