

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.

RECEIVED
FEB 14 2018
SC Court of Appeals

AMENDED REPLY BRIEF OF APPELLANT



ALEXANDER PASTENE, Esq.
Appellant, appearing *pro se*
Post Office Box 22298
Hilton Head Island, S.C. 29925
Tel 843-605-5266
Email: pastenehalexander@gmail.com
Date: February 12 th, 2018

David A. Wilson, Esq., For Respondent
WILSON & ENGLEBARDT, LLC
200 Whitsett Street - Suite 100-B
Greenville, SC 29601
864-232-2329

TABLE OF CONTENTS

	Page
Argument in Reply	1
I. Appellant proved without a doubt that, he had timely filed, and served the Respondent, and the Court, within statute, his Answer to the Counterclaims & Answers of the Respondent, which made all subsequent proceedings moot and Orders <i>void ab initio</i>.....	1
II. It is incumbent upon the Respondent —and his attorney as officer of the court— to be truthful before the courts.....	1
III. It is further incumbent upon the Respondent and his Attorney to submit to the court truthful Affidavits.....	2
IV. Duplicity can be interpreted as not being truthful to the court, which carries consequences	2
V. The Respondent was evasive and misleading in the way he presented (misrepresented) the facts to this Honorable Court in the case at bar	3
VI. It is unfair to attempt to succeed in a legal case by misusing procedural strategies and ignoring the merits a case, to win.....	3
VII. Was it proper to compel Appellant to appear in another court (Anderson) & county (Pickens) to pursue the (Walhalla) Oconee County case, without the record on hand? Confusion & continuances with the Clerk of Court seemed commonplace, which may Walhalla, which may have contributed to the Appellant missing the hearing of April 12, 2016.....	4
Conclusion	4
Certificate of Counsel	6
Table of Contents	i
Table of Authorities	ii

TABLE OF AUTHORITIES
Amended Arguments in Reply

Cases	Page
<u>Bateman v. Rouse, THE STATE OF SOUTH CAROLINA, In The Court of Appeals, Clotell Bateman, Respondent/Appellant, v. Helen V. Rouse, Appellant/Respondent. Appeal From Charleston County A. Victor Rawl, Circuit Court Judge, Opinion No. 3792. Heard March 11, 2004, Filed May 3, 2004. Default Case was reversed and remanded for a new trial grounded on the theory of <i>Void Ab Initio</i>.</u>	1
Nationwide v. First Citizens. THE STATE OF SOUTH CAROLINA. In The Supreme Court. J. Ernest Kinard, Jr., judge. Opinion No. 24644. Heard April 2, 1997 - Filed July 21, 1997. the issue of bad faith when the jury was prejudiced on Mortgagee's counterclaim by evidence of Hunt's fraud and deceit. Affirmed. Remanded. <i>Void Ab Initio</i>	1, 2,3

AMENDED ARGUMENTS IN REPLY

Striving to avoid making redundant arguments —most of which have been set forth in the Initial Brief— the Appellant offers the following points of clarification and rebuttal to the arguments raised by the Respondents.

I. Appellant proved without a doubt that, he had timely filed and served the Respondent and the Court, within statute, his Answer to the Counterclaims & Answers of the Respondent, which made all subsequent proceedings moot, and Orders *void ab initio*.

The record clearly shows that the Appellant answered, filed, and served the court, and the Respondent, timely, legally, on September 12th 2012, within six (6) days, from day he received the Respondent's Answer & Counterclaim dated August 30th, 2012, see PLAINTIFF'S RESPONSE TO DEFENDANTS' SUMMONS & NOTICE, ANSWER AND COUNTERCLAIM, showing stamp by Summary Court Seneca marked RECEIVED, SEP 18, 2012, wherein he denied every allegation and demanded strict proof. Respondent never submitted any proof of his allegations, whatsoever.

The Respondent and his new attorney chose a defense strategy that focused mainly on procedure based on false premises, rather than the merits of the case and thus, prolonged the case for the next almost five (5) years, avoiding paying his debt and a jury trial in Magistrate and Common Pleas courts.

The Appellant, who had filed a Complaint against the Respondent on an unpaid bill for services rendered, not only was denied payment, but delayed the case for about five (5) years, and finally retaliated with damages, including punitive, grounded on an imaginary defamation and default that the Appellant did not cause, or even existed.

In essence, the Respondent succeeded in avoiding paying his debt; knocking a Magistrate out of his jurisdiction; removing the case to another court; and degrading the Appellant at a hearing in his absence. And now, pursuant to his *modus operandi* Respondent filed a sixteen (16) page Initial Brief before this Honorable Appellate Court based on false procedural assumptions, such as: Appellant did not respond to his Answer & Counterclaim, false affidavit, did not serve him timely and properly, *et cetera*.

II. It is incumbent upon the Respondent —and his attorney as officer of the court— to be truthful before these courts.

As regards Initial Brief of Respondents dated 01-16-2018, page 1, line 14, the Respondent stated that: *Appellant failed to timely file responsive pleadings to the counterclaims. This is utterly false & untrue.* Appellant did timely file and serve timely responsive pleadings to the Respondents' counterclaims of 8/29/2012, as proven by the Seneca Summary Court stamp indicating RECEIVED on 9/18/2012). See Appellant's Answer titled: PLAINTIFF'S RESPONSE TO DEFENDANT'S SUMMONS & NOTICE,

ANSWER & COUNTERCLAIM dated 9/12/2012, which, *idem*, shows stamp dated 9/18/2012 by Seneca Summary Court. Actually, Appellant filed his responsive pleadings on 9/12/2012; specifically, six (6) days after receiving the Respondent's unsubstantiated counterclaims, wherein he denied all allegations, demanded strict proof, and opposed to the removal of the case from Magistrate to Common Pleas. This is undeniable fact.

III. It is further incumbent upon the Respondent and his Attorney to submit to the court truthful Affidavits.

On November, 13th, 2012, Attorney for the Respondent filed an "Affidavit of Default as to Defendant's [Respondent's] Counterclaims" before Court of Common Pleas, stamped RECEIVED by Oconee County Clerk of Court, on Nov. 14, 2012. See the contents of that Affidavit and verify that they are false, even if notarized, for, the Appellant as proven beyond doubt, timely Answered, was never in default, and did not Defame the Respondent. This is fact; not opinion.

IV. Duplicity can be interpreted as not being truthful to the court, which carries consequences.

The Respondent's attorney built a case based on a false address printed on his official stationery, and a typed note included in his Summons dated August 29th, 2012.

Please note that, in his Initial Brief of 01/16/2018, the Respondent avoided to mention that Appellant had timely served him to his Easley address, at 600 North A Street, SC 29640, [near Seneca] as printed in the Respondent's official stationery, please note that Respondent used the same stationery with the false Easley address printed on his stationery, from 2012 through 2013.

That, the Appellant assumed—as any ordinary citizen—that all proceedings were being handled by the Respondent at his Easley address [which is near Seneca] where the lawsuit had been initiated and taking place, and that the attorney for the Respondent's address printed on his official stationery was valid, insomuch that it had not been crossed out or marked invalid; that, all addresses listed by the Respondent are supposed to be valid, and that Respondent did not leave a forwarding address with the US Postal Service. The Appellant believes that attorney David A. Wilson for Respondent may have been remiss or disingenuous by listing a false address in his official stationery, despite having stated in the body of his Summons and Notice of August 29th, 2012, that mail was to be sent to his Greenville address.

Regardless, nowhere in the SCACR it is specified that an attorney for a Respondent is allowed to confuse opposing counsel by printing invalid addresses on his stationery, while indicating a different address in his Summons. Furthermore, as mentioned earlier, the Respondent's attorney moved out of the Seneca-Easley area and failed to leave a forwarding address with the USPS-Easley Post Office, see letter

to postal employee Pam Davis, dated 6-27-16, for, had he done so, there still would've been enough time for him to receive the forwarded mail timely, insomuch that Appellant had expeditiously filed his response to the Respondent's counterclaim within six (6) days from receipt! The Appellant made a good faith effort to file/serve timely.

V. The Respondent was evasive and misleading in the way he presented (misrepresented) the facts to this Honorable Court in the case at bar.

On Initial Brief of Respondent, page 1, line 10 *et seq.*, he stated that: *Appellant argued that Respondents did not file and serve the Answer and Counterclaim timely. The Magistrate denied the Appellant's motion & transferred the case to circuit court because the counterclaims exceeded the jurisdictional limit of the magistrate court (R. __, 09/18/12 Order: Notice of Transfer of Case to Court of Common Pleas).* Here, the Respondent contradicts himself by stating that it was the Magistrate who removed the case to Common Pleas of his own volition, however, it was him who intentionally removed the case to Common Pleas by use of unsupported counterclaims of defamation and default, increased the dollar amount to exceed the court limit, and compelled the Magistrate to lose jurisdiction. He actually enjoined Magistrate Simmons: "*please transfer this matter to Circuit Court*", *see Respondent's attorney Wilson's letter to Magistrate Simmons, dated 08/30/2012, second paragraph.*

Apropos the Magistrate's denial of the Appellant's Motion to Dismiss the Respondent's Counterclaim based on having filed and served out of time, the denial specifically took place based on conflicting rules between SC Code §23-310, S.C.R.C.P. 12(b)(6), Rule 2, Magistrate Rules, S.C.R.C.P. 12(a)(2), Rule 12, S.C. Code §22-3-10, and S.C. Code §22-3-30, wherein Magistrate Court ruled that the entire matter be transferred to the docket of the Court of Common Pleas of Oconee County. *See Magistrate's Order of 9/18/2012.*

Notwithstanding, going back in time to a related question, where the Respondent cut the Appellant out of their deal; denied him payment after many months of planning, marketing counseling & implementation, and replaced him with his wife, please note that during the hearing of 04/12/2016, he shrewdly avoided discussing the Sun City Seminar set up by the Appellant, where he made a profit, and the Appellant posed no obstruction, the Respondent focused entirely on Tide Point, which was a seminar in the works; a project in gestation to take place in the future; although there was no final agreement.

Please note that due to misunderstanding with the Clerk of Court the Appellant did not attend the hearing of 04/12/16, where Respondent and the Court made false and derogatory statements against the Appellant, **who had never failed to appear before** (bolded for emphasis) and was promised a trial. *See Transcript of April 12, 2016, Page 23, line 18 (Appellant never failed to appear); page 22, lines 13 thru 22; Page 21, lines 15 thru 25; p.22 lines 1 thru 12; p.6, lines 15 thru 25. And, see Transcript of 09/16/15, p.17 line 4-6.*

VI. It is unfair to attempt to succeed in a legal case by misusing procedural strategies and ignoring the merits of a case, to win.

As stated earlier, in the name of expediency & economy of justice—a concern expressed by the South Carolina Supreme Court—the Appellant decided to cut his losses, and filed a Complaint against the Respondent in Magistrate Court, Seneca, to collect a small portion of what was owed him, and settle for the maximum amount Magistrate court would allow of \$7,500. Therein, Respondent answered by filing a Motion to Dismiss, which was denied, and the case was continued to decide on the “meeting of the minds” before a jury, that never happened. See Magistrate Summons Court Order dated 08/16/12.

Upon learning about the Magistrate’s decision to hold a jury trial, and anticipating a loss on the merits before a jury, the Respondent *idem* fired his original attorney, hired a new one, removed the case from Summary Court to Common Pleas grounded on a false Defamation, increased the monetary amount to meet Common Pleas requirements, and then filed an unsupported motion for Default. Appellant denied all allegations, and demanded strict proof, which were ignored as of today’s date.

VII. Was it proper for the Clerk of Court to compel Appellant to appear in another court (Anderson) & County (Pickens) to pursue the (Walhalla) Oconee County case, without the record on hand? Confusion & continuances with the Clerk of Court seemed commonplace, which may have contributed to the Appellant missing the hearing of April 12, 2016.

Does the Appellant need to list the number of continuances, postponements, and misunderstandings that he experienced with the Walhalla Clerk of Court’s Office, within a period of five (5) years, to secure a simple case of collection of a debt; which caused him to miss the hearing on 04/12/16, and get unfairly trampled in his absence, while seeking impartial justice?

CONCLUSION

Based on the foregoing, in addition to the arguments made in the Initial Brief of the Appellant, he respectfully submits that, the Respondent does not have, and never had, a supported Counterclaim or valid Motions to Dismiss and Default, who submitted a false Notarized Affidavit; and conducted a deposition at the Hearing of April 12, 2016, in the Appellant’s absence, full of false accusations and inaccuracies.

The Appellant respectfully pleads and appeals to the good sense of this Honorable Court, to recognize that:

- a. The subsequent proceedings and Orders issued after the Appellant’s timely Answer dated 09/12/12 (clocked 09/18/2012), and copy of the envelope stamped by the USPS, showing timely service to the Respondent to his Easley address, are moot, and thus, should be reversed, vacated, and the case

remanded to Common Pleas for a jury trial on the merits to take place preferably at another venue than Walhalla or Anderson, South Carolina, so, that justice can be done between the parties.


b. The Respondent's Counterclaims; Motion of Default; Motion to Dismiss; and false Affidavit, have not been supported by any evidence whatsoever, except hearsay; while the Respondent failed to pay his debt, viciously insulted the Appellant, and filed a complaint before SC Attorney General based on a false Medicaid fraud, see Respondent's email to Appellant, dated Thursday, May 31st, 2012.

c. The Appellant did answer timely by filing & serving both the court and the Respondent, his answer to the counterclaims, within statute, as shown by Summary Court's stamp marked RECEIVED 09/18/12, on the Appellant's Answers, and copy of the envelope mailed to Respondent to: Attorney David L. Wilson, 600 N. A Street, Easley, SC, 29640, marked "Returned to Sender. Unable to Forward"

d. Insomuch that the instant case had been plagued by continuances, repeated hearings (at least four hearings) and promises of jury trials to come, in addition to the judge having been taken ill, and burdened with untold number of cases and motions to sign, see Transcript of 09/16/15, p.17 lines 5.

Why did the presiding judge not continue the case on 04/12/16, to give the non-local Appellant the chance to defend his positions, since he had been diligent, and cooperative since day one?

Respectfully submitted,



ALEXANDER PASTENE
Appellant, appearing *pro se*
Post Office Box 22298
Hilton Head Island, S.C. 29925
Tel 843-605-5266
Email: alexanderpastene@yahoo.com
Date: February 12th, 2018

Other Counsel of Record:
David A. Wilson, Esq.
WILSON & ENGLEBARDT, LLC
200 Whitsett Street-Suite 100-B
Greenville, S.C., 29601
Tel. 864 232-2329
Email: dwilson@GreenvilleSClaw.com

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Trial Court Case No. 2012CP3700902 - Cordell Maddox, Circuit Court Judge

Case No. 2017-000294

Alexander Pastene

Appellant,

v.


Marion R. McMillan and
Synergy Spine Center, PA

Respondents.

RECEIVED
FEB 14 2018
SC Court of Appeals

CERTIFICATE OF COUNSEL
PROOF OF SERVICE

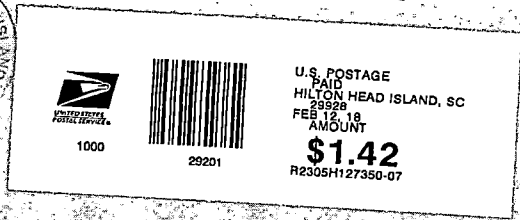
I certify that on today's date February 12th, 2018, I have served Appellant's copy of his Amended Reply Brief of the Appellant, on Marion R. McMillan by depositing a copy of it in the United States Mail, postage prepaid, addressed to his attorney of record, David A. Wilson, 200 Whitsett St., Suite 100B, Greenville, SC 29601.

Signed: 

Alexander Pastene, Esq.
Appellant Appearing *pro se*
P.O. Bix 22298
Hilton Head Is., SC 29925
843-605-5266

David A. Wilson, Esq.
For Respondent
WILSON & ENGLEBARDT, LLC
200 Whitsett Street - Suite 100-B
Greenville, SC 29601
864-232-2329

Pastene
PO BOX 22298
Hilton Head Is.
SC 29925



To: The South Carolina Court of Appeals
1220 Senate St.
Columbia, S.C. 29201

A.H. Court Administration

RECEIVED
FEB 14 2018
SC Court of Appeals

