FINAL BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA

In The Court of Appeals
[In The Supreme Court]

APPEAL FROM HORRY COUNTY
COURT of COMMON PLEAS

LARRY B. HYMAN JR. Circuit Court Judge

Case No. 2014-CP-26-01684

Appellant Case No: 2015-001210

Archie Howell, Respondent,

v.

Christopher Chabot Appellant,

DBA Autoworks,

APPELLANT CHRISTOPHER CHABOT'S FINAL BRIEF

February 13, 2016

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II. RESPONSE TO RESPONDENTS STATEMENT OF THE CASE

This case stems from a contract that the Respondent Archie Howell had with his so called expert witness not the Appellant. Furthermore there was no evidence submitted to back up the claim of the Respondent. The Respondent did not meet the elements of any of the counts in addition the case rested on high prejudicial witness, hearsay, and his testimony in which in his own testimony stated the contract was with his witness not with the appellant even going as far as giving him money.

RESPONSE TO RESPONDENTS A. PROCEDUAL HISTORY:

Respondents fail to tell this court that in fact they changed the amount of the vehicle numerous times as the appellant stated in his initial brief. The respondent stated what the blue book value was in which the bluebook has different value for vehicles depending on the condition of the vehicle. Those include excellent, very good, good, fair and poor. Pictures of the vehicle were never provided only what the Respondent thinks it was worth and what kind of condition it was in. Damages must be backed up by some kind of evidence other than just testimony. If the courts were to go off what people testify to the number of frivolous lawsuits like this one would be out of control and clogged our justice system. Thus why we have the elements to each account that must be proven in which the Respondents did not meet the elements of any of the accounts.

The Respondents act like the Appellant disregarded the court when he failed to show at the hearing on May 4, 2015; this wholly not true. The Appellant filed his motion to reconsider and waited for months for it to be heard. The Appellant had a prior engagement in which he paid paid money and his tickets were nonrefundable. He went to file a motion for continuance but was told that the case was closed. The Appellant tried to file his continuance on more than one

occasion. It took the court over a week to locate his file. It was eventually filed but wasn't ruled on until the day of court. The Respondents on the other hand had have had continuances in the magistrate court as well as getting an extension to file his reply brief.

RESPONSE TO RESPONDENTS B. STATEMENT OF FACTS:

1. Damages to vehicle

Here again the Respondents acknowledged that he took the car to his so called expert witness Joe Tunning and gave him $600.00 in which he was supposed to fixed the vehicle. There lays the contract between Mr. Tunning and the Respondent Archie Howell. They go on to state that Mr. Tunning their own expert took the vehicle apart and couldn't fix it then put it back together and drove supposedly to Autoworks. There is no way of knowing what Mr. Tunning did to the vehicle. If he had put it back together wrong drove he could of done the damage himself. The Appellant testified he never spoke to the Respondent and doesn't remember the vehicle. The Respondent testified on what someone else told him which was complete hearsay which should have never been submitted into evidence. You will notice in the Respondents brief the only thing that they can refer to is the Respondents testimony and their prejudicial expert witness. The burden of proof lies with the Plaintiff whereas no repair orders, no tow bill, pictures of the vehicle, no receipts, no diagnosis of the engine being ruined, no phone records, no bill of sale for the vehicle. None of what the respondent testified to was proven with evidence in court. The Appellant never touched his vehicle, never contracted with the Respondent. This is a clear frivolous lawsuit because they think the Appellant has money. The Respondent says the engine was ruined. Was it if this court can't decipher or if the vehicle was even really sold if it was how would the Appellant know? If damages are to be given damages has to be shown clearly in this case damages hasn't. The Respondents go on to say that he was out $600.00 for the cost of the

values. He already testified he gave the money to Joe Tunning not the Appellant no receipts that the values were even purchased.

2. The January 22, 2014 bench trial

In the lower court there is no discovery process. The Appellant went to court but was told that the lower court does not have a discovery process. At the bench trial the judge acknowledge knowing the Respondents wife. The Appellant did not oppose due to he thought that the judge would be unbiased but this was not the case. Besides the fact no evidence was ever shown the engine was ruined, there was a contract between the Respondent and the Appellant, or even that the car was even sold. The Appellant raised all of his defenses in his response to the complaint but fell on deaf ears by the court. Nothing is worst telling a judge you have a problem ruling over your case especially when you are a pro se litigant. Again the highly prejudicial was not disclosed to the Appellant before trial were a motion in liminie could have been filed.

The respondents called Joe Tunning as an expert witness if Mr. Tunning was such an expert in the field of automotive he would've been able to fix the vehicle. A dentist is a doctor and so is a heart surgeon but you wouldn't let a dentist do open heart surgery on you. It was clear he was highly prejudicial for many reasons. One he was unqualified as an expert witness. Two that Joe Tunning had a relationship with the Respondent and contracted with the Respondent on many occasions before this complaint was filed.

The Respondents lead this court to believe and stated that "Mr. Chabot did not object. In fact, Mr. Chabot recognized Mr. Tunning as an expert" is completely false. In (APP Exhibits Page 057 lines 13-17) "Judge: either you are agreeing with that or not.. agreeing with that or do you wish to depose" "Chris Chabot: as an expert?.. no I would not agree with that" A expert witness

has to be impartial in addition have to be of mortally statue which clearly the expert witness was not when he testified (APP Exhibits Page 059 lines 22-23) "under the table stuff" It is clear that the judge abused his power when he allowed Joe Tunning to testify as an expert witness and its very clear that the Appellant Mr. Chabot objected to him being accepted as an expert witness also.

After hearing all the evidence judge Blanton did not rule immediately. The Appellant was notified by mailing weeks later. The Appellant filed an appeal in Common Pleas. The judge never even read the Appellants appeal nor looked at the transcripts but almost immediately dismissed the Appellants appeal. The Appellant filed a motion to reconsider but was dismissed as stated the facts of the motion to reconsider beforehand in this final brief. The Appellant then filed an appeal in the South Carolina Court of Appeals.

III. RESPONSE TO LEGAL ARGUMENTS

A. Response to Standard of Review:

In the case of *The Gatherings Horizontal Property Regime v. Williams,* S.C. Unpublished Opinion No. 2005-UP-617(2005) the court ruled ("After a review of relevant law, we find the circuit court erred in this case by reversing and remanding for a new trial on the ground stated. We accordingly reverse and remand to the circuit court to receive an amended return from the *magistrate, if necessary, and decide the appeal on its merits).*

B. Response to Respondents Appellant Failed to Preserve Issues for Appellant Review

The Appellant Chabot has preserved issues for appeal when he filed his answer to his complaint including his defenses as well as asking for strict proof. In addition he asked for the case to be dismissed yet the court never ruled on it. Also when he motioned the court that he did not agree that Mr. Tunning was a qualified witness.

This court is required to liberally construe pro se complaints. *Erickson v. Pardus,* 551 U.S. 89, 94 (2007). Such pro se complaints are held to a less stringent standard than those drafted by attorneys, id.; *Gordon v. Leeke,* 574 F.2d 1147, 1151 (4th Cir. 1978), and a federal district court is charged with liberally construing a complaint filed by a pro se litigant to allow the development of a potentially meritorious case. *Hughes v. Rowe,* 449 U.S. 5, 9 (1980); Cruz v. Beto, 405 U.S. 319 (1972). When a federal court is evaluating a pro se complaint, the plaintiff's allegations are assumed to be true. *Erickson,* 551 U.S. at 93 (citing *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 555-56 (2007))

The Appellant did preserve his right to an appeal. His motion to dismiss was never ruled on. He was not allowed any discovery, he was never notified of the Respondents expert witness, he refuted that Mr. Tunning was qualified to testify as an expert witness, and more.

C. Response to Respondents The trial Court Judge Did Not Err By Failing To Recuse Himself

The judge in this case not only did not rule on the Appellants motion to dismiss but knew the Respondents wife. How does a judge allow a witness to be an expert when one he contracted with the Respondent, two could not perform the work, three was not impartial, four had motive for to get himself off the hook of being sued, five never allowed any discovery or

notified of any witnesses, six found a judgment against the Appellant when no proof was ever shown or submitted into evidence, and eight had no reasoning for the amount of the judgment?

In the case of *Ellis v. PROCTER AND GAMBLE DISTRIBUTING COMPANY,* 433 S.E.2d 856 (1993) ("we find a judge's impartiality might reasonably be questioned when his factual findings are not supported by the record. Accordingly, we find evidence of judicial prejudice in this case.") This case was reversed and remanded on less evidence or speculation then this Appellants case. The Respondents cite *State v. Nichols* , *State v. Fleming*, *State v. Adams*, *State v. Morris*, *State v. King*, *State v. Thompson* which are all criminal cases. In *State v. Nichols*, it was ultimately reversed and remanded.

The Respondents go on to cite *Norman v. Stevenson Theaters, Inc.* the court stated "The granting of a new trial on this ground is a matter peculiarly in the discretion of the trial Judge; and, unless the verdict is wholly unsupported by evidence, or is so excessive as to justify the inference that it is the result of caprice, passion, or prejudice" here no evidence was ever submitted in court or to the court of appeals in this case. This case was based purely on testimony and highly prejudicial witness. It a known fact in order for damages to be given damages have to be proven upon evidence not just testimony. There is no basis for the judge to find in the Respondents behalf unless he abused his discretion or was bias.

The Respondents keep citing criminal cases all that have no bearing on this case. It's very clear the judge did not follow the law in this case.

D. Response to Respondents The Trial Judge Properly Qualified Joseph Tunning As An Expert Witness.

The Respondents never disclosed there expert witness which would've allowed the Appellant to *put a motion in limine to keep the expert witness from testifying.* The Respondent and the Respondents expert witness came to trial with unclean hands. A defense that the Appellant stated in his answer to the complaint and his motion to dismiss which the motion was never ruled on.

In Rule 702, SCRE the rule states "If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." See *Daubert v. Merrell Dow Pharmaceuticals*, Inc., 43 F.3d 1311, 1319 (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under Daubert, that's not enough.").

Here the trial judge abused his discretion letting Mr. Tunning to testify because he stated he *figured out how to fix the vehicle by looking it up on the internet. The clearly is not an expert or* he would've been able to fix it himself.

The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. See *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994) (expert testimony based on a completely subjective methodology held properly excluded). See also *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999) ("[I]t will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").

Working on atv, and motorcycles doing lift kits is not qualifications to give an opinion in this case. In addition he took the vehicle apart put it back and there is no way of knowing what he did to the vehicle. Just because someone can read something on the internet does not make them an expert witness.

The Respondents cite *Brown v. Carolina Emergency Physicians, P.A.* another case that was remanded. "An abuse of discretion arises from an error of law or a factual conclusion that is without evidentiary support." *Lee v. Suess,* 318 S.C. 283, 285, 457 S.E.2d 344, 345 (1995) (citation omitted). "Permitting an expert witness to testify beyond the scope of his or her expertise can constitute reversible error." *Pirayesh v. Pirayesh,* 359 S.C. 284, 298, 596 S.E.2d 505, 513 (Ct. App. 2004). Clearly Mr. Tunning testified beyond his scope of expertise. A person engaged as an expert witness has an overriding duty to assist the Court impartially on

matters relevant to the area of expertise of the witness. An expert witness is not an advocate for a party. Mr. Tunning was not an expert he was not impartial and he was advocate for the Respondent which obviously would have disqualified him as an expert witness. In addition he had to be of moral statue which he is certainly not working under the table scheming the government for tax purposes is not up standing citizen.

E. Response To Respondents The Trial Judge Did Not Err In Finding Judgment In Favor For Respondent

The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach. *Fuller v. E. Fire & Cas. Ins. Co.,* 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." Id. Rescission is an undoing of a contract from the beginning, as if the contract had never existed. *Ellie, Inc. v.*

Miccichi, 358 S.C. 78, 95, 594 S.E.2d 485, 494 (Ct. App. 2004). "In a breach of contract action, damages serve to place the nonbreaching party in the position he would have enjoyed had the contract been performed." S.C. Fed. Sav. Bank v. Thornton-Crosby Dev. Co., 303 S.C. 74, 77, 399 S.E.2d 8, 10 (Ct. App. 1990).

Small v. Pioneer Mach, Inc. 494 S.E.2d 835, 842 (S.C. Ct. App. 1997)' see also *Young v. Tide Craft, Inc.,* 242 S.E. 2d 671, 675 (S.C. 1978) (stating that proximate cause is an essential element common to all three theories of recovery" where " actions were based on alternative theories of negligence, breach of implied warranty") *Fuller v. E. Fire & Cas. Ins. Co., 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962).* "The general rule is that for a breach of contract the defendant is liable for whatever damages follow as a natural consequence and a proximate result of such breach." *Id.* The court of appeals reversed and remanded the case due to the plaintiff did not prove all the necessary elements to prove a breach of contract had taken place. "The purpose of an award of damages for breach of contract is to put the plaintiff in as good a position as he would have been in if the contract had been performed." *Minter v. GOCT, Inc., 322 S.C. 525, 528, 473 S.E.2d 67, 70 (Ct. App. 1996).* "The proper measure of compensation is the loss actually suffered by the plaintiff as a result of the breach." *Id.*

There is simply no way of knowing the proper compensation if there is to be compensation to be had in this case especially when the contract was between the Respondent and the Respondents own witness..

The Respondents had the burden of proof in which he proved nothing and there is reasonable doubt when the Respondent and expert witness in their own testimony stated that the contract was between those two and it was the expert witness took the vehicle apart. The Respondent did

not prove any of the elements and the court abused its discretion by finding in favor of the Respondent. The Respondents bring up the offer and acceptance which they are correct but as stated the offer and acceptance was between the Respondent and Joe Tunning not the Appellant. The Respondents also state that Mr. Tunning contacted the Appellant Mr. Chabot to fix the vehicle which is untrue. The Appellant never agreed to fix the vehicle and never spoke to the Respondent nor Mr. Tunning to fix the vehicle. In their own brief just stated there was no contract between the Respondent Archie how and the Appellant Christopher Chabot. It has been well established that "there can be no liability for casual statements, representations as to matters of law, or matters which plaintiff could ascertain on his own in the exercise of due diligence." Robertson v. First Union Nat'l Bank, *350 S.C. 339, 348, 565 S.E.2d 309, 314 (Ct. App. 2002)* (quoting West v. Gladney, *341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000)).*

A claim for negligent misrepresentation is predicated upon the transmission of a negligently made false statement. *See Armstrong v. Collins, 366 S.C. 204, 220, 621 S.E.2d 368, 376 (Ct. App. 2005); Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 407, 581 S.E.2d 161, 166 (2003); Robertson v. First Union Nat'l Bank, 350 S.C. 339, 349, 565 S.E.2d 309, 315 (Ct. App. 2002); Brown v. Stewart, 348 S.C. 33, 42, 557 S.E.2d 676, 680–81 (Ct. App. 2001); West v. Gladney, 341 S.C. 127, 134, 533 S.E.2d 334, 337 (Ct. App. 2000).* Like negligent misrepresentation, an actionable fraudulent misrepresentation case requires there first be a false representation predicated upon misstatements of fact rather than upon expression of opinion, intent, or confidence that the deal would be satisfactory. *See Bishop Logging Co. v. John Deere Indus. Equip. Co., 317 S.C. 520, 526–27, 455 S.E.2d 183, 187 (Ct. App. 1995)* (finding statements by equipment seller concerning expected performance of logging system were opinions as to future performance and could not be basis for claim of fraud).

More specifically, the alleged false representation must be of a present or pre-existing fact. *See* *Spires v. Acceleration Nat'l Ins. Co.*, *417 F. Supp. 2d 750, 755*-56 (D.S.C. 2006) (applying South Carolina law). The negligent representation cannot be based on unfulfilled promises or statements as to future events. *See* *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 105, 439 S.E.2d 283, 285 (Ct. App. 1993).

F. Response To Respondents The Circuit Properly Denied Appellants Motion To Vacate and Dismiss Plaintiff's Claims With Prejudice

Again the Respondents are outside their scope by stating that the Appellant failed to provide the transcripts from the Court of Common Pleas. Apparently getting transcripts has been a real problem for parties appealing to the Court of Appeals because the court reporters are not employed by the state they are independent contractors. The Appellant filed with the Court of Appeals with the issues and notices trying to get the transcripts. The judge allowed the Appellant to file his motion but never even read or looked at his motion. The judge dismissed his appeal when asked did he remember the Respondent or the car and he replied no. Why would he if he never worked on the vehicle nor spoke to the Respondent?

Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 419 (Ct. App. 2000). "The appellate court will reverse the trial court's ruling on a motion only when there is no evidence to support the ruling or where the ruling is controlled by an error of law." *Law v. S.C. Dept. of Corrections*, 368 S.C. 424, 434–35, 629 S.E.2d 642, 648 (2006).

The Respondents are asking this court to find that the Appellant was at fault for not supplying the transcripts when obtaining the transcript were beyond his control. The Appellant would've had cited authority in his initial brief if they had gain possession of the transcripts. The go on to

state that the Appellant did not present any support to the Circuit Court which is preposterous. See (APP Pages 026-082 & APP: Pages 085-092) which had abundance of evidence supported by transcripts and case law. The Appellant made numerous motions regarding the transcripts and kept the Court of Appeals notified of the issues regarding those transcripts.

G. Response To The Circuit Court Properly Denied Appellant's Motion for Reconsideration, Motion For Judgment Notwithstanding The Verdict And/Or Amend The Judgment, Motion For Judicial Review, Motions For Judicial Review Of Damages, And Motion For Trial De Novo

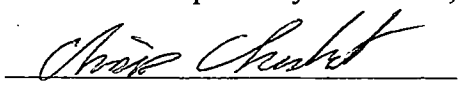
The Respondents act like the Appellant abandoned his issues but not showing up to court. This is fictitious the Appellant filed his motion in a timely matter and it was seven months before this case went to a hearing. The Appellant tried to file a motion for continuance numerous times but was told he couldn't file it because the case was closed. The clerk went to find the file but couldn't locate it. The Appellant spoke to the person in charge whom stated to come back in a couple days. Finally the Appellant was allowed to file his continuance. It was denied the day of the hearing not beforehand. The Appellant has a business to run which includes business trips *which he notified the court that is why he needed a continuance. Every time the Respondents* requested a continuance or an extension of time they were always granted it. Why a pro se litigant wasn't offered the same courtesy as the Respondents is erroneous. The Appellants should not be held responsible for a clerical error. Not allowing the Appellant to timely file a continuance because a clerical mistake showing that the case had been closed when it was clearly not and then being able to locate the file falls under a clerical mistake. Rule 60(a) provides the court with a mechanism for correcting clerical errors and mistakes in its judgments, orders, and other parts of the record. "Generally, a clerical error is defined as a mistake in writing or copying." Dion v. Ravenel, Eiserhardt Assocs., 316 S.C. 226, 230, 449 S.E.2d 251, 253 (Ct. App.

1994). A clerical error "is a mistake or omission by a clerk, counsel, judge or printer which is not the result of exercise of judicial function." Therefore he should not be held responsible for those mistakes. A nunc pro tunc order can be used only for the purpose of placing in the record evidence of judicial action that has actually been taken, and not to correct an error or supply an omission of judicial action. 20 Am. Jur. 2d Courts § 29; Carroll v. Carroll, 338 S.W.2d 694 (Ky. 1960); Harden v. Commonwealth, 885 S.W.2d 323 (Ky. Ct. App. 1994). The court can correct only what was done, not what should have been done. See *Strom v. Collins Entertainment Corp.* where the court reversed the decision based on a clerical error.

IV. CONCLUSION

Wherefore for Appellant asks this Honorable Court to remand this case for a dismissal with prejudice for all the reasons stated in his briefs and his designation of matter. Are justice system cannot afford to allow parties to sue with no evidence and not meeting the required elements if so our justice system will be clogged with more and more frivolous lawsuits like this one. This case should have never been heard but dismissed at the Magistrate Court level and unfortunately it has cost the Appellant a great deal of money to fight this frivolous lawsuit. It is not fair to allow a Plaintiff to file such a suit against a Defendant without any evidence and force a Defendant to expend their money on lawsuit that has no merits such as this case. The Appellant as this case be remanded and dismissed and the cost of defending this case.

Respectfully Submitted,



Christopher Chabot

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CERTIFICATE OF SERVICE OF APPELLANT

THE STATE OF SOUTH CAROLINA

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APPELLANT CHRISTOPHER CHABOT'S

CERTIFICATE OF SERVICE

I, Christopher Chabot, hereby certify that I have personal served a copy of the Appellants final brief, and motion to leave outside the initial deadline, on February 23,2016 to Other Counsel of Record

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