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May 06 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
J.C. Nicholson, Jr., Circuit Court Judge
Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2021-000038

Unpublished Opinion No. 2020-UP-255 (S.C. Ct. App. filed Dec. 23, 2020)

Assistive Technology Medical Equipment Services, LLCRespondent,

v.

Hood & Selander, CPAS, LLC; Donna C. Cash,
as Personal Representative of the Estate of Dorothy
A. Connelly; W.E. Applegate, III, as Personal
Representative of the Estate of James B. Connelly;
Kimberly Cuce; and Phillip DeClemente, Defendants,

Of whom Phillip DeClemente is the Petitioner.

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Attorney for Respondent

ARGUMENT

In its Return, Respondents raise three (3) “counter-questions” in an attempt to distract from the errors of fact and law underlying the lower courts’ decisions in this matter. Without abandoning the questions, issues, and arguments presented in the Petition for Writ of Certiorari, Petitioner addresses each of Respondents’ “counter-questions” in turn, pursuant to Rule 242(g), SCACR.

I. *Whether the Court of Appeals erred in affirming the Circuit Court’s finding that the Petitioner failed to show good cause for relief from default.*

The Court of Appeals committed error in affirming the Circuit Court’s finding that Petitioner failed to show good cause for relief from default entry.

The standard of review for default entry under SCRCP 55 is abuse of discretion. Abuse of discretion occurs when the order was controlled by some error of law or by factual conclusions which lack evidentiary support. *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 606-07, 681 S.E.2d 885, 888 (2009) Petitioner has set forth two grounds establishing that the trial court’s denial of relief from default entry was controlled by errors of law.

First, *Sundown* requires the circuit court to consider reasons why “vacation of default entry would serve the interests of justice” in determining whether a party has set forth a “satisfactory explanation for the default.” *Sundown*, 383 S.C. at 609, 681 S.E.2d at 887. The circuit court failed to address the interests of justice in its Rule 55(c) analysis, and the appellate court did the same in holding the denial of relief from default entry was not an abuse of discretion. (*See, Petition for Writ of Certiorari*, Section I(A), pp. 7-11); (*see also, Petition for Rehearing*, Section II, pp. 11-14). The quoted language, *supra*, was for the first time explicitly included as part of Rule 55(c) analysis in *Sundown*, and the required analysis does not appear to have again been addressed by this Court.

Second, *Sundown* requires the trial court to view SCRCP 60(b) elements under the mere good cause standard when a defendant seeks relief from default entry, and requires that the trial court accept proof of any single Rule 60(b) factor as sufficient to establish good cause. *Sundown*, 383 S.C. at 608, 681 S.E.2d at 889. Petitioner has established multiple Rule 60(b) factors; however, they were either ignored altogether or improperly examined under a heightened “particularized showing” standard. (*See, Petition for Writ of Certiorari*, Section I(B), pp. 11-13); (*see also, Petition for Rehearing*, Section I, pp. 4-11).

The lower courts’ denials of relief from default entry conflict with the Rule 55(c) analysis required by *Sundown*. Conflict with this Court’s precedent is a stated ground for certiorari under SCACR 242(b)(3). The language cited from *Sundown* in this Petition, and its impact on Rule 55(c) analysis, also present novel questions of law – another stated ground for certiorari under SCACR 242(b)(1).

II. *Whether the Court of Appeals erred in finding the record supports the Damages Awarded [by] the Circuit Court.*

The Court of Appeals committed error in finding the record supports the damages awarded by the Circuit Court.

The parties to this action are also parties to a binding Full and Final Release Agreement, which was executed in 2009. The damages satisfaction clause of the Release requires that Respondents “release, acquit, and forever discharge Phillip L. DeClemente ... from any and all damages, cost, loss of services, expenses and compensation whatsoever which ... now has or which may hereinafter accrue.” (R. p. 122) (emphasis added). This contractual provision governs satisfaction of costs and damages imposed against Petitioner which are in any way related to the parties’ business relationship. (*Id.*)

The trial court failed to consider the Release's damages satisfaction clause during the damages proceedings, and instead incorrectly assumed the provision dealt with the issue of liability. (See, *Petition for Rehearing*, Section III(a), pp. 14-16 (discussing the circuit court's mischaracterization of the damages satisfaction provision). The trial court made this same uninformed assumption when ruling on Petitioner's post-judgment motions. (R. p. 31-34). These decisions were controlled by errors of law and factual conclusions unsupported by evidence. (See, *Petition for Writ of Certiorari*, Sections IV and V, pp. 17-21 (discussing the circuit court's error when ruling on Petitioner's post-judgment motions)).

It is clear that the circuit court's rulings were clouded by Petitioner's default status and resulting liability. However, this should not distract the trial court from its duty to enforce the terms of a binding contract on the issue of damages satisfaction

This Court's decision in *C.A.N. Enterprises, Inc. v. S.C. Health & Human Servs. Fin. Comm'n*, 296 S.C. 373, 373 S.E.2d 584 (1988) is somewhat instructive on the important contract law principles applicable in this case. In *C.A.N.*, this Court determined that the State was unable to recover \$24,080.00 in funds improperly claimed by Oakmont Nursing Centers due to the State's failure to conduct an audit in a timely manner and in accord with the parties' contract. In making this decision, this Court stated, "[a]lthough we acknowledge that Oakmont will receive a windfall, we reluctantly decline to interpret the contract as the State urges. To do so would strain well established principles of contract law." *Id.* 377, 373 S.E.2d at 586. Similarly, Petitioner's default status should not have distracted the circuit court from enforcing the terms the parties' Full and Final Release agreement, which is contractually dispositive of the damages satisfaction issue.

The record does not support the damages awarded by the circuit court because the record does not include consideration of the damages satisfaction clause of the parties' Release contract. The lower courts' holdings in this case ignore foundational principles of contract law, constituting special and important reasons for discretionary review.

III. *Whether the Court of Appeals erred in affirming the decision of the Circuit Court to [deny] Petitioner's motion [for] a continuance and allowing Respondents' Expert Witness Art Bradham to testify.*

The Court of Appeals committed error by affirming the circuit court's decision to deny Petitioner's continuance motion and by allowing Art Bradham to testify as an expert on Respondents' behalf.

First, the circuit court's denial of Petitioner's motion for a continuance conflicts with this Court's decision in *Howard v. Holiday Inns, Inc.*, 271 S.C. 238, 246 S.E.2d 880 (1978). Under *Howard*, defaulting defendants have the right to participate in damages hearing through cross-examination and objection to Plaintiff's evidence." 271 S.C. at 241, 246 S.E.2d at 882. Petitioner was denied the right to participate in cross-examination of Respondents' damages hearing witnesses. The appellate court erred in affirming the circuit court's denial of Petitioner's motion for a continuance to allow his attendance at the damages hearing, and its decision threatens the only right held by defaulting defendants in future cases. Here again, conflict with this Court's precedent is a stated ground for certiorari under SCACR 242(b)(3).

Second, the circuit court's decision to allow Art Bradham to testify as an expert constituted abuse of discretion. The admission of Art Bradham's "expert" testimony was manifestly unfair and unreasonable. Mr. Bradham's testimony was fraught with conflicts of interest, breaches of legal fiduciary duties, and ethical violations in his own profession. (*See, Petition for Writ of Certiorari*, Section III, pp. 15-17); and (*Brief of Appellant*, Section C, pp. 29-

32). The prejudice Petitioner suffers as a result of the court’s abuse of discretion is clear – the circuit court’s damages Order awarded the *exact amount* of money to which Bradham testified. (*Id.*) The Court of Appeals’ failure to reverse the damages judgment based on the circuit court’s abuse of discretion warrants this Court’s discretionary review.

Finally, these issues are also responsive to Respondents’ previous “counter-question:” *whether the Court of Appeals erred in finding the record supports the Damages Awarded [by] the Circuit Court.* The record demonstrates that: (1) Petitioner was deprived of his right to participate in his damages hearing when critical testimony was presented; and (2) the circuit court’s damages judgment was based entirely on improper expert testimony. The Court of Appeals committed error in finding the record supports the damages awarded by the circuit court.

CONCLUSION

Respondents’ Return is unpersuasive, and the Petition presents special and important reasons which warrant discretionary review. Based on the foregoing reasons, and those stated in the Petition, this Court should grant the Petition for Certiorari and permit further briefing of the issues presented.

May 6, 2021
Charleston, South Carolina

Respectfully Submitted,

s/ Cameron L. Marshall

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Attorney for Petitioner

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Kimberly Cuce; and Phillip DeClemente, Defendants,

Of whom Phillip DeClemente is the Petitioner.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below he served counsel for Respondents, James E. Smith, Jr. with a copy of Petitioner’s *REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI* by emailing the same to the following AIS email address:

James E. Smith, Jr.
james@jamesmithpa.com
Counsel for Respondents

The undersigned also certifies that, on the date indicated below, a copy of Petitioner’s *REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI* has been sent to the South Carolina Court of Appeals via email using that court’s email address, ctappfilings@sccourts.org.

[SIGNATURE AND DATE ON FOLLOWING PAGE]

May 6, 2021
Charleston, South Carolina

s/ Cameron L. Marshall
Cameron L. Marshall



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VIA EMAIL ONLY

Honorable Daniel E. Shearouse, Clerk
South Carolina Supreme Court
By Email to: suptfilings@sccourts.org

RE: Appellate Case No. 2021-000038
Assistive Technology Medical Equipment Services, LLC
v.
Phillip DeClemente.

Dear Mr. Shearouse:

Please find attached Mr. DeClemente's *Reply to Return to Petition for Writ of Certiorari* in reference to the matter above, along with proof of email service of this document on opposing counsel.

A copy of this letter, Mr. DeClemente's Reply, and proof of service has also been emailed to the Court of Appeals.

Respectfully,

/s/Cameron L. Marshall
Cameron L. Marshall

Enclosures as stated

cc via email: Hon. Jenny Abbott Kitchings, Clerk of Court, S.C. Court of Appeals
cc via email: James E. Smith, Jr., Esquire