No Respondent's Brief Filed

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
The Court of Common Pleas
D. Garrison Hill, Circuit Court Judge

Case No: 2009-CP-23-10754

Brad Marett.....Respondent

vs.

Dallah Forrest and Summersett Golf, Inc.....Appellants

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

The present Appeal is before this Honorable Court after two (2) Appeals from the Magistrate's Court to the 13th Judicial Circuit, both of which were based upon the fact that $7,500.00 damages were awarded by the juries, though these damages were never proven. After the first Appeal to the Magistrate's Court, the Honorable Charles B. Simmons, Jr. issued an Order dated September 10, 2007 in which the Court found, "***while great deference is certainly given to the fine Trial Judge in this matter, the Court is simply unable to locate any evidence in the record sufficient to allow the jury to determine a basis for an award of $7,500.00...in light of the above, the Court is compelled to reverse and remand the matter for a full trial on the merits" (emphasis added.)***

The case was then re-tried before Magistrate Stokes as a jury trial on December 10, 2009, in which the jury, once again without basis, awarded the Respondent $7,500.00 in damages. After being noticed of the jury's verdict, the Appellant timely filed a Notice of Civil Appeal to the Circuit Court for the 13th Judicial Circuit on December 21, 2009. The Magistrate never prepared the transcript, pursuant to Rule 18 and only did a Return the day before Appeal Hearing before Judge Hill, by E-mail on April 12, 2011. The Notice of Appeal was filed on December 21, 2009 and the Magistrate's Return was not timely filed and was received **years** after its due

date. To Appellant's knowledge, no request for extension was ever made by and/or granted to the Magistrate. The Magistrate was contacted numerous times in regard to the Return but never filed same until Appellant's counsel brought same to the attention of the Chief Administrative Judge, which only occurred at the end of the day at 4:24 p.m. by E-Mail, the day prior to the Appeal Hearing in Circuit Court.

The Appeal Hearing was had before Judge Hill on April 13, 2011 and Judge Hill upheld the jury's verdict, though damages were not proven. On May 16, 2011, more than a month after the Appeal was heard, the Court's law clerk sent an e-mail to Respondent's counsel asking that the proposed Final Order from Judge Hill's ruling be submitted to the Judge. On May 25, 2011, Appellant's Counsel wrote to Respondent's counsel also inquiring as to the status of the Order. On March 1, 2012, Judge Hill's new law clerk, wrote Respondent's counsel in regard to the outstanding Order, once again, reminding Respondent's counsel that the previous law Clerk had written, almost a year before, as to the Order. On March 5, 2012, Appellant's Counsel, after receiving the proposed Order, wrote Respondent's Counsel that the Order was in accordance with the Court's ruling but that Appellant's Counsel objected to same as to such an untimely order being submitted to the Court. Said Order was signed by Judge Hill on March 15, 2012, clocked in on March 16, 2012 and was received by Appellant on March 20, 2012.

Appellant then filed a Motion to Reconsider with the Court on March 30, 2012. The Court denied the Motion to Reconsider by Form 4 Order dated April 9, 2012, clocked in on April 12, 2012 and received by Appellant's Counsel on April 13, 2012. The present Notice of Appeal was then timely filed.

STATEMENT OF THE FACTS

The Appellant owns Summersett Golf Course. The Appellant sold to Respondent a house on Summersett Golf Course, for a reduced price, since the parties had known each other for decades (R.p.97, Lines 18-25; p.98, Lines 1-10, 22-25). For the only time in the history of the Golf Course, Appellant agreed to a membership on the course but the membership had nothing to do with the sales price of Respondent's Condo (R. p. 99 Lines 1-16; p. 121 Lines 15-25). Down the road, Respondent became quite a problem and actually threatened to kill Appellant (R. p. 101 Lines 17-25). As a result, on the advice of a policeman, who was a member at the golf course, Appellant was given two (2) options by Law Enforcement. Appellant could either bring charges against Respondent or send him a No Trespass Notice (Tr. p. 102 Lines 3-6). Appellant chose the least injurious to Respondent, choosing to send him a No Trespass Notice because Appellant was in fear of his life (R. p. 102 lines 9-22).

The argument, which is the basis for the underlying suit, ensued due to Respondent wanting Appellant to make repairs after the warranty expiration and after the time that Appellant was obligated to make such repairs. The Respondent confronted Appellant over the repairs and demanded they be made. Appellant refused to do any further repairs since the warranty had expired and further due to the fact that there was not anything wrong with Respondent's air

conditioning unit (R. p. 71 Lines 1-16). The Respondent just wanted his air conditioning unit replaced, without justification, because another condo owner, who actually had a problem, had their unit replaced. (R. p. 51, Lines 16-25, R. p. 77, Lines 23-25.) The Respondent then threatened to sue Appellant if he did not make the repairs. When the Appellant still refused to make the repairs because any duties to make the repairs had long expired, the Respondent then threatened to kill Appellant (R. p. 101 Lines 1-25). The golf course had a code of conduct in place, which all players at the golf course had to abide by in order to play golf. Respondent's conduct violated the code of conduct rules (R. p. 102 Lines 23-25; p. 103 Lines 1-9). Due to the Respondent's own conduct in threatening to kill Appellant, he was no longer able to play golf. The Respondent admitted that it was not okay to threaten people (R. p. 82 Lines 1-15) and therefore any alleged damages Respondent suffered were due to his own misconduct and Respondent should be barred from recovery, not to mention that Respondent can never prove he has suffered from any damages.

ARGUMENT I

THE TRIAL COURT ERRED BY UPHOLDING THE MAGISTRATE COURT'S JURY VERDICT.

The Trial Court did not consider all the evidence presented and the Jury Verdict should have been revised and/or set aside. The Jury Verdict of $7,500.00 was based on the Jury solely giving the highest amount allowed in a Magistrate's Court. There was no evidence presented that could have allowed the Jury to arrive at the $7,500.00 figure.

Interestingly enough, the Magistrate, in his Return, stated that "This Court admits it was surprised by the verdict and will admit that if this had been a bench trial, this Court would not have ruled as the jury" (R.p. 81 Magistrate's Return, Paragraph 3) The Magistrate stated, "I'll be honest with you, Mr. Bennett, though, until you (referring to Respondent's Counsel) argued it....I hadn't picked up on getting at it that way myself, and I try a bunch of cases...and you know, it's that hard for the jury to pull that number out...until you argued it, I was, in my head, I said he ain't put up any damages...I mean, I didn't pick up on doing it that way, and I'm not sure the jury would, either...I didn't catch it" (R. p.88, Lines 10-24.) The Magistrate stated that no testimony was presented as to damages and that the Respondent's counsel had just said there was damages. Damages cannot be proven by Respondent's counsel attesting to same. Respondent could not present any evidence and/or testimony as to his damages and his counsel had to just thrown the number in himself. In actuality, at Trial, the Magistrate found that any damages possible to be $1008.00. The only damages, if any, that could be possible were based upon the fact that Respondent testified he played golf three (3) times per month at $7.00 per round for a total of $252.00 per year. There was four (4) years left on the membership, which would make Respondent's damages, if any, of a total of $1,008.00. This is represented by the $252.00 per year multiplied by the four years left on the membership.

Though the Magistrate felt this way (R.p. 143 Lines 12-20) he allowed the verdict of $7500.00 denying Motions of Appellant's attorney throughout and clearly should have granted Appellants Motion for a Judgment N.O.V. In *Whisenant v. James Island Corp.*, 281 S.E. 2nd 794, 277 S.C. (1981) it was stated there must be evidence to "enable the Court or Jury to determine the amount thereof with reasonable certainty or accuracy." There was nothing to show that $7500.00 was a reasonable amount of certainty.

This was the same basis that Judge Charles Simmons by Order dated September 10, 2007 revised the prior award of $7500.00 and remanded for a new Trial to determine the actual damages, if any, with certainty.

ARGUMENT II

THE TRIAL COURT ERRED BY ALLOWING A SEVERELY DELINQUENT ORDER TO BE THE ORDER OF THE COURT

The Court clearly erred by allowing this delinquent Order to be entered. This argument was made on Appellant's Motion to Reconsider dated March 30, 2012 and denied by Order of the Court dated April 9, 2012, clocked in April 10, 2012 and received by Appellant on April 13, 2012.

This matter was before the Court on April 13, 2012. On May 16, 2012, more than a month after the Appeal was heard, the Court's Law Clerk at the time, sent an e-mail to Respondent's Attorney. On May 25, 2011, Appellant's Attorney also wrote Mr. Bennett to no avail. On March 1, 2012 (Eleven (11) months after the Hearing), the New Law Clerk for Judge Hill inquired of Mr. Bennett again, reminding him of the prior Law Clerk's letter. The undersigned noted his objection to the untimeliness of the Order and the submission of the Order a year later. The Court obviously denied the Motion to Reconsider without considering the untimeliness of the filing of the Order by Respondent's Attorney. The Court dismissed this untimeliness, as well as, other applicable rules and time limits.

ARGUMENT III

THE TRIAL COURT ERRED BY NOT CONSIDERING APPELLANT'S MOTION TO RECONSIDER AS TO THE VIOLATION OF RULE 18 AS TO APPEALS FROM MAGISTRATE COURT

The Magistrate's Return was clearly untimely. The Notice of Appeal was timely filed on December 21, 2009. Pursuant to Rule 18, the Magistrate's Return was not received by

Appellant's lawyer until 4:24 p.m. by e-mail on the afternoon before the Hearing was to be held the next morning at 9:00 a.m. This was filed the same time with the Clerk's Office. This was done three (3) years after the Notice of Appeal on December 2, 2009.

According to Rule 18, the Magistrate's Return was due "within thirty (30) days of the date of filing of the Notice of Appeal with the Clerk of the Circuit Court for the Court wherein the Judgment was rendered together with the record, a statement of all proceedings in the case and if necessary, the testimony taken at trial." The Magistrate, as well as the Non Jury Coordinator for Greenville County Court of Common Pleas, were contacted several times to no avail, only when the undersigned contacted the Chief Administrative Judge for the Court of Common Pleas was it scheduled. The Magistrate never prepared the transcript pursuant to Rule 18, never asked for an extension for good cause shown and only did a return at the 11th hour.

The Return was received at 4:24 p.m. the afternoon before the morning of the 9:00 a.m. Hearing. The Appellant then had no chance to Reply. Due to the fact that the Magistrate failed to comply with Rule 18 and the Court failed to enforce Rule 18, the Return was not timely, therefore, the Judgment should have been reversed. Since the Appellant did not receive it until 4:24 p.m. there was not time to argue at the Hearing on April 13, 2011. The Return was due in January 2010 so it was 1 ½ Years late and 2 ½ years from the date of the Notice of Appeal. This was totally ineffectually handled and the Appellant was prejudiced as a result of same. Instead, the Court entertained Respondent's argument, without evidence and foundation for same, that Appellant "was just waiting for Respondent to die and was drawing the matter out," which was not the case. The Respondent sued Appellant and therefore had the burden of proving his damages. The case can be simply explained, in that damages must be proven and that just did not happen in this case.

ARGUMENT IV

THE TRIAL COURT AND THE CLERK OF COURT ERRED BY NOT FOLLOWING RULE 75 OF THE SOUTH CAROLINA RULES OF CIVIL PROCEDURE.

Upon receipt of the Magistrate's Return, the Clerk of the Circuit Court to which the Appeal was taken shall give notice in writing to the parties that the Return had been filed (Rule 75). Once again, this was not done and the untimeliness did not allow the Clerk of Court to notify the parities of the Magistrate's Return. Neither the Trial Court nor the Appellant or Respondent knew that it had been filed. There was no way it could have been brought up as an issue since the Clerk of Court did not notify anyone and did not have the opportunity due to the untimeliness of the Magistrate's Return.

ARGUMENT V

THE TRIAL COURT FAILED TO CONSIDER THAT THE PERSONAL ATTACKS BY RESPONDENT'S ATTORNEY ON APPELLANT LED TO THE VERDICT THAT WAS NOT BASED ON EVIDENCE.

The attacks by Respondent's Counsel and Respondent against Appellant, Mr. Forrest stirred up passion as to rich versus poor, leading to a verdict not based at all on facts. There must be some certainty and there was not. The allegations of Respondent's Counsel of denying this poor old dying man, which was allowed by the Magistrate, impassioned the Jury leading to the unsubstantiated and unproven verdict. This case could have been tried anywhere else in Greenville County leading to a fair verdict. The trial was not fair or just and should have been reversed by Judge Hill, just as it was by Judge Simmons before, by Order dated September 10, 2007. Nothing changed in the 2nd trial from the 1st Trial except for some illogical arguments from Respondent's attorney, not in any testimony or evidence. Furthermore, the Respondent continued the "poor old dying man" argument at the Circuit Appeal Hearing. However, Respondent never proved his damages and the Jury's verdict should have been reversed.

CONCLUSION

The Appellant respectfully requests that this Honorable Court reverse the Jury's verdict. The Respondent is not entitled to any damages due to his own misconduct in threatening to kill Appellant. The Respondent never presented any evidence and/or testimony of his damages and Respondent's Counsel had to "through a number" without basis to the Jury with a misleading argument to obtain the flawed verdict.

Respectfully Submitted,

Greenville, South Carolina
November 26, 2012

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CERTIFICATE OF COUNSEL

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

November 27, 2012

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