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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.

FINAL BRIEF

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Date: Wednesday, March 28th, 2018

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Estate Weeks, 329 S.C. 251, 259, 495, SE2d 454, 459 (Ct.App.1997). Abuse of discretion.

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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.

Balloon Plantation v. Head Balloons, 303 S.C. 152, 399 S.E.2d 439 (Ct.App.1990). "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, 303 S.C. at 154, 399,S.E.2d *See* at 440. The sanction should be aimed at the specific misconduct of the party sanctioned.

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)."Whatever sanction is imposed should serve to protect the rights of discovery provided by the Rules of Civil Procedure".

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

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., In 1997, the South Carolina Court of Appeals was explicit in deciding a case on the subject of default, it argued as follows:

"The imposition of sanctions is generally entrusted to the sound discretion of the Circuit Court" except if abuse of discretion exists.

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).

Bateman v. Rouse, THE STATE OF SOUTH CAROLINA, In The Court of Appeals, 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 *Void Ab Initio*, last two paragraphs. R. p.33.

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 & deceit. Affirmed. Remanded. *Void Ab Initio*. R. p.33.

STATEMENT OF ISSUES ON APPEAL

1. Because, the Appellant timely Answered the Respondent's Counterclaim for Defamation denying every allegation and demanding strict proof:

- Was the Appellant in Default if he timely answered within statute, and his Answer shows the Magistrate Court Stamp marked "Received 09/18/2012"? R. pp. 30-31.
- Did the Respondent offer proof, show merit, or present any evidence in support of his Counterclaim for Default & Damages?
- If the Respondent gave the Sun City presentation & profited from the seminar —which was set up and prepared by the Appellant— based on what facts did the respondents claim defamation and default?
- If the Appellant was not in default from the start because he Answered & Served the court and Respondent on time, then are not all subsequent orders & proceeding moot and invalid? R. p. 33, last two paragraphs. Theory of *Void Ab Initio*.

2. Because, the Appellant timely Answered the Counterclaim and notified the Respondent and the Court:

- Did the Judge err or abuse his discretion by issuing Orders of Default & Damages against the Appellant based on false affidavits and no evidence whatsoever?
- 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, to mislead him to cause him to abuse his discretion and issue an Order of Default and assess false Damages against the Appellant? R. p. 94, lines 5-9. R. p. 95, lines 7-8, 12-13.

3. Because, of inadvertences, mistakes, or misunderstandings between the Oconee County, Walhalla, and the Anderson County's, Clerks of Court, and the Appellant, did the Walhalla Clerk of Court mislead the Appellant when she contacted him by telephone, stating that he was NOT to appear at the scheduled hearing of April 12, 2016, as the Clerk of Court's Office had done previously, seemingly because it was going to be continued again? *see* the several times that the instant case had been continued, taken into advise, etc., over a period of over four (4) years...

4. Because, the Appellant was erroneously ruled to be in Default, and assessed false Defamation, Damages, and Punitive, 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. R. pp. 59-72.

The case at bar is about an Uncollected Debt for Marketing & Implementation services provided by the Appellant to the Respondent in 2008 and later again in 2014. Insomuch that defendant did not pay his debt the Appellant chose to avoid a lengthy trial, cut his losses, and thus sought a speedy trial against the Respondent in Magistrate Court, Seneca, R. pp. 18-22, and p. 23. In response to the Appellant's Complaint before Magistrate the Respondent filed Motions to Dismiss, which were denied by Magistrate, so, to avoid paying his debt he changed attorneys, removed the case from Magistrate to Common Pleas, & filed a Counterclaim for Defamation without evidence. R. pp. 24-29, & R. p. 61 numbers 9-11. Subsequently, he filed a false motion/affidavit for default R p. 34.

The Respondent and his attorney's Counterclaim for Defamation was unsupported and false, and their newfangled Motion for Default was another means to avoid paying his debt. The Respondent, his attorney, and the presiding Judge abused discretion, procedure, and used false affidavits under oath to support a false defamation to distract from the argument on the merits (collection of an unpaid debt) which simple collection was miserably prolonged for the last about five (5) years. The conclusion reached by the trial court was without reasonable factual support & resulted in prejudice to the rights of the appellant, thereby amounting to an error of law. R. p. 108 lines 12-21.

Appellant, Alexander Pastene (Pastene), was Respondent Dr. McMillan's patient, (McMillan) since about early 2008, and again in 2014, when Pastene needed a second lower back 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 resides, however, as the Seminar's first oral presentation was being set up by Pastene in 2008, McMillan discontinued the marketing & implementation agreement grounded on some

cockamamie religious excuse, which may have been discriminatory in the first place. *See Respondent's putdowns in Appellant's absence* R. p.117, lines 19-25. R. p.132, lines 1-22.

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

As Pastene had anticipated, he required a second lower back endoscopic procedure on or 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.

Accordingly, once again, as done in 2008, Pastene effectuated Marketing & Implementation services for McMillan, and just as in 2008, although this time during the scheduling of the seminar at Sun City, South Carolina, McMillan again cut Pastene out, informed him that his wife would be taking over, and that Pastene was no longer needed, *see* email exchange. Pastene accepted the Respondent's decision but 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 or owing Pastene any money at all. *See* contradictory email exchange, email of 03/28/12, & Sun City Seminar contract# 045099, postponed until 05/25/12.

In fact, Defendant McMillan made a profit from the Seminar set up by Pastene at Sun City, *see* McMillan's own statements during his deposition of 4-12-2016, R. p. 127, lines 8-25. Note that Respondent McMillan shrewdly 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, R. p. 118, lines 3-8, wherein he essentially negated owing Pastene any money, which seems unreasonable, especially, since McMillan seemed to have dropped his "religious requirements" altogether. Pastene believed that McMillan

was going to pay Pastene, although, *idem*, he 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 & implementation 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 (the SC Attorney General found no fraud, and the case was not pursued). *See* Attorney General email exchanges dated March 31, 2008, and 2014, attached herewith under Exhibit 1. Transcript of April 12, 2016, R. p. 126, lines 18-25, there was no cancellation because Tide Pointe had never been contracted or finalized; it had only been a project in motion. Respondent's testimony on R. p. 118, lines 9-15, is false, as well as all of his false statements and accusations made on 04-12-16, in the Appellant's absence. *See* Transcript of 4-12-2016.

Appellant wishes to bring up his "RESPONSE TO NOTICE OF TRANSFER OF CASE TO COURT OF COMMON PLEAS" dated 10/29/2012, under ¶#5, before the lower court, not included in his DOA or ROA, showing Respondent was notified of Appellant's objections to his Counterclaim, to his address at 600 North A Street, Easley, SC 29640.

ARGUMENTS

The case at bar —originally 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 and arguing the case on the merits. Moreover, McMillan and his attorney David Wilson, Counterclaimed for a Defamation that never existed, and was never supported by any evidence whatsoever; only built on falsehoods and hearsay. The Defendant used procedure to avoid arguing the case on the merits. *See* SC Supreme Court (2006) case # 26236, Disciplinary action vs. K. Edwards, Respondent, where Respondent was suspended from his practice. R. p. 32, 4th quoted case down.

As stated earlier, 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 Respondent misused procedure and the truth to have the case thrown out early on at Magistrate Court by filing a Motions to Dismiss that were denied by Chief Magistrate Simmons at Summary Court.

Unsatisfied with Magistrates' 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 the case as it went along, including claiming a 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 the Appellant denied every allegation and demanded strict proof according to statute. As of today's date the Respondents did not submit any proof, except a false Affidavit by the Respondent's attorney, under oath, falsely stating that, the Appellant did not answer, respond or other. R. p. 34, R. p.108, lines 18-21.

The Respondent's attorney argued that he specifically demanded the Answer to be made to his "Greenville" address, although, unwittingly the Appellant Answered to his "Easley" address as printed in his official stationary, and Common Pleas Court R. p. 30-31, and thus complied with statute.

Moreover, the Respondent's attorney stated that he moved, but neither crossed out his Easley address as printed in his stationary nor filed a forwarding address with the USPS-Easley, nor notified the USPS that he was moving out. R. p.102 lines 12-23.

The Appellant believes that despite the Respondent's attorney written note about Answering to his Greenville address, he may have intentionally mislead the Appellant by inducing him to Answer to an invalid address (Easley) printed on his stationary.

Bottom line: the Appellant complied with statute by timely Answering, denying the Respondent's allegations, and demanding strict proof; by serving the court and the Respondent to his address listed in his stationary in Easley. R. pp. 75-89, Transcript of 07/29/13. Parenthetically, Respondent stated that he was not notified by Summary Court. R. p. 76 lines 19-23.

Meanwhile, the Respondent's attorney never crossed out the Easley address from his stationary, did not leave a forwarding address, or advised the USPS he was moving out. He never proved or showed any evidence of anything 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 back and forth— the Court of Common Pleas erred by issuing a judgement for Defamation, Default, Damages, and Punitive, in the Appellant's absence. Note that, the Clerk of Court had confused the Appellant by telling him to not attend to the scheduled hearing of April 12, 2016, which he unintentionally missed, that it would be continued as had been done before.

Moreover, Appellant wishes to include his letter to Judge Maddox dated 09/02/15, describing the Respondent's claim for defamation. R. pp. 44-45, & Appellant's Sworn Affidavits R. pp. 35-38, and R. pp. 39-58.

Again, it should be noted that, Respondent's attorney printed two addresses in his stationary to communicate with the Appellant; that, one address showed an Easley address (nearest Seneca: the Respondent's address) and a Greenville address, many miles away. The Respondent's attorney never removed or crossed out the Easley address from his stationary, and failed to advise the Easley Post Office that he would be moving out, or sought to leave a forwarding address at Easley; his error; not the Appellant's. The Appellant complied with Statute, *see* Rule 5 SCACR, (b) (1) Service by mail is complete

upon mailing of all pleadings and papers subsequent to service of the original summons and complaint. It was in the Appellant's interest to not be found to be in default.

As regards, the Appellant's non-appearance at the April 12, 2016, hearing before Judge Cordell Maddox, IT WAS A MISTAKE, OK? At the last minute the Walhalla's Clerk of Court's Office made a telephone call to the Appellant stating that the hearing had not been continued, and that he was to attend that day, in the afternoon, which 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, *see* Rules 55 & 60, (a, b, *et seq*) SCACR. Appellant should be relieved from judgment due to clerical mistake, and impossibility to attend due to distance, lack of time, and delay or postponement of notification, which could've been effectuated the day before.

CONCLUSION

Not only the Appellant timely filed his Answer and Served the Court and the Respondent —he responded within six (6) days from the day of the Respondent's Answer and Counterclaim— according to statute, but the Appellant denied their allegations and demanded strict proof, while the Respondents never proved any of their allegations. The Appellant respectfully pleads with this Honorable Appellate Court that all proceedings, including judgments for Defamation, Default, Damages, and Punitive, subsequent to the Appellant's timely Answer and Service to the Court, and Defendant be considered moot, retroactive, vacated, and remanded.

The Plaintiff knows of no law, statute, or jurisprudence that states or implies that, a Plaintiff is in default if:

- He timely Answered and Served a Defendant's Answer & Counterclaim, by filing them with the proper Clerk of Court, and serving copies addressed to one of the two addresses printed in the Defendant's attorney official stationery;
- Neither one of the two addresses printed in the Defendant's attorney official stationery was crossed out or marked invalid; R. p. 158, lines 15-22, p. 159 lines 9-12
- The Defendant's attorney moved out from one of the two addresses printed in his official Stationery without leaving forwarding address or notifying the USPS that he was moving out, making it impossible for the Plaintiff to know he was not reachable.
- An address typed in the Defendant's Counterclaim superseded any or all of the Defendant's attorney addresses printed in his official stationery.

Wherefore, the Appellant pleads with this Honorable Appellate Court that it reverses and remands to Common Pleas; finds that all proceedings subsequent to his timely Answer & Service of September 12, 2012, to Respondent's Counterclaim are found to be moot, and invalid; that it orders discovery to take place; and a jury trial to be held on the merits (collection of a debt), so, that justice can be done 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 Hilton Head Island, South Carolina,
On this 30th day of March, 2018

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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

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Case No. 2017-000294

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CERTIFICATION

I certify that on today's date March 29th, 2018, I have served the instant Certification onto Respondent Marion R. McMillan, stating that material not presented to the lower court was added to the Final Brief, 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: _____

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