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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court
ON APPEAL FROM CHARLESTON COUNTY
R. Markley Dennis, Administrative Tribunal Law Judge
Order dated: 27 February 2014

Pepsi Bottling Group, INC, et al.....Respondent,

v.

Mr. Wesley Edward Smith III,Appellant.

RECORD ON APPEAL

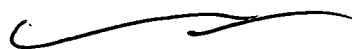
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On appeals from order othe State Court of Appeal that was review per the lower court
order related to case 2013-CP-10-00417 from the Administrative law court.. The caption shall
contain the name of the appellate court where the document is to be filed in the Court of Appeals
as in compliance with rule 267. With me, Mr. Wesley Edward Smith III being held in contempt
of the lower court, it is difficult to get any favorable responses, so pursuant to "rule 207
TRANSCRIPT OF PROCEEDING (b) Appeals From an Administrative Tribunal.
*(1) Ordering the Transcript. Within ten (10) days after the date of service of the notice of
appeal, appellant shall, in writing, make satisfactory arrangements with the administrative law
court or the agency (administrative tribunal) to obtain a transcript of the proceeding before that
body. Appellant shall contemporaneously furnish all counsel of record, and the clerk of the
appellate court with copies of all correspondence with the administrative tribunal. "*

THEREFORE Pursuant to appellate rule 207 Due to the interchangeability of the Administrative
law court personnel, it is respectfully requested that this court compel the lower court to provide
all documentation that supported the alleged final disposition per the order to all opposing parties
related to such civil Summary Judgment action.

June 9 , 2015

Respectfully Submitted



Mr. Wesley Edward Smith III

THE STATE OF SOUTH CAROLINA
In the Supreme Court
ON APPEAL FROM CHARLESTON COUNTY
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Order dated: 27 February 2014

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**MOTION TO ARGUE GOODSON v AMERICAN BANKERS INC CO (S Ct 1988),
McCall v A-T-O- 276 S.C. 143 (1981) PRECEDENT(S) PURSUANT RULE 217 IN
OPPOSITION OF COURT OF APPEALS DISMISSAL ORDER AND IMPLIED
REMITTITUR MOTION TO RECORD ON APPEAL**

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I. INTRODUCTION

This appeal is from an order granting the Pepsi Bottling Group Summary Judgment without the required legal familiarity or allowance of notice of the trial and the appellant rights to attend and appear at such trial. This stem from a faulty practice which premise its action on the citizen of the State with the reliance the State prosecutors intervening, with the determination being solely based upon the third party hearsay. I seek reversal, remand to the State court for redressing, relief, independent action in equity, economic monetary recovery and recovery in kind. Mr. Wesley Edward Smith III was not allowed to appeal pursuant rules 203(b)(1) after the untimely expressly written order, to have a trial for any type of allege allegations, which cause me to be legally unfamiliar with the causes of action to PBG complaints and the order(s) which

are absent the elements necessary, as requiring equal and fair substantiated proof and supporting enforcement agency memorandum of law argument. Without this clarity, this case has not allowed Mr. Wesley Edward Smith III rise above or to make sense of frivolous generalizations, as seemingly contained in the order. It could be quite possible this lack of legal familiarity could be do to delegated, but not authorized to act in a professional practice, but under oath but not in strict guidance of the procedures as stated by state law. I, Wesley Edward Smith III moves before this honorable court dissenting the order of the Honorable R. Markley Dennis order because the lower court did afford me all the protection of the appeal process prior to considering my inquire process frivolous and moot before filing a contempt of court charge against me. I am not here to point any fingers, because I am not sure whose obligation, responsibility or duty it was (administrative clerk, state solicitor or duly noted, state prosecutors PBG), familiar or without evidence clarity. The Summary Judgment order of the lower court adversely affect me in one of three different ways, (1) not allowing me raise the claim that PBG owes me money, Secondly I believe that acts were discriminative, and thirdly the Judges order does not unveil or compel the disclosure of evidence based legal facts containing evidence that a party-litigant received notice of the hearing or trial and a judgment is rendered, whereas I Mr. Wesley Edward Smith III (the absent party), upon motion, is entitled to a judicial determination of whether he received proper notice. I did not. This is perceived in violation to me personally and directly contradicts the legal precedent of Goodson v America Bankers Inc Co (St App 1988), and supplement finding in McCall V A-T-O (1981 as herein after relied upon.

I opposed to the adverse term of employment business practice that I am unequivocally oppose to the impartial treatment of separated powers while advocating against the

consideration of fair emancipation of those being arbitrarily targeted, tortured and bullied.

This State judicial process, based on a basic generalization contained in the court order on appeal is not procedurally correct nor in compliance with the precedent Goodson v American Bankers Inc Co. (St App. 1988). Before this court considers submitting the remittitur it should have allowed Mr. Wesley Edward Smith III a trial which is absent before implying the order and action are finally disposed, that is without being legally familiarized and substantiated without the evidence. I have attempted to complain in the lower court (silence by have a contempt of court charge place upon me) of my appellate protections were/are being overlooked and disregarded, thus denying me of the entitlements of fundamental rights concerning fair procedural due process. This includes being afforded to appeal any judgment of PBG or after the court of common plea determination in accordance with this appellate rule as stated in relevant parts:

NOTICE OF APPEAL 203

(a) Notice. A party intending to appeal must serve and file a notice of appeal and otherwise comply with these Rules. Service and filing are defined by Rule 262.

(b) Time for Service.

(1) Appeals From the Court of Common Pleas. A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.

SUPPORTING LEGAL ARGUMENT

Goodson v America Bankers Inc Co (St App 1988). As stated in relevant parts: our Supreme Court held:

[W]here a judgment roll does not contain evidence that a party-litigant received notice of the

hearing or trial and a judgment is rendered, the absent party, upon motion, is entitled to a judicial determination of whether he received proper notice. If it be determined that the party received such notice, the judgment remains; if not, the absent party is entitled to a new trial. 289 S.C. at 128. This is the gist and reasons for my complaint argument; being deprived procedural due process fairness.

II. APPELLATE PROCEDURAL REVIEW FACTS

As based on information and belief from supporting memorandum of appellate courts requirements which consist of procedure, rules and practices by which appellate courts review trial court judgments, this Appellate review performs several functions, including correcting errors committed by a trial court, developing the law, and achieving uniformity across courts. Appellate procedure focuses on several main themes: what judgments are appealable, how appeals are brought before the court, what will be required for a reversal of the lower court (such as a showing of "abuse of discretion or "clear error"), and what procedures parties must follow. The Appealable issue here in the error of law of which the court order granted Summary Judgment to non deserving third party moot, frivolous and baseless action form which the order should be reversed due to the fact (pointing to the issue on the record) the order issue lacked legal familiarity (No complaint were served but reliance was governed by the State persecutors, an intervening third party hearsay) As relying on the case of Goodson America Bankers, Inc. Co(1988), "on the basis of standard of acceptability" as applied to any citizen within the State (however actors have been known and previously described"): As related, McCall v A-T-O Inc. 276 S. C. 143 (1981), the South Carolina Supreme Court "has never held layman (many name given t a particular citizen) to a lesser standard, than that of a attorney (or common sir name of state defense team, state prosecutor or state solicitor) ". As also understood appealable issue are commonly limited to final judgments. The order does not afford me the raise the shield of my precedence protections the respondents has and also denied.

III. STANDARD OF REVIEW

Appellant Supplement argument on appeal of this case, under the provisions of the South Carolina Administrative Procedures Act (APA) govern an appeal from an action of the Board. * Lark v. Bi Lo, Inc., 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, this tribunal "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact." S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2000). This tribunal may, however, reverse or modify a decision if substantial rights of an appellant have been prejudiced because the administrative findings or decisions are affected by an error of law, "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," or "arbitrary and capricious." Id. Here, Appellant argues that the Board's decision is not supported by reliable, probative, and substantial evidence. Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion of the administrative agency. E.g., Jennings v. Chambers Development Co., 335 S.C. 249, 516 S.E.2d 453 (Ct. App. 1999). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.

IV. CONCLUSION

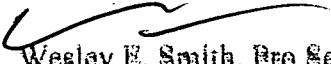
WHEREAS I did not receive notice of this trial, and the Judge dismiss all my subsequent action with prejudice, and the Judges has not unveil or compel the disclosure of evidence based legal facts containing evidence that a party-litigant received notice of the hearing or trial and a judgment was rendered in error and Mr. Wesley Edward Smith III (the absent party), upon

motion, is entitled to a judicial determination of whether he received proper notice.

WHEREAS as I oppose to any party admitting to be at practice on the professional field of play, doesn't make an authorized plausible excuse to encroach upon Mr. Wesley Edward Smith III judicial rights, waiver of his legal rights, or authorized legal proceeding to take place without my knowledge not give up my immunity shield of the afforded legal precedent not to act absent in my defense. Based upon the perceived violation of my right to be at the trial, an error of law existing in accordance with appellate rules, the Summary Judgment in its entirety should be reversed and remanded and all complaints for torturous relief allowing equity, remedy and recovery. The amended complaint reconsidered for redressing the issue overlook do to a mistake of law that was previously give to the court by the State prosecutors that chose to intervening while encroaching upon my legal rights. As result under the state tort law SC code Ann 1976 15-78-10 (et seq), I have a right to recover treble damage , miscellaneous and actual damages for being personally tortured and personally injured and seek to compensated, equitable relief and recovery economically and punitive damages by treble for the violation of recognizable rights owed to Mr. Wesley Edward Smith III.

I seek relief afford under rule 240 and all other remedies affording equity, recovery, restoration and relief.

June 9, 2015


Wesley E. Smith, Pro Se
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Attorney for Appellant

THE STATE OF SOUTH CAROLINA
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ON APPEAL FROM CHARLESTON COUNTY

R. Markley Dennis, Administrative Tribunal Law Judge

Order dated: 27 February 2014

Pepsi Bottling Group, INC et al , Respondent,

v

Mr. Wesley Edward Smith III, Appellant.

PROOF OF SERVICE

I, Wesley Edward Smith III, certify that on June 9, 2015, submits his Motion to argue Precedent Pursuant rule 217 of Record on Appeal by First Class Mail via United States Mail and on all parties listed below in this action to the following.

TO: Attorney for Appellant
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Attorney for Respondent

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Attorney for Appellant

ATTACHMENT "A"

Goodson v. AMER. BANKERS INS. CO. OF FLA.

Annotate this Case

295 S.C. 400 (1988)

Donald GOODSON, Respondent v. AMERICAN BANKERS INSURANCE COMPANY OF FLORIDA, Appellant.

1155

Court of Appeals of South Carolina.

Heard March 22, 1988.

Decided May 9, 1988.

*401 Robert T. Williams, of Williams & Brink, Lexington, for appellant.

John A. Mason, Columbia, for respondent.

Heard March 22, 1988.

Decided May 9, 1988.

SHAW, Judge:

Donald Goodson commenced an action against appellant, American Bankers Insurance Company of Florida, hereinafter American. From a denial of a motion to set aside the judgment, American appeals. We affirm.

American, through its agents, Rick and Sharon O'Rear, posted an appearance recognizance bond for Goodson. In exchange, Goodson agreed to pay American a certain sum, and as security for the debt, Goodson permitted the O'Rears to hold his truck. The O'Rears subsequently sold the truck although Goodson claimed to have paid and worked off the debt owed. As a result, Goodson sued American on various theories.

Goodson's summons and complaint were served on the South Carolina Department of Insurance which accepted service and forwarded these documents to Norman I. Weil, an attorney for American. A timely answer was served and filed, signed by Ms. O'Rear as agent for American. However, the answer did not state an address. In April of 1986, Goodson's attorney sent requests for admissions and interrogatories to both Ms. O'Rear and Mr. Weil which apparently were never answered. The record also reflects a letter was sent to Ms. O'Rear and Mr. Weil in September of 1986 informing *402 them the case would be coming to trial soon.[1] On October 2, 1986, the case was heard before a jury. American did not appear at the trial and was not represented by counsel. The jury

returned a verdict in favor of Goodson for \$34,800 actual damages and \$15,200 punitive damages.

I.

American contends the trial judge erred in refusing to set aside the judgment for excusable neglect under Rule 60 of the South Carolina Rules of Civil Procedure claiming it received no notice of the trial. Rule 60(b)(1) S.C.R.C.P. provides as follows:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect ...

Although most often used when relief is sought from a judgment by default, Rule 60(b)(1) applies to any final judgment. See H. Lightsey, J. Flanagan, South Carolina Civil Procedure, 398-399 (2nd Ed. 1985). Relief under this section is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of that discretion. *Id.* at 399. Such an abuse arises when the judge issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support. *Id.* (See also *Ledford v. Pennsylvania Life Insurance Co.*, 267 S.C. 671, 230 S.E. (2d) 900 (1976) and *Ricks v. Weinrauch*, 293 S.C. 372, 360 S.E. (2d) 535 (Ct. App. 1987). While these cases deal with the trial court's discretion in setting aside default judgments, the principles are equally applicable to motions for relief from any final judgment.)

American points to no error of law by the trial judge. Rather, it contends the trial judge abused his discretion in finding there was no excusable neglect which would warrant setting aside the judgment. We disagree.

*403 Whether American received notice of the impending trial is not clear. Goodson claims to have sent notice. American claims it never received any. However, it is clear that American's own neglect was the cause of any such problem. First, the answer was signed by Ms. O'Rear and not an attorney. Contrary to Rule 11 of the South Carolina Rules of Civil Procedure, Ms. O'Rear did not give an address on the answer.[2] Secondly, a party has a duty to monitor the progress of his case. Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney. (See H. Lightsey, J. Flanagan, South Carolina Civil Procedure, 400 (2nd Ed. 1985) and *McCall v. A-T-O, Inc.*, 276 S.C. 143, 276 S.E. (2d) 529 (1981)). Any neglect resulted from American using Ms. O'Rear, a layman, in defending the case. In our opinion, the facts of this case do not amount to excusable neglect.

II.

American next contends the trial judge erred in refusing to set aside the judgment, as the verdict rendered by the jury was excessive. American asserts the actual damages were limited to \$8,820, the amount prayed for by Goodson, yet the jury returned a verdict of \$34,800 in actual damages. It bases this contention on two arguments.

A. American claims under Rule 55(b)(1) of the South Carolina Rules of Civil Procedure, it was entitled to be served with written notice of the application for judgment at least three days prior to the hearing and it received no such notice. American summarily claims its nonappearance at trial constituted a default situation. We disagree.

Rule 55(a) of the South Carolina Rules of Civil Procedure states, "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend ... the clerk shall enter his default upon the calendar." (emphasis added). In the instant case, American had not "failed to plead" and no default was entered by the clerk.

*404 Further, Rule 55(b) provides for written notification where there has been an application for judgment by default. There was no such application. The case went before a jury and a full trial was held on the matter.

B. In finding the judgment should not be set aside for an excessive verdict, the trial judge correctly relied on Rule 54(e) of the South Carolina Rules of Civil Procedure. That rule provides:

A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

American argues, while the trial judge was correct on the law, he was incorrect in his finding that Goodson was entitled to such relief. The trial judge stated, "It appears from the testimony presented at the trial, and I so find and rule, that the damages awarded by the jury are consistent with the case presented by the plaintiff, and are in accord with the relief to which plaintiff was entitled under the evidence." We do not have the transcript of the trial before us and, therefore, cannot second guess the finding of the trial judge. The appellant is responsible for compiling an adequate record from which this court can make an intelligent review. We will not consider facts that do not appear in the transcript of record. *Windham v. Honeycutt*, 290 S.C. 60, 348 S.E. (2d) 185 (Ct. App. 1986).

Affirmed.

CURETON, J., concurs and dissents in separate opinion.

GOOLSBY, J., concurs in separate opinion.

CURETON, Judge (concurring and dissenting):

American moved to set aside Goodson's judgment apparently under equity principles and under Rules 59[1] and 60 of the South Carolina Rules of Civil Procedure based on: (1) its *405 failure to receive notice of the hearing in accordance with Rule 55(b)(1); (2) mistake, inadvertence and/or excusable neglect under Rule 60(b)(1); and (3) excessiveness of the jury verdict.

I.

American argues the trial court erred as a matter of law in holding Goodson's judgment was not a default judgment. Moreover, it argues that because the judgment is a default judgment, it was entitled to three days' notice of Goodson's application for the judgment and his failure to give such notice makes the judgment void and it should be set aside under Rule 60(b)(4).

It is clear default may result from delicts other than failures to file an answer. In fact, Rule 55(a) provides for the entry of default when a party fails to "otherwise defend." There is some disagreement among the federal courts whether under similar circumstances a defendant is entitled to default status as opposed to the plaintiff being entitled to proceed to obtain a judgment based on a trial on the merits in the defendant's absence.[2] The logical basis for this disagreement seems to be that a defendant who files an answer, but fails to appear or defend thereafter, should not be penalized more severely than a defendant who does absolutely nothing. By way of illustration, if American had done nothing in this case, Goodson's recovery of actual damages under Rule 54(c) could not have exceeded the amount stated in his complaint which was \$8,820.00.

Although there appears to be authority for the proposition that a failure to appear at trial after answering the complaint should entitle a defendant to default status, the majority view appears to permit the plaintiff to proceed to judgment on the merits.[3] See 11A Words and Phrases "Default" 272-274 (1971); *Coulas v. Smith*, 96 Ariz. 325, 395 P. (2d) 527 (1964); *Tartaglia v. Del Papa*, 48 F.R.D. 292 (E.D.Pa. *406 1969). I, therefore, agree with the majority that the judgment at hand was not a default judgment. Thus, Rule 55 is inapplicable.

In *Sijon v. Green*, our Supreme Court held:

[W]here a judgment roll does not contain evidence that a party-litigant received notice of the hearing or trial and a judgment is rendered, the absent party, upon motion, is entitled to a judicial determination of whether he received proper notice. If it be determined that the party received such notice, the judgment remains; if not, the absent party is entitled to a new trial.

289 S.C. at 128, 345 S.E. (2d) at 248. In the case at hand, the trial court made no finding whether American received notice of the hearing. In fact, he reasoned that any lack of notice was the fault of American since its agent Sharon O'Rear failed to list her address in the pleadings and American failed to keep abreast of the progress of the trial roster to determine when the case would come to trial. The *Sijon* court did not have before it the question of whether the notice of hearing could be waived by the defendant. To that extent, the holding in *Sijon* is inapposite.

The record contains no showing why American did not list its address on its pleadings or keep abreast of the trial roster. Therefore, it has not sustained its burden of showing the trial judge abused his discretion in failing to find excusable neglect. *Em-Co Metal*

Products, Inc. v. Great Atlantic & Pacific Tea Co., 280 S.C. 107, 311 S.E. (2d) 83 (Ct. App. 1984).

II.

Nevertheless, I am persuaded by American's argument that the excessiveness of the verdict provides a basis for relief from judgment. Although Rule 60 provides no basis for setting aside a judgment on this ground, our Supreme Court has held that a judgment should be vacated on general principles of equity where the award is patently and greatly out of proportion to the wrongs alleged in the complaint. *Renney v. Dobbs House, Inc.*, 275 S.C. 562, 274 S.E. (2d) 290 (1981); *Williams by and through Williams v. Vereen*, 284 S.C. 219, 325 S.E. (2d) 337 (Ct. App. 1985). In *Renney*, the *407 appellant based his motion to vacate on S.C. Code Ann. Section 15-27-130 (1976). [4] The Supreme Court, on its own motion, vacated the judgment on equitable grounds stating:

"Whether a defendant is or is not in default, it is incumbent upon the judge and/or the jury to make a judicial determination of the amount recoverable based on the proof."

275 S.C. at 567, 274 S.E. (2d) at 293.

Here, Goodson itemized his actual damages in his complaint as amounting to \$8,820.00. [5] While we have no hint of why or how the jury awarded \$34,000 in actual damages, it is implicit American's non-appearance at trial had something to do with the amount of the verdict. I would hold the actual damages award is so patently out of proportion to the wrongs alleged in the complaint, that this court should do as our Supreme Court did in *Renney*, and reverse and remand the case for a new trial on actual damages only.

The majority cites Rule 54(c) as support for upholding the excessive actual damages award. I agree that in an ordinary non-default trial of a case, a party's pleadings should not preclude relief for which the party is justly entitled. However, where as here, Goodson itemizes his actual damages, it is unduly prejudicial to American for the court and jury to award actual damages grossly in excess of those specified in the complaint. As to those damages, American had absolutely no notice Goodson was claiming them. See *United States v. Hardy*, 368 F. (2d) 191 (10th Cir. 1966) (party had no notice other party was claiming damages because no plain statement appeared in either pleadings or pretrial order). Goodson notes the law has always been that a party is entitled to fully recover all damages incurred, although not demanded in his complaint, citing former Code Section 15-35-70 and cases enumerated thereunder especially the case of *Christopher v. Christopher*, 18 S.C. 600 (1882). But attention is directed to the case of *Straub v. Screven*, 19 S.C. 445 (1883) which holds that where a complaint stated *408 amounts due and credits allowed and demanded judgment for a certain sum, and the answer admitted the allegations, it was error for the trial judge to reduce the credits and give judgment for a larger sum. I would reverse and remand for a new trial on actual damages only.

GOOLSBY, Judge (concurring):

I concur in the opinion of Judge Shaw.

Regarding Judge Cureton's view that the case should be remanded for a new trial on the issue of damages alone, the trial judge, as Judge Shaw points out, made an express finding that the proof supported the amount recovered. Nothing in the record shows otherwise. Indeed, the reason why we have as Judge Cureton stated, "no hint of why or how the jury awarded \$34,000 in actual damages," is because the appellant failed to provide us with a proper record.

Moreover, neither of the appellant's two exceptions fairly raise the issue of whether the damages awarded were excessive because their amount exceeded the amount itemized in the complaint. Ordinarily, if a question is not asked of us, we do not answer it.

NOTES

[1] A letter from Mr. Weil to a Mr. Nowosad of American indicates Mr. Weil had notified American of the suit but had not been retained to handle it.

[2] S.C.R.C.P. 11 provides in part, "A party who is not represented by an attorney shall sign his pleading and state his address."

[1] I cannot discern American's argument under Rule 59.

[2] See 6 J. Moore, W. Taggart and J. Wicker, Moore's Federal Practice Section 55.02[3], n. 12 (2d ed. 1987).

[3] The question of whether a defendant received notice of the hearing at which he failed to appear is another issue. Failure of a defendant to receive such notice may give rise to right of new trial for the defendant. *Sijon v. Green*, 289 S.C. 126, 345 S.E. (2d) 246 (1986).

[4] Repealed by Act 100, 1985 S.C. Acts 277. Now replaced by S.C.R. Civ. P. 60.

[5] While not required, Rule 8(a) permits a plaintiff to demand a sum certain in money as actual damages.

ATTACHMENT "B"

McCall v. ATO, INC.

276 S.C. 143 (1981)

Dennis H. McCALL, Appellant, v. A-T-O, INC., Respondent.
21412

Supreme Court of South Carolina.

March 23, 1981.

*144 George T. Sink, of Charleston, and Larry C. Brandt, Walhalla, for appellant.

Harold A. Boney, of Dowling, Sanders, Dukes, Novit & Svalina, Beaufort, for respondent.

March 23, 1981.

GREGORY, Justice:

This appeal is from an order vacating a default judgment in a personal injury case. We reverse and remand.

Appellant was injured January 14, 1978 when he was asked to help unload steel he had delivered to respondent's construction site in Berkeley County.

The Director of Industrial Relations for respondent's plant in Goose Creek, Paul G. Smith, immediately notified Waite Hill Services, Inc., a subsidiary of respondent in charge of litigation and claims and Traveler's Insurance Company of the injury and claim. On November 27, 1978, Travelers denied the accident was covered under either the respondent's workmen's compensation or general liability policies.

The summons and complaint commencing this action were thereafter served upon Ms. Karen Payne, secretary to the president of respondent's construction equipment division on December 8, 1978. On that same day, Ms. Payne delivered the summons and complaint to the office of Mr. Smith, who directed his secretary, Ms. Carolyn Bird, to inform the corporate risk department of respondent at Willoughby, Ohio. Ms. Bird followed these instructions by telephoning the corporate risk department, and, at their direction, she forwarded a copy of the summons and complaint to them.

On December 15, 1978, Ms. B.J. Leland of the corporate risk department directed Ms. Bird by telephone to forward copies of the summons and complaint to Travelers Insurance Co. and to Mr. Jack Mangus of Waite Hill Services in Atlanta.

*145 Ms. Bird did not comply with these instructions on December 5, and since she was going on vacation the following week, she left written instructions for Mr. Smith, who was out of town on that date, to forward the copies of the summons and complaint to Travelers and Waite Hill Services.

Upon his return to the office on December 19 or 20, Mr. Smith found the message but did not comply. Instead, he telephoned the corporate risk department to inform them he had already contacted Travelers and Waite Hill Services concerning the claim. Mr. Smith incorrectly assumed the instructions concerning the mailing of the summons and complaint to Travelers and Waite Hill Services were no longer valid. The corporate risk department incorrectly assumed Mr. Mangus of Waite Hill Services in Atlanta would take care of the matter.

On January 5, 1979, the twenty-eighth day after service of the summons and complaint, counsel

for appellant filed an affidavit of default dated January 3, 1979 and the trial judge signed the order for judgment by default.

Notice of motion and motion to vacate the default judgment were filed on October 26, 1979. A hearing was held on February 5, 1980. The trial judge, on March 28, 1980, set aside the order of judgment by default and granted respondent the right to answer on the ground the conduct of Mr. Smith constituted excusable neglect.

Appellant asserts the trial judge erred in holding respondent's failure to timely answer resulted from excusable neglect. We agree.

The lower court's determination of motions to vacate default judgments will not be disturbed absent a showing of abuse of discretion. *Stewart v. Floyd*, ___ S.C. ___, 265 S.E. (2d) 254 (1980); *Accord, Renney v. Dobbs House, Inc.*, ___ S.C. ___, 274 S.E. (2d) *146 290 (1981). An abuse of discretion arises in cases in which the judge was controlled by some error of law or where the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support. *Id.*

Here, the factual situation is similar to that faced by this Court in *Ledford v. Pennsylvania Life Ins. Co.*, 267 S.C. 671, 230 S.E. (2d) 900 (1976). There, the insurance company's attorney interpreted the insurance company official's letter referring the insured's file to local counsel and the local counsel's return acknowledgment to mean the local counsel was aware of the suit. This assumption was made despite the fact that the letters antedated the service of the summons and complaint by several weeks. This Court found the trial judge abused his discretion in vacating the default judgment on the basis of excusable neglect.

Respondent seeks to distinguish *Ledford* by arguing that the layman in this case should be held to a lesser standard than the lawyer in that case.

This Court has never held a layman to a lesser standard than attorneys. In *Little v. Orkin Exterminating Co.*, 270 S.C. 305, 241 S.E. (2d) 909 (1978), the branch manager of Orkin mailed copies of the summons and complaint to Orkin's legal office in Atlanta but failed to send them by certified mail. The branch manager was a layman. This Court found the manager's conduct did not constitute excusable neglect and that the trial judge's vacation of the default judgment was improper. Here, Mr. Smith did even less than the manager in *Little*. He did not even forward the pleadings to his company's counsel.

Respondent also argues Mr. Smith's lack of familiarity with legal proceedings constitutes excusable neglect. *Renney v. Dobbs House, Inc.*, *supra*, disposes of this contention. There, this Court held failure to serve responsive pleadings within the statutory period because complainant used a different *147 method of service from that utilized in other proceedings did not constitute excusable neglect. We concluded the trial judge erred in vacating the default judgment for that reason.

The trial judge's finding of excusable neglect is without evidentiary basis, thus an abuse of discretion.

Therefore, we conclude the trial judge erred in vacating the default judgment. His order is reversed and the case remanded for re-entry of the default judgment and determination of the amount of damages in accordance with the procedures set forth in *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E. (2d) 880 (1978).

Reversed and remanded.

LEWIS, C.J., and LITTLEJOHN, NESS and HARWELL, JJ., concur.

ATTACHMENT "C"

SC Administrative Law Court Decisions

CAPTION:

Thomas P. Smarsh, RN vs. SCDLLR

AGENCY:

South Carolina Department of Labor, Licensing and Regulation

PARTIES:

Appellant:

Thomas P. Smarsh, RN

Respondents:

South Carolina Department of Labor, Licensing and Regulation, Board of Nursing

DOCKET NUMBER:

01-ALJ-11-0255-AP

APPEARANCES:

n/a

ORDERS:

ORDER

STATEMENT OF THE CASE

Pursuant to S.C. Code Ann. §§ 40-33-931 (2001) and 1-23-380(B) (Supp. 2000), Appellant Thomas P. Smarsh appeals the South Carolina Board of Nursing's (Board) Final Order of June 14, 2001, which revoked his license to practice nursing. The Board found that Appellant committed misconduct in violation of S.C. Code Ann. § 40-33-935(g) (2001) and S.C. Code Ann. Regs. 91-19(c)(2)-(3) (Supp. 2000) by entering into inappropriate relationships with three minors under the custody of the Department of Juvenile Justice (DJJ). Specifically, the Board found that Appellant, in the course of those relationships, gave candy to the minors, took photographs of the minors, administered prescription drugs to two of the minors without a physician's order, allowed one of the minors to distribute prescription drugs to other juveniles at DJJ, offered one of the minors alcoholic beverages, allowed two of the minors-both under sixteen years old and without valid driver's licenses-to drive his car and to shoot his firearms, and engaged an inappropriate private, personal, and possibly sexual relationship with each of the three minors that, at the very least, included inappropriate sexual discussions and inappropriate physical contact. Pursuant to S.C. Code Ann. Regs. 91-19(h)-(l) (1976 & Supp. 2000), the Board considered the Hearing Panel's report of May 1, 2001 in issuing its Final Order.

Upon careful consideration of the record, the briefs filed,⁴¹ and the applicable law, I find that the Board's revocation of Appellant's license to practice nursing as a registered nurse must be affirmed.

STANDARD OF REVIEW

The provisions of the South Carolina Administrative Procedures Act (APA) govern an appeal from an action of the Board. *Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Under the APA, this tribunal "shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact," S.C. Code Ann. § 1-23-380(A)(6) (Supp. 2000). This tribunal may, however, reverse or modify a decision if substantial rights of an appellant have been prejudiced because the administrative findings or decisions are affected by an error of law, "clearly erroneous in view of the reliable, probative and substantial evidence on the whole record," or "arbitrary and capricious." *Id.* Here, Appellant argues that the Board's decision is not supported by reliable, probative, and substantial evidence.

Substantial evidence is that evidence which, in considering the record as a whole, would allow reasonable minds to reach the conclusion of the administrative agency. E.g., *Jennings v. Chambers Development Co.*, 335 S.C. 249, 516 S.E.2d 453 (Cl. App. 1999). The possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Id.* Where there is a conflict in the evidence, the administrative agency's findings of fact are conclusive. *Id.* This tribunal cannot substitute its judgment for that of an agency upon a question as to which there is room for a difference of intelligent opinion. E.g., *Chemical Leamen Tank Lines v. S.C. Pub. Serv. Comm'n*, 258 S.C. 518, 189 S.E.2d 296 (1972). While a decision of an administrative agency will normally be upheld, the findings may "not be based upon

surmise, conjecture, or speculation, but must be founded on evidence of sufficient substance to afford a reasonable basis for it." *Mullinax v. Winn-Dixie Stores, Inc.*, 318 S.C. 431, 458 S.E.2d 76 (Ct. App. 1995).

The burden is on the Appellant to show convincingly that the Board's order is without sufficient evidentiary support. See *Hamm v. Am. Tel. & Tel. Co.*, 315 S.C. 119, 432 S.E.2d 454 (1993); *Hamm v. Pub. Serv. Comm'n of S. C.*, 310 S.C. 13, 425 S.E.2d 28 (1992).

ISSUE ON APPEAL

I. Is the Board's decision to revoke Appellant's nursing license clearly erroneous in view of the reliable, probative, and substantial evidence in the record because the Board admitted hearsay testimony and unauthenticated documents into evidence at the hearing and relied upon such evidence in reaching its final decision?

ANALYSIS

The sole ground upon which Appellant bases this appeal is the contention that the Board's decision to revoke his license was based upon improperly admitted hearsay evidence. However, because Appellant did not object to the admissibility of this evidence at the hearing, he waived his right to make such an objection, and, moreover, failed to preserve this issue for appeal.

It is a fundamental principle of appellate practice that an issue must be properly preserved at the trial level before it can be heard on appeal. The South Carolina Court of Appeals expounded upon this basic requirement for appellate review in a recent case:

Objections not raised in the trial court cannot be relied on in the appellate court. The duty is on the litigant to make a timely objection in order to preserve the right of review. A

contemporaneous objection is required to properly preserve an error for appellate review.

The failure to make an objection at the time evidence is offered constitutes a waiver of the right to object.

Doe v. S.B.M., 327 S.C. 352, 356, 488 S.E.2d 878, 880 (Ct. App. 1997) (citations omitted).

(2) In the case at hand, Appellant did not object to the introduction of hearsay testimony and unauthenticated documents into evidence at his hearing, and he concedes as much. (Br. of Appellant at 3-4.) Appellant has, therefore, waived his right to object to such evidence in this appeal.

Further, the consequences of Appellant's failure to object to hearsay evidence at his hearing are in no way mitigated by the fact that he represented himself at the hearing. Appellant was fully informed of his right to have the assistance of counsel at the hearing (R. at 16, 136, 211, 215), and he knowingly waived that right. (R. at 16, 136.) Given this knowing waiver of his right to counsel, the hearing panel was not, and this tribunal is not, required to make exceptions for Appellant's lack of legal sophistication. See *Goodson v. Am. Bankers Ins. Co. of Fla.*, 295 S.C. 400, 403, 368 S.E.2d 687, 689 (Ct. App. 1988) ("Lack of familiarity with legal proceedings is unacceptable and the court will not hold a layman to any lesser standard than is applied to an attorney."); *McCall v. A-T-O, Inc.*, 276 S.C. 143, 146, 276 S.E.2d 529, 530 (1981) ("This Court has never held a layman to a lesser standard than attorneys."); see also *Doe v. S.B.M.*, 327 S.C. 352, 488 S.E.2d 878 (Ct. App. 1997) (holding that a pro se litigant failed to preserve the issue of whether certain evidence should have been admitted at a damages hearing by failing to object to the evidence at the hearing). As a consequence of representing himself at the hearing, Appellant bore full responsibility for the inadequacy of

that representation, including any adverse consequences resulting from his unfamiliarity with legal proceedings.

Finally, this tribunal's holding that Appellant's failure to object to hearsay evidence at the hearing precludes him from raising that objection on appeal should not be taken to suggest that Appellant's argument is otherwise sound and that the Board's decision rests upon insufficient evidence. Indeed, while much of the evidence now objected to by Appellant is technically hearsay, his failure to object to that evidence at the hearing rendered the evidence competent. South Carolina courts have consistently held that evidence admitted without objection becomes competent and may be properly considered by the finder of fact. See *Wayne Smith Const. Co., Inc. v. Wolman, Duberstein, & Thompson*, 294 S.C. 140, 363 S.E.2d 113 (Ct. App. 1987); *Cantrill v. Carruth*, 250 S.C. 415, 158 S.E.2d 208 (1967); *Wessinger v. Duncan*, 113 S.C. 205, 102 S.E. 6 (1920); *Minton v. Pickens*, 24 S.C. 592 (1886). This rule is a general one, grounded in judicial prudence: "[M]uch evidence such as reliable affidavits or copies of writings, though inadmissible under the technical exclusionary rules, is trustworthy and valuable. In that case, absent an objection, the trial judge would be unjustified in excluding the evidence," *McCormick on Evidence* § 55, at 247-48 (John W. Strong ed., 5th ed. 1999). Accordingly, the Board's decision cannot be said to rest upon incompetent evidence.

As noted above, the sole issue upon which Appellant brought this appeal was not properly preserved for appellate review. Consequently, his appeal must fail and the Board's final order revoking Appellant's license to practice as a registered nurse must be affirmed.

ORDER

IT IS THEREFORE ORDERED that the South Carolina Board of Nursing's Final Order of June 14, 2001 in this matter is **AFFIRMED**.

AND IT IS SO ORDERED.

JOHN D. GEATHERS

Administrative Law Judge

Post Office Box 11667

Columbia, South Carolina 29211-1667

#December 7, 2001

Columbia, South Carolina

#1. Pursuant to the discretion granted under ALJD Rule 39, this tribunal determined that it was not necessary to hear oral arguments in this appeal.

#2. This requirement is not new. Writing in response to an objection to the introduction of hearsay statements at trial made for the first time on appeal, Justice Jonathan Jasper Wright noted, in 1873, that "[a]s [the statements] were introduced without objection, any consideration of their mere competency is precluded." *Means v. Feaster*, 4 S.C. 249, 256 (1873).

ATTACHMENT "D"

The South Carolina Court of Appeals

Pepsi Bottling Group, Respondent,

v.

Wesley Edward Smith, III, Appellant.

Appellate Case No. 2015-000548

The Honorable R. Markley Dennis, Jr.
Charleston County
Trial Court Case No. 2013CP1000417

ORDER

Appellant has failed to file the notice of appeal filing fee, an amended notice of appeal, as required by Rule 203 of the South Carolina Appellate Court Rules, and the Court's letters dated April 15, 2015, and May 1, 2015. Accordingly, this matter is dismissed. The remittitur will be sent as provided by Rule 221(b), SCACR.

FOR THE COURT

BY V. Claire Allen, Deputy
CLERK

Columbia, South Carolina

FILED

SF 5/29/15

cc:

Wesley Edward Smith, III
Ashley Bryan Abel, Esquire



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