THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

Gordon G. Cooper, Master-In-Equity

Trial Court Case No. 2014-CP-42-04205

Appellate Case No. 2016-000916

Ex Parte Anthony L. Mathis, ...Appellant,

Invacare Corporation, Inc. and all of its subsidiaries, assignors, and assignees,.. Respondent,

v.

MD Medical, LLC and Gary Day, ...Defendants.

INITIAL REPLY BRIEF OF APPELLANT

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STATEMENT OF ISSUES FOR REVIEW

I. Respondent's discussion of the Circuit Court's general authority in supplementary proceedings ignores the gross misapplication of that authority to the facts of this matter.

II. Respondent's argument that the Circuit Court's August 24, 2015 Order of Reference for Rule to Show Cause provides sufficient notice of Respondent's intent to hold Appellant personally liable for Respondent's judgment misconstrues the plain language of said Order and mischaracterizes the nature of this action.

III. Respondent's suggestion that Appellant has failed to properly preserve his objections to the Circuit Court's improper determination that the funds Appellant receives from Dr. John Petrich should be directed to Respondent is wholly inaccurate.

I. RESPONDENT'S DISCUSSION OF THE CIRCUIT COURT'S GENERAL AUTHORITY IN SUPPLEMENTARY PROCEEDINGS IGNORES THE GROSS MISAPPLICATION OF THAT AUTHORITY TO THE FACTS OF THIS MATTER.

Respondent argues that the Circuit Court's December 14, 2015 and March 30, 2016 orders properly bind Appellant to Respondent's judicial judgment in his individual capacity because the Statute of Elizabeth as applied under South Carolina law recognizes an action for fraudulent conveyance and/or because South Carolina Code of Laws Section 15-39-410 (1976) allows a court to apply property of a judgment debtor toward the satisfaction of the judgment. These arguments blatantly ignore that South Carolina law has long forbid the casual application of those laws in supplementary proceedings where, like in this case, the question of ownership exists as to the property the judgment creditor seeks to have applied to its debt. In Palmetto Bank & Trust Co. et al. v. McCown-Clark Co. et al, 143 S.C. 98, 141 S.E. 155 (1928) reaffirmed the rule established in Deer Island Lumber Co. v. Virginia-Carolina Chemical Co., 111 S. C. 299, 97 S.E. 833 (1918) that forbids a court from summarily disposing of the issue of ownership in supplementary proceedings. Despite Respondent's mischaracterization of Appellant's position, Appellant has always asserted that the proceeds received from the distribution of MD Medical, LLC's assets belonged to Appellant as a debtor himself of MD Medical, LLC, as compensation for his great financial loss and as consideration to discourage Appellant from pursuing legal action against MD Medical, LLC, Gary Day and Deborah Hamby Day. (See November 19, 2015 transcript at pages 18 – 19 and 31).

Appellant's challenge to the Circuit Court's December 14, 2015 and March 30, 2016 orders is squarely based on his assertion that those orders create an improper interference with his lawful contractual agreement with Dr. Petrich and, therefore, his

personal funds. Furthermore, the undersigned counsel for Appellant urged the Circuit Court to recognize it did not have the authority to hold Appellant personally liable for Respondent's judgment against MD Medical, LLC and Gary Day (See November 19, 2015 transcript at pages 48 – 51) and the Circuit Court erroneously ignored that argument. The Circuit Court's failure does not negate the long-standing South Carolina law that

> a third person claiming property rights which have not been passed upon in the original action under which the execution is issued should not be deprived either of his day in court or of the right of trial in the form prescribed by law for a regular judicial procedure.

Palmetto Bank & Trust Co. et al., 143 S.C. 98, 141 S.E. at 156. In the matter at bar, the Appellant is a third person claiming ownership of the asset sales proceeds the Circuit Court's December 14, 2015 and March 30, 2016 orders seek to apply toward Respondent's judgment. As the Appellant has argued from the outset of this matter, the Circuit Court did not have jurisdiction nor authority to assert control over those proceeds through the supplemental proceedings underlying this appeal. There is no provision of South Carolina law that either expressly or by implication gives the Circuit Court authority to summarily dispose of the issue of ownership, or to order that the sales proceeds Appellant claims as his personal funds to be applied towards the satisfaction of Respondent's judgment through supplemental proceedings. Id.; Deer Island Lumber Co., supra.; and Wannamaker v. Bryant, 165 S.C. 107, 162 S.E. 779, 780 (1932). Moreover, Appellant's appearance in obedience to the Circuit Court's August 24, 2015 Order of Reference for Rule to Show Cause shall not be construed as his consent to a mode of trial not authorized by the clear provisions of South Carolina law. Id.

Respondent's argument that Appellant failed to provide proof of MD Medical, LLC's debt to him further highlights the error of the Circuit Court's December 14, 2015

and March 30, 2016 orders. As discussed in Appellant's Initial Brief, the Circuit Court's August 24, 2015 Order of Reference for Rule to Show Cause does not provide any notice whatsoever that Respondent sought to hold Appellant personally liable for its judgment against MD Medical, LLC and Gary Day nor that Respondent sought to require Appellant to apply any funds to the satisfaction of Respondent's judgment. Therefore, Appellant was not aware that he needed to defend himself and his actions during the dissolution of MD Medical, LLC and was not prepared to submit evidentiary support of his position in regard to said dissolution. Appellant was only prepared to appear for deposition and otherwise fully, completely, and truthfully respond to discovery in accordance with the South Carolina Rules of Civil Procedure which is all the August 24, 2015 Order of Reference for Rule to Show Cause required of him. Respondent cannot now benefit from the fact that Appellant did not set forth a full evidentiary case for his position where Appellant was deprived of his right to notice of Respondent's claims against him and a separate day in court as required by Palmetto Bank & Trust Co. et al. As a matter of law, the Circuit Court did not have the jurisdiction nor authority to bind Appellant to Respondent's judgment in his individual capacity. Accordingly, Respondents argument that the Circuit Court's December 14, 2015 and March 30, 2016 orders are proper under the Statute of Elizabeth and Section 15-39-410 must be rejected and the Circuit Court's December 14, 2015 and March 30, 2016 orders must be reversed.

II. RESPONDENT'S ARGUMENT THAT THE CIRCUIT COURT'S AUGUST 24, 2015 ORDER OF REFERENCE FOR RULE TO SHOW CAUSE PROVIDES SUFFICIENT NOTICE OF RESPONDENT'S INTENT TO HOLD APPELLANT PERSONALLY LIABLE FOR RESPONDENT'S JUDGMENT MISCONSTRUES THE PLAIN LANGUAGE OF SAID ORDER AND MISCHARACTERIZES THE NATURE OF THIS ACTION.

Respondent's argument that the Circuit Court's August 24, 2015 Order of Reference for Rule to Show Cause provides sufficient notice of Respondent's intent to hold Appellant personally liable for Respondent's judgment completely ignores the significant fact that Appellant is not a party to Respondent's January 21, 2015 judgment. Respondent is correct that the August 24, 2015 Order of Reference for Rule to Show Cause states the property, assets, accounts, funds, or holding belonging to MD Medical, LLC may be applied to Respondent's judgment and that the Circuit Court was asserting the power to rule on motions and issue a final order. However, Respondent is absolutely incorrect in its assertion that the August 24, 2015 Order of Reference for Rule to Show Cause authorized the Circuit Court to enter judgment against Appellant personally. Respondent's argument that the August 24, 2015 Order of Reference for Rule to Show Cause provides sufficient notice completely ignores the fact that said Order only asserts authority over the property of MD Medical, LLC and Gary Day. The August 24, 2015 Order of Reference for Rule to Show Cause does not at all provide notice that the Circuit Court would seek to assert authority over Appellant's personal property. The plain language of that Order simply does not establish any such authority. Furthermore, as discussed above, South Carolina law specifically forbids the Circuit Court from depriving Appellant his day in court or of the right of trial in the form prescribed by law for a regular judicial procedure where property he claims to be his is sought to be applied to the debt of another.

The significant fact that Appellant is not a party to Respondent's January 21, 2015

judgment cannot be ignored. The fact that Respondent failed served Dr. John Petrich with any form of notification regarding any stage of the Circuit Court proceedings is likewise significant. It is undisputed that the payments Dr. Petrich is obligated to make to Appellant come from Dr. Petrich's personal funds. As a third party, Dr. Petrich is also entitled to his day in court before he can be subjected to an order of the court directing his use of his personal funds. Despite Respondent's bold contention, Dr. Petrich's rights are indeed compromised by the Circuit Court's December 14, 2015 and March 30, 2016 orders. The Circuit Court's December 14, 2015 and March 30, 2016 orders have bound Dr. Petrich to a financial obligation which he does not have by way of contract nor law without any inquiry at all as to whether Dr. Petrich has the resources to fulfill that obligation. If Dr. Petrich is not able to fulfill the financial obligation required by the Circuit Court's December 14, 2015 and March 30, 2016 orders, is he now subject to the Court's contempt powers? Such an extreme result is exactly why South Carolina law requires proper notice and proper judicial proceedings before a person is bound by the Court's authority. The Circuit Court's December 14, 2015 and March 30, 2016 orders are improper under South Carolina law and, therefore, must be reversed.

Respondent's reliance on Salvo v. Hewitt, Coleman & Assocs., 274 S.C. 34, 39, 260 S.E.2d 708, 711 (1979) is misplaced. Salvo acknowledges a limited exception to the rule that a court ordinarily may not grant relief beyond the scope of the notice when a ground not included in the notice of the motion is nevertheless fully argued before the court without objection. As discussed in Appellant's Initial Brief, during the course of the November 19, 2015 hearing, Appellant strongly and repeatedly objected to any testimony and references to his personal assets and business affairs beyond his basic identity as a

practicing physician and vehemently objected to Respondent's suggestion that Appellant should be held personally responsible in any way in this matter. Accordingly, this matter does not fall within the limited exception to the notice rule regarding participation without objection set forth in Salvo and Salvo does not excuse the fact that the August 24, 2015 Order of Reference for Rule to Show Cause fails to provide any notice whatsoever that Respondent sought to hold Appellant personally liable for its judgment against MD Medical, LLC and Gary Day nor that Respondent sought to require Appellant to apply any of his personal funds toward the satisfaction of Respondent's January 21, 2015 judgment. The Circuit Court's December 14, 2015 and March 30, 2016 Orders must be reversed and Appellant should be deemed to have fully complied with the August 24, 2015 Order of Reference and Rule to Show Cause by submitting himself to examination on November 19, 2015.

III. RESPONDENT'S SUGGESTION THAT APPELLANT HAS FAILED TO PROPERLY PRESERVE HIS OBJECTION TO THE CIRCUIT COURT'S IMPROPER DETERMINATION THAT THE PAYMENTS APPELLANT RECEIVES FROM DR. JOHN PETRICH SHOULD BE DIRECTED TO RESPONDENT IS WHOLLY INACCURATE.

In a footnote on page thirteen of its Initial Brief, Respondent vaguely suggest that Appellant has failed to preserve his objection to the Circuit Court's improper determination that the funds Appellant receives from Dr. John Petrich should be directed to Respondent. As discussed above, counsel for the Appellant have strongly urged the Circuit Court to recognize that Respondent was not entitled to any relief involving Appellant's personal funds without first commencing a separate action setting forth its claim against Appellant's personal assets. (See November 19, 2015 transcript at pages 48 – 51). In regard to Respondent's request for relief against Dr. Petrich, Respondent did not seek such relief

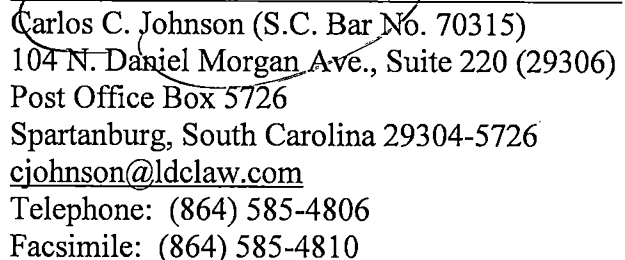
during the November 19, 2015 hearing. At that time, Respondent only requested that Appellant be required to keep the funds he receives from Dr. Petrich in a separate account. (See November 19, 2015 transcript at pages 48.) The appropriate time for Appellant to raise his objection to that requested relief was in his Motion to Reconsider and Amend which he did. Accordingly, the Appellant has properly preserved all issues he now submits for this Honorable Court's review.

CONCLUSION

Based upon the foregoing arguments and cited authorities, Appellant respectfully requests that this Honorable Court issue an order reversing the Circuit Court's Orders of December 14, 2015 and March 30, 2016.

Respectfully submitted,

LYLES, DARR & CLARK, LLP



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September 16, 2016
Spartanburg, South Carolina

Attorneys for Appellant

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In The Court of Appeals

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Ex Parte Anthony L. Mathis, ...Appellant,

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v.

MD Medical, LLC and Gary Day, ...Defendants.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Reply Brief on Invacare Corporation, Inc. and all of its subsidiaries, assignors, and assignees, by depositing a copy of it in the United States Mail, postage prepaid, on September 16, 2016, addressed to their attorneys of record, Bonum S. Wilson, III and Brandon T. Reeser, Wilson & Heyward, LLC, Post Office Box 13177, Charleston, South Carolina 29422.

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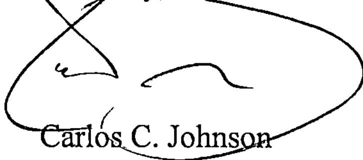
Re: Ex Parte Anthony L. Mathis, Appellant, Invacare Corporation, Inc., and all of its subsidiaries, assignors, and assignees, Respondent v. MD Medical, LLC and Gary Day, Defendants
Case Number: 2016-000916

Dear Ms. Kitchings:

Enclosed for filing are an original and one copy of Appellant's Initial Reply Brief in the above-referenced case and an original and one copy of the Designation of Matter to be Included in the Record on Appeal. Also enclosed are the Proofs of Service of the Appellant's Initial Reply Brief and Designation of Matter to be Included in the Record on Appeal on the Respondents.

Sincerely,



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Enclosures

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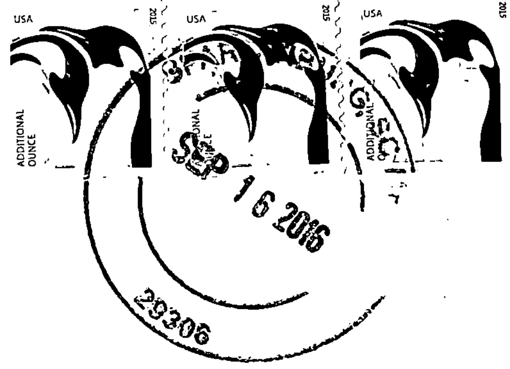

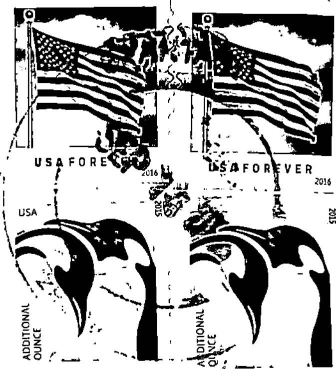

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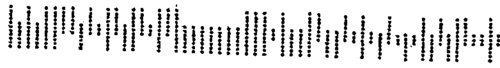

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