

THE STATE OF SOUTH CAROLINA
In The 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

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SC Court of Appeals

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.

FINAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 1

Argument2

 I. Did the Circuit Court erroneously rule that Dr. Anthony L. Mathis is personally liable to Respondent for the January 21, 2015 judgment Respondent obtained against MD Medical, LLC and Gary Day and that Dr. John Petrich should redirect contractual payments he owes Dr. Anthony L. Mathis to Respondent where the August 24, 2015 Order of Reference for Rule to Show Cause fails to properly notify Dr. Anthony L. Mathis that he may be subject to personal liability in this matter and wholly fails to notify Dr. John Petrich whatsoever..... 4

 II. Did the Circuit Court erroneously apply The Statute of Elizabeth and/or South Carolina Code of Laws Section 15-39-410 (1976) as the legal basis for Respondent’s request for relief where the Respondent failed to show by clear and convincing evidence that the contract between Dr. Anthony L. Mathis and Dr. John Petrich is fraudulent in nature 7

Conclusion 9

TABLE OF AUTHORITIES

CASES

<u>Griffin v. Capital Cash, 310 S.C. 288, 294, 423 S.E.2d 143, 147 (Ct.App.1992)</u>	4
<u>Bass v. Bass, 272 S.C. 177, 180, 249 S.E.2d 905, 906 (1978)</u>	4
<u>Turbeville v. Floyd, 288 S.C. 171, 174, 341 S.E.2d 651, 652 (Ct.App.1986)</u>	4
<u>Skinner v. Skinner, 257 S.C. 544, 549, 186 S.E.2d 523, 526 (1972)</u>	4
<u>Salvo v. Hewitt, Coleman & Assocs., 274 S.C. 34, 39, 260 S.E.2d 708, 711 (1979)</u>	5
<u>Oskin v. Johnson, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (S.C. 2012)</u>	8

STATUTES

South Carolina Code of Laws Section 27-23-10 (1997).....	7, 9
South Carolina Code of Laws Section 15-39-410 (1976).....	7, 9

STATEMENT OF ISSUES ON APPEAL

- I. Did the Circuit Court erroneously rule that Dr. Anthony L. Mathis is personally liable to Respondent for the January 21, 2015 judgment Respondent obtained against MD Medical, LLC and Gary Day and that Dr. John Petrich should redirect contractual payments he owes Dr. Anthony L. Mathis to Respondent where the August 24, 2015 Order of Reference for Rule to Show Cause fails to properly notify Dr. Anthony L. Mathis that he may be subject to personal liability in this matter and wholly fails to notify Dr. John Petrich whatsoever?

- II. Did the Circuit Court erroneously apply The Statute of Elizabeth and/or South Carolina Code of Laws Section 15-39-410 (1976) as the legal basis for Respondent's request for relief where the Respondent failed to show by clear and convincing evidence that the contract between Dr. Anthony L. Mathis and Dr. John Petrich is fraudulent in nature?

STATEMENT OF THE CASE

This matter arises from an August 24, 2015 Order of Reference for Rule to Show Cause that required Dr. Anthony L. Mathis, DPM (hereinafter "Appellant") to appear for deposition and otherwise fully, completely, and truthfully respond to discovery in accordance with the South Carolina Rules of Civil Procedure. The Order of Reference for Rule to Show Cause arose from a default judgment Respondent obtained on January 21, 2015 against MD Medical, LLC, a South Carolina limited liability company, and Gary Day, an individual, upon allegations that MD Medical, LLC and Gary Day had breached contractual obligations to Respondent. Appellant was not a party to the action in which Respondent obtained its judgment, was not served with any pleadings or orders in that matter and was not a party to the contract underlying Respondent's action against MD Medical, LLC and Gary Day.

The examination required by the August 24, 2015 Order of Reference for Rule to Show Cause was held on November 19, 2015. Appellant appeared and answered Respondent's questions regarding MD Medical, LLC and Gary Day and also produced the documents he had in his possession concerning MD Medical, LLC and Gary Day.

Appellant objected to all questions and request for production concerning his personal finances and his medical practice on the basis that those matters are not related to MD Medical, LLC nor Gary Day and, therefore, are irrelevant (R. p. 99, line 23). At the conclusion of the examination, Respondent argued for an order holding Appellant personally liable to Respondent for the January 21, 2015 judgment Respondent obtained against MD Medical, LLC and Gary Day. Appellant objected to Respondent's request on the basis that the August 24, 2015 Order of Reference for Rule to Show Cause does not properly notify Appellant that Respondent sought to hold him personally liable for the January 21, 2015 judgment and denies Appellant the opportunity to properly defend against the Respondent's request that he be held personally liable (R. p. 143, line 20).

By Order dated December 14, 2015, the Circuit Court granted Respondent's request and held Appellant personally liable for the January 21, 2015 judgment and further ordered Dr. John Petrich to redirect contractual payments he owes Appellant to Respondent. Appellant received the Circuit Court's December 14, 2015 Order on December 22, 2015. On January 4, 2016 Appellant filed a Motion requesting that the Circuit Court reconsider and amend its December 14, 2015 Order. That Motion was denied by Order of the Circuit Court dated March 30, 2016 and received by Appellant on March 30, 2016. Appellant filed his Notice of Appeal from those Orders on or about April 28, 2016.

ARGUMENT

The Circuit Court's December 14, 2015 and March 30, 2016 Orders unjustly bind Appellant to a judicial judgment for which he was never contractually or legally responsible for in his individual capacity. The record of this case clearly establishes that Appellant was not a party to the civil action in which Respondent obtained the subject

default judgment. The record is also clear and, in fact, uncontroverted that Appellant did not have any direct involvement with the contractual agreements Respondent had with MD Medical, LLC and Gary Day. Appellant is only involved in this matter before this Honorable Court because he was a member of MD Medical, LLC and because, when he learned the extent of the managing member's, Gary Day, mismanagement of the company, Appellant insisted the company be closed and dissolved so he could avoid future financial harm. Appellant did not have any actual notice of MD Medical, LLC's and Gary Day's debts to Respondent until after arrangements were made to close and dissolve MD Medical, LLC. (R. pp. 107 – 108 and 125). There is no indication and certainly no evidence that Appellant acted with any trace of fraud in connection with the dissolution of MD Medical, LLC.

The uncontroverted document and testimony evidence in the record of this case confirms that Gary Day's mismanagement of MD Medical, LLC imposed a substantial financial burden on Appellant by way of loans to the company and tax levies and also involved Mr. Day's and his wife's¹ filtering of nearly two hundred thousand dollars (\$200,000) from MD Medical, LLC above and beyond the ninety thousand dollar (\$90,000) salaries they paid themselves. (R. pp. 127, line 17 – 141, line 15). Upon the dissolution of MD Medical, LLC, Appellant reached an agreement with Gary Day whereby Appellant would receive all proceeds, if any, from the distribution of MD Medical, LLC's assets to compensate Appellant for his great financial loss and to discourage Appellant from pursuing legal action against MD Medical, LLC and Mr. and Mrs. Day. (R. pp. 113 – 114,

¹ Gary Day's wife, Deborah Hamby Day, was also a member of MD Medical, LLC. Respondent's failure to hold Ms. Day responsible for its claim against MD Medical, LLC further highlights the unjustified nature of Respondent's efforts to hold Appellant personally liable.

line 9). Mr. Day arranged an agreement with Dr. John Petrich whereby Dr. Petrich would purchase the assets of MD Medical, LLC and direct all payments for those assets to Appellant as a creditor of MD Medical, LLC. (R. p. 126). Mr. Day also secured a job working for Dr. Petrich as part of that transaction. Appellant did not arrange the transaction with Dr. Petrich. As a creditor of MD Medical, LLC, Appellant's agreement with the terms of the agreement with Dr. John Petrich were completely legal and not in any way fraudulent. Accordingly, Appellant asserts that the Circuit Court's December 14, 2015 and March 30, 2016 Orders create an improper interference with his lawful contractual agreement with Dr. Petrich.

I. THE CIRCUIT COURT ERRONEOUSLY RULED THAT DR. ANTHONY L. MATHIS IS PERSONALLY LIABLE TO RESPONDENT FOR THE JANUARY 21, 2015 JUDGMENT RESPONDENT OBTAINED AGAINST MD MEDICAL, LLC AND GARY DAY AND THAT DR. JOHN PETRICH SHOULD REDIRECT CONTRACTUAL PAYMENTS HE OWES DR. ANTHONY L. MATHIS TO RESPONDENT WHERE THE AUGUST 24, 2015 ORDER OF REFERENCE FOR RULE TO SHOW CAUSE FAILS TO PROPERLY NOTIFY DR. ANTHONY L. MATHIS THAT HE MAY BE SUBJECT TO PERSONAL LIABILITY IN THIS MATTER AND WHOLLY FAILS TO NOTIFY DR. JOHN PETRICH WHATSOEVER.

Under long-standing South Carolina jurisprudence, “[i]t is an error of law for a court to decide a case on a ground not before it.” Griffin v. Capital Cash, 310 S.C. 288, 294, 423 S.E.2d 143, 147 (Ct.App.1992) (citation omitted). “Due process requires that a litigant be placed on notice of the issues which the court is to consider.” Bass v. Bass, 272 S.C. 177, 180, 249 S.E.2d 905, 906 (1978). “One of the basic purposes of a notice of motion is to apprise the opposing party of the relief sought and the grounds therefore.” Turbeville v. Floyd, 288 S.C. 171, 174, 341 S.E.2d 651, 652 (Ct.App.1986) (quoting Skinner v. Skinner, 257 S.C. 544, 549, 186 S.E.2d 523, 526 (1972)). Thus, a court ordinarily may not grant relief beyond the scope of the notice. *Id.* A limited exception to

this rule exists when a ground not included in the notice of the motion is nevertheless fully argued before the court without objection. See Salvo v. Hewitt, Coleman & Assocs., 274 S.C. 34, 39, 260 S.E.2d 708, 711 (1979).

The August 24, 2015 Order of Reference for Rule to Show Cause only notifies Appellant that he “shall appear for the depositions and otherwise fully, completely, and truthfully respond to the discovery in accordance with the South Carolina Rules of Civil Procedure.” (R. p. 9 - 12). Appellant was not a party and Respondent never served Appellant with the Complaint nor provided any notification whatsoever to Appellant of the action and default judgment underlying the August 24, 2015 Order of Reference for Rule to Show Cause. The 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 January 21, 2015 judgment. Moreover, the August 24, 2015 Order of Reference for Rule to Show Cause completely fails to make any allegation of fraud or fraudulent conveyance. Therefore, Respondent’s request that Appellant be held personally liable was not properly before the Circuit Court and the Court’s December 14, 2015 and March 30, 2016 Orders should 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.

Importantly, 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 and, therefore, the Circuit Court's December 14, 2015 and March 30, 2016 Orders should 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.

The record of this case does not provide any jurisdictional basis for the Circuit Court's order that Dr. John Petrich redirect contractual payments he owes Appellant to Respondent. There is no evidence whatsoever in the record of this case that Respondent served Dr. John Petrich with any form of notification regarding any stage of the Circuit Court proceedings. Dr. John Petrich was not a party to the action in which Respondent obtained its judgment against MD Medical, LLC and the August 24, 2015 Order of Reference for Rule to Show Cause does not even reference Dr. Petrich. Pursuant to South Carolina law, the Circuit Court did not have jurisdiction and authority to bind Dr. John Petrich in its December 14, 2015 Order and, therefore, the Circuit Court's December 14, 2015 and March 30, 2016 Orders should be reversed.

II. THE CIRCUIT COURT ERRONEOUSLY APPLIED THE STATUTE OF ELIZABETH AND/OR SOUTH CAROLINA CODE OF LAWS SECTION 15-39-410 (1976) AS THE LEGAL BASIS FOR RESPONDENT'S REQUEST FOR RELIEF WHERE THE RESPONDENT FAILED TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT THE CONTRACT BETWEEN DR. ANTHONY L. MATHIS AND DR. JOHN PETRICH IS FRAUDULENT IN NATURE.

The Circuit Court's December 14, 2015 Order cites South Carolina Code of Laws Section 27-23-10 (1997) and South Carolina Code of Laws Section 15-39-410 (1976) as the basis for its holding that Appellant should be personally liable for the January 21, 2015 judgment Respondent holds against MD Medical, LLC and Gary Day. However, Sections 27-23-10 and 15-39-410 apply solely to property of a judgment debtor. In this matter, Appellant was not a judgment debtor and his personal assets were not subject to the Circuit Court's jurisdiction. The Circuit Court's December 14, 2015 and March 30, 2016 Orders erroneously hold that MD Medical, LLC's assets were improperly distributed and that Appellant's contractual agreement with Dr. John Petrich constitutes a fraudulent conveyance. As discussed above, the dissolution of MD Medical, LLC and contractual agreement with Dr. John Petrich were arranged in a manner to dissuade Appellant from pursuing legal action against MD Medical, LLC and Mr. and Mrs. Day. Although the record of this case reflects that MD Medical, LLC and Gary Day were indebted to Respondent at the time MD Medical, LLC was dissolved and Appellant entered into his contractual agreement with Dr. John Petrich, the record of this case and the Respondent have completely failed to establish in any way that the contract between Appellant and Dr. John Petrich is fraudulent in nature or otherwise subject to the provisions of the Statute of Elizabeth as codified and interpreted under South Carolina law. Furthermore, Appellant testified at length during the November 19, 2015 examination that the remaining financial

assets of MD Medical, LLC were exhausted through the payment of as many of the company's debts as those assets were sufficient to pay.

In this matter, Respondent asserts the position that Appellant should be held personally responsible for Respondent's judgment against MD Medical, LLC and Gary Day simply because he had some vague knowledge of the debt at the time MD Medical, LLC was dissolved. Respondent does not assert that Appellant intended to defraud MD Medical, LLC's creditors, and the Circuit Court's finding that Appellant removed MD Medical, LLC's assets without valuable consideration completely ignores the Appellant's position as creditor of MD Medical, LLC and further highlights the injustice of Respondent's failure to provide proper notice of its claims as discussed above. Respondent suggested for the first time with no prior notice that the money paid pursuant to Appellant's and Dr. John Petrich's contract actually belongs to MD Medical, LLC. South Carolina law does not allow Plaintiff to recover on such mere allegations.

South Carolina law provides that a clear and convincing evidentiary standard governs fraudulent conveyance claims brought under the Statute of Elizabeth. Oskin v. Johnson, 400 S.C. 390, 396, 735 S.E.2d 459, 463 (S.C. 2012). In this matter, the testimony of Gary Day and Appellant clearly establish that Appellant was a creditor to MD Medical, LLC by virtue of the numerous loans he made to the company and the company's admission, through Gary Day's and Appellant's uncontroverted testimony, that Appellant was entitled to repayment of the money lent. Respondent has not presented any provision of law that provides Respondent's debt has priority over Appellant's debt. To properly prevail, Respondent must provide proper notice of its claim and prove its claim by clear and convincing evidence. Respondent has not provided proper notice and has provided no

proof whatsoever that the money paid pursuant to Appellant's and Dr. John Petrich's contract actually belongs to MD Medical, LLC.

Neither MD Medical, LLC nor Gary Day are a party to the contract between Appellant and Dr. John Petrich which Respondent and the Circuit Court's December 14, 2015 and March 30, 2016 Orders seek to attack and neither MD Medical, LLC nor Gary Day has a right to demand or receive the money paid under that contract. That money does not belong to MD Medical, LLC and the circumstances underlying this matter do not establish an action of chose. Therefore, the Circuit Court did not have jurisdiction or authority over that money pursuant to Sections 27-23-10 (1997) and 15-39-410 (1976) and Appellant should not be held personally liable for Respondent's judgment against MD Medical, LLC and Gary Day nor should Dr. John Petrich be required to redirect contractual payments he owes Appellant to Respondent. The Circuit Court's December 14, 2015 and March 30, 2016 Orders should 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.

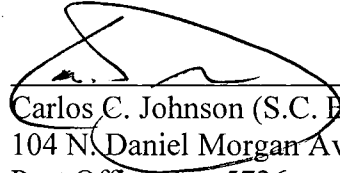
CONCLUSION

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.

[ATTORNEY'S SIGNATURE APPEARS ON FOLLOWING PAGE]

Respectfully submitted,

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October 31, 2016
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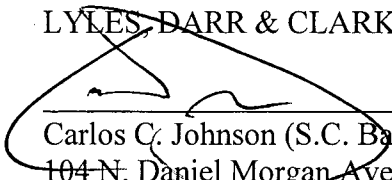
v.

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CERTIFICATE OF COUNSEL REGARDING APPELLANT'S FINAL BRIEF

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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