

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
R. Keith Kelly, Circuit Court Judge

JAN 11 2016

SC Court of Appeals

Appellate Case No.: 2015-000701
Circuit Court Case No.: 2014-CP-42-02846

Paula Rose, Respondent,

v.

Charles Homer Rose, II, Appellant.

APPELLANT'S REPLY BRIEF

Kim R. Varner
Varner & Segura
304 Pettigru Street
Greenville, SC 29601
(864) 271-2232

J. Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292

COUNSEL FOR APPELLANT

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
R. Keith Kelly, Circuit Court Judge

Appellate Case No.: 2015-000701
Circuit Court Case No.: 2014-CP-42-02846

Paula Rose, Respondent,

v.

Charles Homer Rose, II, Appellant.

APPELLANT'S REPLY BRIEF

Kim R. Varner
Varner & Segura
304 Pettigru Street
Greenville, SC 29601
(864) 271-2232

J. Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

Statement of the Issues in Reply ii

Table of Authorities iii

Argument

**I. THE APPLICATION OF AN ADVERSE INFERENCE
BASED ON THE APPELLANT’S EXERCISE OF HIS FIFTH
AMENDMENT RIGHTS IS INAPPROPRIATE IN THE
PRESENT CASE..** 1

Conclusion 3

STATEMENT OF THE ISSUES IN REPLY

- 1) Is it appropriate to apply an adverse inference to Appellant's exercise of his Fifth Amendment rights where the default hearing was held prior to the dismissal of the Appellant's criminal domestic violence charge?

TABLE OF AUTHORITIES

CASES

Griffith v. Griffith, 332 S.C. 630, 506 S.E.2d 526 (Ct. App. 1998) 2

Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885
(2009) 3

RULES

Rule 55(c), SCRCP. 3

ARGUMENT IN REPLY

I. THE APPLICATION OF AN ADVERSE INFERENCE BASED ON THE APPELLANT'S EXERCISE OF HIS FIFTH AMENDMENT RIGHTS IS INAPPROPRIATE IN THE PRESENT CASE.

The Respondent misstates the holding of Griffith arguing that under the facts of this case the trial judge was *obligated* to draw an adverse inference against the Appellant for invoking his Fifth Amendment rights. Griffith only held that it was *permissible* to draw such an inference. Under Griffith an adverse inference is not mandatory, nor is the judge obligated to apply such an inference: “We join with these jurisdictions in concluding that it is permissible for the fact finder to draw an adverse inference in a civil case against a party invoking the Fifth Amendment privilege against self-incrimination.” Griffith v. Griffith, 332 S.C. 630, 646-47, 506 S.E.2d 526, 534-35 (Ct. App. 1998). In Griffith the Court found the permissive inference persuasive in light of the wife’s refusing to testify although she had been granted immunity and therefore, had no legal basis to claim the Fifth in her case. Application of the adverse inference in that case turned on the Court’s finding that there was no good faith reason to claim the Fifth when immunity had been granted. The default hearing in the present case occurred prior

to the dismissal of the Appellant's criminal domestic violence charge. He therefore had a valid basis for the exercise of his Fifth Amendment right at the time of the default hearing. An adverse interest under Griffith does not apply.

The standard for granting relief from an entry of default under Rule 55(c) is "good cause." Rule 55(c), SCRCF. "This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice." Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).


The Respondent argues that the passage of just over three months before filing for relief from default is essential to the case. This argument talks a lot about what the Appellant could have done to corroborate the Respondent's assurances that she was dismissing the case but it fails to address the fact that the Respondent's assertions caused the Appellant to delay in his a response. The Respondent does not argue that the Wife did not make promises to dismiss the case that delayed the Appellant's filing an Answer or motion for relief, but that due to the volatile nature of the relationship the Appellant should not have relied on the Respondent's promises. Here, the Respondent lulled the Appellant into believing the case would be dropped thus obtaining a default judgment. Right up

to just before the default hearing she continued to assure the Appellant that she would not pursue the case. Now she is arguing the delay she caused and that he should not have believed him. A default judgment under these facts is simply inequitable.

CONCLUSION

Based on the foregoing the decision of lower court should be reversed.

Respectfully submitted,



J. Falkner Wilkes, 12893
114 Whitsett Street
Greenville, SC 29601

Kim R. Varner
Varner & Segura
304 Pettigru Street
Greenville, SC 29601
(864) 271-2232

COUNSEL FOR APPELLANT

January 6, 2016.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
R. Keith Kelly, Circuit Court Judge

Appellate Case No.: 2015-000701
Circuit Court Case No.: 2014-CP-42-02846

RECEIVED

JAN 11 2015

SC Court of Appeals

Paula Rose, Respondent,

v.

Charles Homer Rose, II, Appellant.

CERTIFICATE OF COUNSEL

I certify that the Appellant's Brief and Reply Brief comply with Rule 211(B), SCACR.

Respectfully submitted,



J. Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
COUNSEL FOR APPELLANT

January 6, 2016.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM SPARTANBURG COUNTY
COURT OF COMMON PLEAS
R. Keith Kelly, Circuit Court Judge

Appellate Case No.: 2015-000701
Circuit Court Case No.: 2014-CP-42-02846

RECEIVED

JAN 11 2016

SC Court of Appeals

Paula Rose, Respondent,

v.

Charles Homer Rose, II, Appellant.

CERTIFICATE OF SERVICE

I certify that on the 6th day of January 2016, I served the Appellant's Brief, Appellant's Reply Brief and Certificates on the Respondent by placing a copy of same in the U. S. Mail, first class postage prepaid, addressed to counsel of record as indicated below:

Charles J. Hodge
T. Ryan Langley
Hodge & Lanley Law Firm, P.C.
229 Magnolia Street
Spartanburg, SC 29306

Respectfully submitted,



J. Falkner Wilkes
114 Whitsett Street
Greenville, SC 29601
(864) 282-1292
COUNSEL FOR APPELLANT