

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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MAR 10 2016

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

Kristi Harrington, Circuit Court Judge

Appellate Case No. 2014-001493

Wildflower Nursery, Inc. d/b/a Pleasant Landscapes.....Appellant,

v.

Joseph W. Beasley, Jr. a/k/a Bill Beasley.....Respondent.

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, Wildflower Nursery, Inc. d/b/a Pleasant Landscapes (“Wildflower”) respectfully petitions the Court for a rehearing of its Unpublished Opinion No. 2016-UP-082 filed on February 24, 2016. As explained below, the Court overlooked and misapprehended several things when it ruled: (1) Wildflower’s due process rights were not violated because Wildflower received notice of the case roster publication; (2) Wildflower’s position that the July 3, 2014 Order was issued *ex parte* was a nullity because Wildflower was improperly without counsel at the time; (3) the circuit court did not abuse its discretion in denying Wildflower the opportunity to retain counsel prior to striking its complaint; and (4) denial of Wildflower’s pro se motion to vacate was proper and affirming the circuit court’s July 21, 2014 Order as final, rendering any question regarding the June 9, 2014 order moot.

ARGUMENTS

- I. The Court misapprehended evidence in the Record that Wildflower received notice of the trial on May 9, 2013, and as a result of this failure regarding notice, the trial court's July 3, 2014 Order was issued in violation of Wildflower's due process rights.**

The Court held that Wildflower's due process rights were not violated because the Record contains evidence from the clerk's office that Wildflower received notice. However, the Court overlooked Mr. Parker's sworn affidavit that clearly states he received **no** notice of the trial, even though he made "dutiful inquiries." (*See* R. pp. 106 – 107). The South Carolina Supreme Court has held that absent "due notice and opportunity to be heard a court has no jurisdiction to adjudicate such personal rights," and that "[a] judgment by a court without jurisdiction of both the parties and the subject matter is a nullity and must be so treated by the courts whenever and for whatever purpose it is presented and relied on." *Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972).

Despite the ruling of the Court, the file fails to show *how* the Clerk's Office notified Wildflower of the hearing on the motion to strike or of the trial date. Importantly, the Court overlooked the fact that the transcript reveals that the trial court made no inquiry into whether Wildflower was notified of the hearing and apparently relied solely on defense counsel's statement, "We notified them of this hearing, and they still haven't shown up." (R. p. 77). Additionally, the Court's Opinion overlooked that counsel for Beasley failed submit any documentation of the alleged notice. (*See* R. pp. 77 – 81). In contrast to that lack of evidence showing notice, Wildflower submitted an

affidavit declaring that Wildflower never received such notice. (*See* R. pp. 106 – 107).¹

The Court’s reasoning also overlooked or misapprehended precedent and policy because the significant constitutional harm² suffered by Wildflower (resulting from the lack of notice) was minimized in the Court’s Opinion. Such reasoning potentially overlooked this State’s policy that favors “trial of issues on merit over securing judgment by slight technicalities.” *See Cf Columbia Pools, Inc. v. Galvin*, 288 S.C. 59, 61, 339 S.E.2d 524, 525 (Ct. App. 1986). A reversed order recognizing Wildflower’s due process rights in this context would also be consistent with “the policy of our state to resolve cases on the merits.” *See Caldwell v. Wiquist*, 402 S.C. 565, 575, 741 S.E.2d 583, 588 (Ct. App. 2013).

II. The July 3, 2014 Order was issued *ex parte*, and the Court misapprehended the demonstrably prejudicial consequences of this fact.

The Court’s Opinion misapprehended the significance of the *ex parte* communication, and concluded that because Wildflower was without counsel, there was no counsel of record of which to issue the July 3, 2014 Order. The Record is clear and Beasley does not contest: the circuit court signed a formal order on June 16, 2014, and this proposed order was prepared by Beasley on behalf of Respondent (*See* Respondent’s Final Brief, 6; R. pp. 15 – 17). Beasley’s actions amounted to an *ex parte* submission counter to the clear intent of the South Carolina Rules of Civil Procedure—an issue

¹ Likewise, the Court overlooked the lack of evidence available in the Record to support the trial court’s finding that Wildflower “received notice from the Clerk as to the date and time of this hearing.” (*See* R. p. 21). The Opinion misapprehended and/or overlooked the important fact that the trial court’s order contained undisputed factual inaccuracies regarding how, or if at all, Wildflower received notice of the hearing and trial. (*See id.*)

² The injury or harm caused by the lack of notice, which precluded Wildflower from appearing with counsel, is addressed in greater detail in Wildflower’s Reply Brief. (App. Final Reply Brief at 4-5).

overlooked or misapprehended by the Court in its Order. (*See* Respondent’s Final Brief, 6; *see also* Rule 5(b)(3), SCRCPP). Rule 5(b)(3)’s underlying purpose is to provide opposing parties the opportunity to review and comment on proposed orders before they are issued. Regardless of whether Wildflower had counsel at this time, counsel for Beasley’s communications with the trial court were *ex parte* and in violation of Rule 5(b)(3).

When evaluated in context, it seems the Court overlooked and misapprehended what the *ex parte* communication represented as part of a troubling pattern, directly related to Wildflower’s lack of notice. The issuance of the *ex parte* order came on the heels of Wildflower having been excluded from matters in the trial court for more than two years, beginning with the “removal” of the action. In light of the continuous problems regarding due process, Beasley’s *ex parte* activities were prejudicial under the circumstances—a point which this Court overlooked in its Opinion.

III. The Court misapprehended *Renaissance*, and overlooked the clarifying factors established in *Blue Star Rental & Sales*, when it found that circuit court did not abuse its discretion in denying Wildflower the opportunity to retain counsel.

Both the trial court and this Court relied upon *Renaissance Enterprises, Inc. v. Summit Teleservices, Inc.*, 334 S.C. 649, 515 S.E.2d 257 (1999) for the proposition that a corporation must be represented by an attorney in the circuit court. However, the Court’s Opinion overlooked the factors that would demonstrate that the trial court abused its discretion in denying Wildflower from retaining counsel.

As a matter of law, South Carolina has not endorsed the rule that the unauthorized practice of law renders a proceeding to be a nullity, but instead the South Carolina Supreme Court has held that our courts should evaluate the facts and circumstances of

each case to determine a just remedy. *Brown v. Coe*, 365 S.C. 137, 144, 616 S.E.2d 705, 709 (2005). The Court overlooked that the trial court wholly failed to engage in such an evaluation of the circumstances.

The Court overlooked or misapprehended that *Renaissance* has been interpreted by the South Carolina Supreme Court in a later decision. Subsequent interpretation of *Renaissance* has instructed that the unauthorized practice of law does not render a “proceeding a nullity” because such actions “amount[] to an amendable defect.” See *Blue Star Rental & Sales, Inc. v. Ridge Envtl., LLC*, No. 2014-MO-048, 2014 WL 6977616, at *3 (Dec. 10, 2014) (holding that the “unauthorized practice of law does not operate to void the lawsuit in its entirety, particularly absent any showing of prejudice to the opposing party.”). The Court overlooked that when the trial court granted Beasley’s Motion to Strike, the denial exceeded the sound discretion of the trial court because Wildflower never had the ability to appear.³

In its reasoning, the Court may also have overlooked that the trial court violated its discretionary abilities because Beasley would not have been prejudiced in any manner by admonishing Wildflower to seek counsel. *Blue Star Rental & Sales* establishes that Wildflower’s unauthorized practice of law should not have voided the law suit in its entirety, as a matter of law, which was the sum effect of the trial court’s dismissal of Wildflower’s initial complaint. Both the trial court and the reasoning provided by this Court overlooked and/or misapprehended the significant fact that Wildflower’s original complaint was properly filed in the magistrate’s court, where corporations can be represented by non-lawyers. Failing to provide Wildflower the opportunity to retain

³ While the Court noted that Wildflower had ample opportunity to obtain counsel, this overlooks the factors established in the Record and discussed in Section I *supra*.

counsel amounted to a violation of Wildflower's due process rights, and addressing this overlooked argument would provide this Court grounds to overturn its February 24, 2016 Opinion.

IV. By finding that the Form 4 order should not have been vacated, even though it was not 'final' as a matter of law, the Court erroneously concluded that the issue was moot.

The Court erroneously mooted Wildflower's valid due process argument that a final order was never entered because the Court held that because a non-lawyer cannot represent a corporation before the circuit court. However, the factors, reasoning, and argument overlooked by the Court related to the improper practice of law are discussed above in Section III as well as in greater detail Section II of the Final Brief of Appellant (at 12-14) and Section IV of the Final Reply Brief of Appellant (at 6-8). By overlooking or misapprehending the argument that enforcement of a non-final judgment against Wildflower amounted to a violation of Wildflower's due process rights, the Court's conclusion regarding mootness was incorrect.

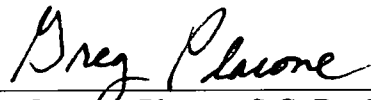
In its Opinion, the Court failed to properly consider that judgments do not come into existence until a final order has been issued. *Cook v. Jennings*, 18 S.E. 640, 643 (1893) ("Wherever and whenever a court has made a final determination of the rights of the parties in the action, such is a judgment."). Such a consideration is material because a Form 4 Order, like the one that Beasley sought to enforce, indicates by its own terms that a formal, final order will follow. *See Cheap-O's Truck Stop, Inc. v. Cloyd*, 350 S.C. 596, 605, 567 S.E.2d 514, 518 (Ct. App. 2002) (noting that a form order is not a final order if the circuit court specifies that a formal order will be filed). The Court's Opinion only addressed mootness, by upholding the July 21, 2014 Order, and such reasoning

overlooked or misapprehended the significance of the non-final order issued previously in November 2013 and June 9, 2014. At the time these orders were entered, no judgment against Wildflower existed when they were entered. This allowed Beasley to enforce the non-final judgment, in violation of Wildflower's due process rights.

CONCLUSION

Based on the foregoing, Appellant Wildflower respectfully requests that Wildflower's Petition for Rehearing be granted and that the Court rehear and amend its decision accordingly.

Respectfully submitted,



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March 10, 2016

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APPEAL FROM CHARLESTON COUNTY
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Kristi Harrington, Circuit Court Judge

Case No. 2011-CP-10-1559

Wildflower Nursery, Inc. d/b/a Pleasant Landscapes.....Appellant,

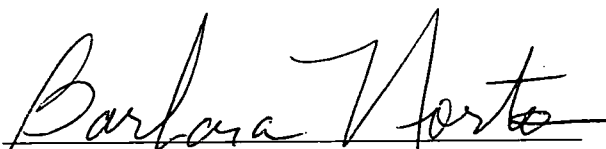
v.

Joseph W. Beasley, Jr. a/k/a Bill Beasley.....Respondent.

PROOF OF SERVICE FOR APPELLANT'S PETITION FOR REHEARING

I certify that on this 10th day of March 2016, I have served the foregoing **Appellant's Petition for Rehearing** via U.S. Mail, first class postage prepaid, on the following counsel of record:

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Barbara Norton, Legal Practice Assistant
NEXSEN PRUET, LLC

D. Gregory Placone
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VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1015 Sumter Street
Columbia, South Carolina 29201

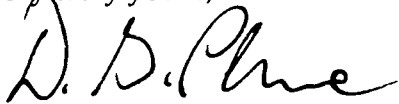
**Re: Wildflower Nursery, Inc., d/b/a Pleasant Landscapes vs.
Joseph W. Beasley, Jr., a/k/a Bill Beasley
Appellate Case No.: 2014-001493**

Dear Ms. Kitchings:

Enclosed herewith for filing with the Court are the original and 7 copies of the ***Appellant's Petition for Rehearing*** in the above referenced matter. Please return a stamped-clocked copy to me via our courier.

By copy of this letter and as evidenced by the attached ***Proof of Service***, we are serving counsel of record with a copy of the same

Very truly yours,



D. Gregory Placone

DGP/bn

Enclosures

cc w/encl.: Steven L. Smith, Esquire
Zachary James Closser, Esquire

- Charleston
- Charlotte
- Columbia**
- Greensboro
- Greenville
- Hilton Head
- Myrtle Beach
- Raleigh