

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

S.C. SUPREME COURT

The Honorable Alex Kinlaw, Circuit Court Judge

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Appellate Case No. 2019-002040

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David Rosen.....Appellant,

v.

Josephine Middleton.....Respondent.

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**PETITION FOR WRIT OF CERTIORARI**

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## **CERTIFICATE OF COUNSEL**

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on April 30, 2020.

### **QUESTIONS PRESENTED**

- I. Whether the Circuit Court erred in ruling that the respondent was abandoned by her attorney when she fired her attorney and failed to obtain new counsel.

### **STATEMENT OF THE CASE**

The petitioner and the respondent were involved in a romantic relationship and lived with one another at 407 Tanner Chase Way, Mauldin, South Carolina 29607. On or about September 18, 2017, the respondent ended her relationship with the petitioner and instructed him to move out of the house. The petitioner complied with the respondent's request and began to move his possessions out of the house. The respondent prevented the petitioner from removing all of his possessions, including his car. The petitioner attempted to retrieve his possessions numerous times, but the respondent continued to prevent him from doing so.

On October 18, 2017, the respondent filed an Application for Ejectment, stating that the petitioner had moved out of her residence but had left items on the property. The petitioner continued to try to retrieve his possessions, even speaking with the police on October 20 and October 24. The respondent continued to deny the petitioner access to his property. On October 25, 2017, counsel for the respondent notified the petitioner that the respondent would allow the petitioner to retrieve his property in exchange for a payment of \$10,000.

On November 3, 2017, the petitioner, proceeding *pro se*, filed an action against the respondent in the Magistrate's Court. On December 13, 2017, the magistrate court informed both

parties, who were present with counsel, that the petitioner's complaint would be transferred to the Court of Common Pleas after the petitioner filed an amended complaint, which he did on December 15, 2017. Service of the amended complaint was made on January 12, 2018, on Michael Gambrell, the attorney of record for the respondent. Defense counsel did not file any responsive pleading. After the case was transferred, the petitioner served the amended complaint with the updated civil action number upon Gambrell on September 11, 2018. The petitioner also served discovery requests, including Requests for Admission, with the September 11, 2018, service of the amended complaint.

On November 23, 2018, the petitioner moved for default judgment or, in the alternative, summary judgment. On December 18, 2018, the Court heard the petitioner's motion and granted summary judgment in favor of the petitioner. The petitioner properly notified defense counsel of this hearing, but neither the respondent nor her counsel appeared. The Court scheduled a damages hearing for January 14, 2019. That hearing was rescheduled for January 17, 2019 and then for February 7, 2019. The petitioner provided notice to defense counsel of all three of those scheduled hearings. On February 7, 2019, defense counsel requested a continuance for the hearing. The Court rescheduled the hearing for March 4, 2019. Neither the respondent nor her counsel appeared. On March 5, the Court issued a Form 4 order awarding the petitioner \$61,233.00 in actual damages. The Court issued a formal order memorializing that award on March 25, 2019.

On September 16, 2019, the respondent filed a *pro se* motion to quash. In that motion, the respondent stated, "Michael Gambrell was not my attorney, I have not spoken to Michael Gambrell since Dec 13, 2017, he came to court at Alex Pattera request. (Alex Pattera was my attorney at that time) I have emails to Michael Gambrell from March 12, 2018 telling him I did not want him to represent me since he never contacted me. I have had no representation on the above claim [...]". On September 24, 2019, current counsel for the respondent filed a motion for substitution of

counsel and, on October 2, a motion for relief from judgment. On March 5, 2019, the court granted both of those motions.

The petitioner filed a notice of appeal on December 9, 2019. On January 14, 2020 the respondent filed a motion to dismiss appeal for lack of jurisdiction. The Court of Appeals granted that motion on March 19, 2020. This petition for certiorari follows.

## ARGUMENT

### **I. The respondent cannot claim attorney abandonment when she fired her attorney and failed to obtain new counsel.**

In the memorandum in support of her motion for relief from judgment and at the hearing on that motion, the respondent argued that she is entitled to relief because she was abandoned by her counsel. In doing so, she relied almost entirely upon one case, *Maples v. Thomas*, 132 S.Ct. 912 (2012). The *Maples* petitioner was a capital prisoner sentenced to death in Alabama for the murder of two individuals. On direct appeal, both the Alabama Court of Criminal Appeals and the Alabama Supreme Court denied Maples' appeals and affirmed his convictions and sentence. He then initiated postconviction proceedings with new counsel. Counsel for Maples filed a petition for postconviction relief, which was denied without a hearing. Notice of this ruling was mailed to Maples' attorneys of record. Because the attorneys had left their firm, the notices were returned to sender. The clerk of court, despite knowing that counsel had not received notice of the denied motion, made no further attempts to contact or locate counsel. The Alabama Assistant Attorney General later notified Maples that he had missed the deadline for appealing that denial.

In granting relief to the petitioner, the *Maples* Court stated, “[a]bandoned by counsel, Maples was left unrepresented at a critical time for his state postconviction petition, and he lacked a clue of any need to protect himself *pro se*. In these circumstances, no just system would lay the

default at Maples' death-cell door." *Maples* at 917. The Court held that, "under agency principles, a client cannot be charged with the acts or omissions of an attorney who has abandoned him. Nor can a client be faulted for failing to act on his own behalf when he lacks reason to believe his attorneys of record, in fact, are not representing him." *Maples* at 924.

The facts of *Maples* are not at all analogous to those of the present case. In this case, the respondent initiated the proceedings between the parties by filing a *pro se* application for ejectment. The respondent then attempted to extort the petitioner, informing him that she would only return his personal property if she paid him ten thousand dollars. After several attempts to retrieve his possessions, the petitioner filed a *pro se* complaint which, by the respondent's own admission, was properly served on the respondent. The petitioner and the respondent both attended a hearing in person, during which the court informed the parties that the matter was not concluded and that the case would be transferred from magistrate court to the Court of Common Pleas. The respondent then fired her counsel and failed to retain new counsel for eighteen months, during which time the Court awarded summary judgment and damages to the petitioner.<sup>1</sup>

The respondent initiated these proceedings out of spite and attempted to extort the petitioner. When these attempts failed, she fired her attorney and failed to obtain new counsel. Not only was the respondent aware that she was unrepresented, but she knew that she needed to protect herself *pro se*. She now claims attorney abandonment, which directly contradicts statements and representations that she made in her *pro se* motion to quash. The respondent cannot come to this Court with unclean hands and falsely claim attorney abandonment when, by her own admission,

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<sup>1</sup> The petitioner notes that the lower Court's ruling and his inability to gain redress from the Court of Appeals violates his constitutional rights, including his right to Due Process and the Equal Protection clause of the United States Constitution.

she fired her attorney. That she failed to retain new counsel for eighteen-months does not entitle her to relief from judgment.

**II. Even if relief from a judgment were proper, a damages hearing, and not a re-set to before the grant of summary judgment, would be the proper remedy.**

As an initial matter, the respondent went into default when she failed to timely respond to the petitioner's complaint, and she is still in default. Also, relief from the judgment does not relieve the respondent from the grant of summary judgment. Said differently, if the Court denies the petitioner's motion to reconsider, summary judgment has still been entered against her and she is still in default. She would only be entitled to another damages hearing, not a reversal of the grant of summary judgment. The respondent has never filed any motion to withdraw deemed admissions as required by Rule 36, SCRPC, and those deemed admissions entitle the petitioner to summary judgment to this day.

**CONCLUSION**

For the reasons stated, the petitioner asks the Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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