(6)

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Cordell Maddox, Circuit Court Judge

Common Pleas Case No. 2012-CP-37-00902
Appellate Court Case No. 2017-000294

Alexander Pastene, Appellant,

v.

Marion R. McMillan and Synergy Spine Center, P.A., Respondents.

INITIAL BRIEF

ALEXANDER PASTENE, Esq.
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TABLE OF AUTHORITIES

Estate of Weeks, 329 S.C.. 251 259, 495, S.E. 2d 454, 459, (Ct.App.1997). Abuse of discretion.

Melton v. Olenik, 664 S.E. 2d 487, 488 - 379 S.C., 45, Melton Respondent, Olenik AKA Chon Son Kim Appellant No. 4418 Ct. Appeals of SC Heard 4-16-2008, Decided 6-20, 2008.

RRR, Inc.m v. Tongas (SC App. 2008 378 SC 174, 662, SE 2d 438

South Carolina Supreme Court (2006) case # 26236, Disciplinary action vs. Kenneth Edwards, Respondent, where Respondent was suspended from his practice.

"Before invoking this severe remedy [default] the trial court must first determine that there is some element of bad faith, willfulness, or gross indifference to the rights of other litigants. The sanction imposed should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits of a case". Balloon Plantation v. Head Balloons, 303 S.C. 152, 399 S.E.2d 439 (Ct.App.1990). The sanction should be aimed at the specific misconduct of the party sanctioned. Balloon Plantation, 303 S.C. at 154, 399,S.E.2d *See* at 440.

Furthermore, "whatever sanction is imposed should serve to protect the rights of discovery provided by the Rules of Civil Procedure". Downey, 294 S.C. at 45, 362 S.E.2d at 318; Kershaw Co. Bd. of Educ. v. United States Gypsum Co., 302 S.C. 390, 396 S.E.2d 369 (1990).

The South Carolina Rules of Civil Procedure(SCRCP) are clear and comprehensive when it comes to Judgments by Default, SCRCP Rules 37, 55, 60, *et seq.*

*I*n 1997, the South Carolina Court of Appeals was explicit in deciding a case on the subject of default, *see* 327 S.C. 538 (1997) 489 S.E.2d 679 Paul KARPPI, d/b/a P/C Technology, Respondent, v. Greenville Terrazzo Co., Inc. and Ogden Teck Inc., it argued

as follows: "The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court"

Downey v. Dixon, 294 S.C. 42, 45, 362 S.E.2d 317, 318 (Ct.App.1987). A trial court's exercise of its discretionary powers with respect to sanctions imposed in discovery matters will be interfered with by the Court of Appeals only if an abuse of discretion has occurred,

Clark v. Ross, 284 S.C. 543, 328 S.E.2d 91 (Ct.App. 1985). The burden is upon the party appealing from the order to demonstrate the trial court abused its discretion,

Clark, 284 S.C. at 570, 328 S.E.2d at 107. (Ct.App. 1985). An abuse of discretion may be found where the appellant shows that the conclusion reached by the trial court was without reasonable factual support and resulted in prejudice to the rights of appellant, thereby amounting to an error of law,

Dunn v. Dunn, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (citing Darden v. Witham, 263 S.C. 183, 209 S.E.2d 42 (1974).

Rule 37 SCRCP, expressly grants the trial court power to order judgment by default for either the violation of a court order, or, upon motion for a party's failure to respond to certain discovery requests,

Rule 37(b)(2)(C) & (d), SCRCP, however, when the court orders default or dismissal, or the sanction itself results in default or dismissal, the end result is nevertheless harsh medicine that should not be administered lightly.

Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1996); Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991).

STATEMENT OF ISSUES ON APPEAL

1. Because, the Appellant timely Answered the Respondent's Counterclaim for Defamation denying every allegation and demanding strict proof: **a.** Was the Appellant in Default if he timely answered within statute and his Answer shows a Court Stamp marked "Received" ? **b.** Did Respondent offer proof, show merit, or present any evidence in support of his Counterclaim & Damages? **c.** If Respondent McMillan gave the Sun City presentation & profited from the seminar (which was prepared by the Appellant) where are the defamation and damages claimed by the Respondent? **d.** If the Appellant was not in default, *ab initio*, then, are not all subsequent orders & proceeding moot or invalid?

2. Because, the Appellant timely Answered the Counterclaim and notified the Respondent and the Court: **a.** Did the Judge err or abuse his discretion by issuing Orders of Default & Damages against the Appellant based on false affidavits and evidence? **b.** Did the Respondent and his attorney take advantage of an overburdened judge who had been ill; had been presented with stacks of 200 motions to sign; and was handling a load of 5,200 cases, and mislead him to cause him to abuse his discretion and issue an Order of Default and assess false Damages against the Appellant?

3. Because, of inadvertences, mistakes, or misunderstandings between the Oconee County, Walhalla, and the Anderson County Clerks of Court, did the Walhalla Clerk of Court mislead the Appellant when she told him that he was NOT to appear at the scheduled hearing of April 12, 2016, as had been done previously, because it was going to be continued?

4. Because, the Appellant was erroneously ruled in Default, and assessed false Defamation & Damages, wasn't he negated his right to jury trial guaranteed by the South Carolina and United States Constitutions?

STATEMENT OF THE CASE

(History)

Above all, the Appellant wishes to include a Sequence of Events captioned: "Amended Addendum to Plaintiff's Motion Relief from Judgment under 55 & 60 SCRCP dated 12-2016", that is self explanatory.

The case at bar is about an Uncollected Debt for Marketing & Implementation services provided by the Appellant to the Respondent in 2008 and later in 2014.

The Appellant chose to cut his losses and sought a speedy trial against the Respondent in Magistrate Court, Seneca, to avoid a lengthy lawsuit, but in response to the Appellant's Complaint the Respondent filed a Motion to Dismiss, which was denied the Magistrate. Out of revenge, the Respondent changed attorneys, removed the case from Magistrate to Common Pleas, and filed a Counterclaim for Defamation devoid of any evidence whatsoever, followed by a Motion in Default.

The Appellant believes that, the Respondent and his attorney filed a false Counterclaim for Defamation and Motion for Default as a means to avoid an adverse judgment at Magistrate Court that'd compel him to pay his debt. The Appellant believes that the Respondent, his attorney, and the presiding Judge abused procedure, and used false affidavits under oath to support a defamation to distract from the argument on the merits (collection of an unpaid debt) which was miserably prolonged for the last about five (5) years, (underlined for emphasis).

Incidentally, Appellant, Alexander Pastene (Pastene), was Respondent Dr. McMillan's patient, (McMillan) since about early 2008, and again in 2014, when Pastene needed a second Endoscopic Facet Rhizotomy, which procedure was used by the Respondent to treat Pastene's lower back ailment.

Upon inquiring about Pastene's business background in 2008, McMillan retained Pastene (an MBA graduate with 25 years marketing experience) to expand his practice from Seneca to the Hilton Head Island, S.C. area, where Pastene resided, however, as the first oral presentation was being set up by Pastene, McMillan discontinued the marketing & implementation agreement grounded on some cockamamie religious excuse, which may have been discriminatory, withal.

Regardless, McMillan agreed to pay Pastene what he owed him for the marketing/implementation services rendered (*see* copy of email of March 2008 enclosed herewith). At that time Pastene demanded about ninety (90) hours of marketing consulting and implementation work at a cost of $100/hour plus a % on every procedure, for a total of well over $9,000.00, but McMillan never paid Pastene. Notwithstanding, Pastene did not press for the payment of the unpaid debt fearing that McMillan would refuse him future treatment on his lower back ailment, and drop him as a patient.

As Pastene had anticipated, he required a second lower back endoscopic procedure about 2014, which he received, although on this occasion McMillan once again retained Pastene to expand his business to the Hilton Head area —in the presence of one of his nurses, a one Ashley Hodges. *See* email exchange dated

Accordingly, and once again as in 2008, Pastene effectuated Marketing & Implementation services for McMillan, but just as he had done earlier in 2008, during the scheduling of the seminar at Sun City, South Carolina, McMillan once again cut Pastene out, informed him that his wife would be taking over, that Pastene was no longer needed, *see* email exchange. Pastene accepted the Respondent's decision and this time he demanded payment of all of the marketing and implementation services rendered. Following, McMillan proceeded to insult Pastene, negated any agreement between the parties, and owing Pastene any money at all.

Anyway, McMillan made a profit from the Seminar prepared for him by Pastene at Sun City, *see* McMillan's own statements during his deposition of 4-12-2016, page 17, lines 8 through 17. Note that Respondent McMillan mislead the court by evading to mention that he had made a profit from the Sun City Seminar, prepared by Pastene, *see* Transcript of April 12, 2016, Page 6, lines 18 through 25, and page 8, lines 3, through 8, where he negated owing Pastene any money, which seems unreasonable, especially, since this time McMillan seemed to have dropped his "religious" requirements altogether, so, Pastene believed that McMillan was going to pay Pastene, although ended up deceiving Pastene once more time. *See* Pastene's Complaint before the S.C. Dept. of Labor, Licensing, & Regulation.

Despite having committed in writing to pay Pastene for marketing services rendered back in 2008, and subsequently in 2014, not only he did not pay what he owed, but proceeded to threaten him and effectuate false allegations of Medicaid fraud before the S.C. Attorney General, whereas, the SC Attorney General found no fraud, and the case was not pursued. *See* Attorney General email exchange dated March 31, 2008, and 2014, attached herewith under Exhibit 1. Transcript of April 12, 2016, Page 6, lines 18 through 25, Page 8, lines 9 through 15. Page 19, lines 12 through 22, Page 21, lines 15 through 25. Page 22, lines 1 through 22, under Exhibit 2.

ARGUMENTS

The case at bar —a debt collection— can be identified as a red herring case of manipulation of legal procedure by the Respondent and his attorney to avoid paying his debt instead of arguing the case on the merits. Moreover, McMillan and his attorney David Wilson, Counterclaimed for a Defamation without merit that was never supported by any evidence whatsoever, but was built on falsehoods and hearsay; namely, they used procedure to hide the merits of the case. *See* SC Supreme Court (2006) case # 26236, Disciplinary action vs. K. Edwards, Respondent, where Respondent was suspended from his practice.

The instant case was initiated by the Appellant in Magistrate Court in an effort to expedite the collection of an unpaid debt from the Respondent even if it meant cutting his losses, but, the recalcitrant Respondent still attempted to have the case thrown out early on at Magistrate Court by filing a Motion to Dismiss, which was denied.

Unsatisfied with the Court's denial, the Respondent shrewdly used a back-door effort, changed attorneys, removed the case from Magistrate to Common Pleas, and Countersued based on an unsupported Defamation that never existed, built as it went along, including a false case of Default against the Appellant that, too, had never existed, for, the Appellant had timely answered the Countersuit by serving the Respondent and the Court his Answer within one (1) week of the Respondents' Summons & Countersuit, wherein he denied every allegation and demanded strict proof according to statute. As

of today's date the Respondent never submitted any proof, except for a false Affidavit under oath stating that, the Appellant's Answer had been untimely filed & served.

The Respondent argued that insomuch he specifically demanded an Answer to his Greenville address, meaning that an Answer to his other address indicated in his official stationary was insufficient to comply with SCACR —there is no such rule in the SCACR. Moreover, the Respondent did not cross out his other address printed in his stationary, and he neither filed a forwarding address with the USPS nor notified the USPS that he was moving out. The Appellant believes that the Respondent may have intentionally mislead the Appellant, by inducing him to Answer to an invalid address printed on his stationary. Bottom line: the Appellant complied with SCACR by timely denying every one of the Respondent's allegations, and demanding strict proof, and by serving the court and the Respondent to the addresses listed in his stationary. Meanwhile, the Respondent never proved or showed any evidence of what he alleged in his Countersuit.

Notwithstanding, after several fruitless hearings that the Appellant was compelled to attend from Hilton Head Island to Walhalla; back and forth (about 8 hours driving time, the Court of Common Pleas' Judge erred by issuing a Judgement for Defamation, Default, and Damages against the Appellant, in a case where the clerk of court mistakenly confused the Appellant by telling him to not attend the scheduled hearing of April 12, 2016, that it would be continued as had been done before, thus denied the Appellant his day in court, and subsequent his constitutional right to a jury trial.

Moreover, Appellant wishes to include his letter to Judge Maddox dated September 2, 2015, describing the Respondent's defamation, and insults designed to discredit the Appellant.

Please note that, the Respondent and his attorney included two printed addresses in his stationary which they used to communicate with the Appellant; one address showed an Easley address (nearest town to the seat of the lawsuit: Seneca) and the other in Greenville, many miles away. The Respondent never removed or crossed out the Easley address from the stationary, and failed to advise the Easley Post Office that he would be moving out, also he left no forwarding address.

On the other hand, the Appellant complied with Statute, see Rule 5 SCACR, (b) (1), Same How Made. ...Service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.

As regards, the Appellant's non-appearance at the April 12, 2016, hearing before Judge Cordell Maddox, when Clerk of Court's made a telephone call to the Appellant, that the hearing had not been continued, as calculated earlier, that he was to attend that day, in the afternoon, it was impossible, because the Appellant was over four (4) hours away from Walhalla, on Hilton Head Island. *See* copy of Phone record from Walhalla to the Appellant on the morning of April 12, 2016. In accordance to *see* Rules 55 & 60, (a, b, *et seq*) SCACR, Appellant should be relieved from judgment due to clerical mistake, and impossibility to attend due distance, lack of time, delayed or postponed notification, which could've been effectuated the day before.

CONCLUSION

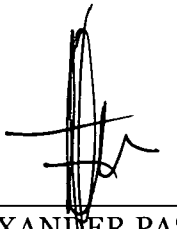
The Appellant argues that, his Answer and Service on the Respondent's Counterclaim were timely —responded within six (6) days— and according to statute; that, the Appellant was not in Default because he Answered and Served the Respondent's Counterclaim; that, the allegations in the Respondent's Counterclaim, were denied and demanded strict proof by the Appellant; that the Appellant's demand for strict proof was not addressed by the Respondent and his attorney; that, all proceedings subsequent to the Appellant's timely Answer and Service to the Court, should be moot, retroactive, and thus invalid.

Wherefore, the Appellant pleads with this Honorable Appellate Court that it reverses and remands back to Common Pleas; it finds that all proceedings subsequent to his timely Answer & Service of September 12, 2012, to Respondent's Counterclaim are found to be moot, and thus invalid; that it orders that discovery takes place; that a jury

trial be held on the merits (collection of a debt), so, that justice can be made between the parties. That the Appellant is granted his right to a trial before a jury of his peers in accordance to the South Carolina and United States Constitutions.

Respectfully Submitted,

On beautiful Hilton Head Island, South Carolina,
On this 28th day of August, 2017



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Errata:

Corrections to Initial Brief Cover, in compliance with SC Ct Appeals' letter dated Aug. 23, 2017.

Also *see* corrected typos (words "sought" p. 6, line 6, and "him" page 6, line 12.)

Document re-dated Aug. 28th, 2017, and signed by the Appellant.

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In The Court of Appeals

APPEAL FROM OCONEE COUNTY
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Cordell Maddox, Circuit Court Judge

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PROOF OF SERVICE

I certify that, I have served the Appellant's Initial Brief and Designation of Matter to be included in the ROA, dated August 20, 2017, onto Marion R. McMillan by depositing a copy of it in the United States Mail, postage prepaid, on this Aug, 20th, 2017, addressed to his attorney of record, David A. Wilson, 200 Whitsett St. Suite 100B, Greenville, SC 29601

Signed: _____

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