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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Michael G. Nettles, Circuit Court Judge

Appellate Case No. 2019-001488
Civil Action Case No. 2018-CP-40-06344

MB Hutson/MB Hudson, ... Appellant,

v.

Penn America Insurance Company,
Global Indemnity Group, Inc.,
Timothy J. Newton, Esq., J.R. Murphy, Esq.,
John Doe #1, John Doe #2, ... Respondents.

RESPONDENTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS

Pursuant to Rule 260(a) of the South Carolina Appellate Court Rules and all other applicable authority, Respondents Penn America Insurance Company and Global Indemnity Group, Inc. ("PAIC"), Timothy J. Newton ("Newton") and J.R. Murphy ("Murphy") (collectively "Respondents"), jointly file this Reply Memorandum in support of their Motion for an Order dismissing this appeal. In support thereof, Respondents state as follows:

I. This appeal should be dismissed for lack of subject matter jurisdiction.

Appellant M.B. Hutson's Response filed June 21, 2021 demonstrates that the relief he requests is not within the power of the civil courts to render. Hutson claims against Respondents are based upon violation of ethical rules. Hutson's core allegation against Respondents, which

he repeats continually, is that they had an obligation to report to a court fraud committed by a third party, TLC Holdings, LLC, and its principals. (Hutson Resp., p. 2.)

A. Civil courts lack jurisdiction to rule on alleged ethics violations.

A court lacking subject matter jurisdiction has no authority to act. Dove v. Gold Kist, Inc., 314 S.C. 235, 238, 442 S.E.2d 598, 600 (1994). Subject matter jurisdiction over a proceeding is fundamental—it cannot be waived, and it may be challenged at any time, even on appeal. Tatnall v. Gardner, 350 S.C. 135, 137, 564 S.E.2d 377, 378 (Ct. App. 2002). Courts are even required to raise the issue *sua sponte* if necessary to ensure the orderly administration of justice. Id.

The trial court's ruling in favor of Respondents was based entirely upon civil defenses. The court ruled, among other things, that Hutson failed to establish a duty of care, that he failed to demonstrate a breach of any duty and proximate cause, and that his claim was barred by a release. (See Order attached to Notice of Appeal filed Sept. 4, 2019). The trial court supported its ruling by finding that Hutson failed to obtain an expert to support a claim for professional liability (Id. at 17.) and that he failed to establish that Newton knew TLC committed fraud. (Id. at 23.) The trial court ruled that the ethics rules Hutson raised are inapplicable. (Id. at 17-18.) PAIC also raised numerous civil defenses. (See Order filed Sept. 25, 2019 supplementing Notice of Appeal.) The trial court had jurisdiction to rule that Hutson could not establish civil liability.

However, Hutson has not challenged Respondents' civil defenses on appeal. In brief after court filing, Hutson seeks reversal solely on the theory that Respondents have an ethical duty to report fraud allegedly committed by TLC. Civil courts lack subject matter jurisdiction to adjudicate this question.

South Carolina circuit courts are vested with original jurisdiction in civil and criminal cases, except those cases in which exclusive jurisdiction has been given to another body. Rainey v. Haley, 404 S.C. 320, 323, 745 S.E.2d 81, 83 (2013). S.C. Const. art. V, § 11. In Rainey, the Supreme Court held that circuit courts lacked subject matter jurisdiction to hear a civil suit against a former member of the House of Representatives for violating a House Ethics rule. Id. at 322-23, 745 S.E.2d at 82. The court held that "ethics investigations concerning members and staff of the Legislature are intended to be solely within the Legislature's purview, to the exclusion of the courts . . . ." Id. at 327, 745 S.E.2d at 84-85. The court based its holding upon the fact that a comprehensive statutory scheme regulates the behavior of elected officials. Id. at 323-25, 745 S.E.2d at 83.

Like legislators, the behavior of attorneys is subject to a comprehensive statutory scheme. The State Constitution grants the Supreme Court authority to regulate the practice of law. S.C. Const. at. V, § 4. The Legislature has recognized the inherent power of the Supreme Court to discipline attorneys. S.C. Code Ann. § 40-5-10. By statute, the Supreme Court is empowered to promulgate ethical rules. S.C. Code Ann. § 40-5-20. The Supreme Court also has statutory authority to investigate lawyer misconduct. S.C. Code Ann. § 40-5-30.

In Rainey, the court held that a civil lawsuit was barred even though the statutory scheme did not confer exclusive jurisdiction on the State Ethics Commission. See 404 S.C. at 329, 745 S.E.2d at 86 (Beatty, J., dissenting). The lack of authority of circuit courts to adjudicate complaints of lawyer misconduct presents an even clearer case because the Supreme Court's jurisdiction is exclusive. Numerous cases hold that the authority to discipline attorneys rests entirely with the Supreme Court. In re Collie, 410 S.C. 556, 567, 765 S.E.2d 835, 840 (2014); In re Gibbs, 349 S.C. 261, 280, 562 S.E.2d 639, 648-49 (2002); 1 S.C. Jur. Attorney and Client § 6

(May 2021 Update). The Supreme Court has delegated to the Commission on Lawyer Conduct jurisdiction over all allegations that a lawyer has committed misconduct. In re Berger, 408 S.C. 313, 322, 759 S.E.2d 716, 720 (2014).

Violation of ethical rules invokes the Supreme Court's disciplinary process. Rule 407, Scope [6], SCACR. However, ethical rules do not serve as the basis for civil liability. "Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." Id. at Scope [7]. "The Rules . . . are not designed to be a basis for civil liability." Id.

This rule regarding the inapplicability of ethics complaints to civil liability applies with particular force when the allegations concern opposing attorneys. The Rules of Professional Responsibility recognize that most ethical duties flow from a lawyer-client relationship. Rule 407, Scope [4], SCACR. "[T]he purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." Id. at Scope [7]. The Rules do not confer standing to an antagonist in a collateral proceeding to seek their enforcement. Id.

By his own admission, Hutson seeks to weaponize the ethical rules governing lawyers for his own self-serving purposes in litigation against a third party. This courts of civil jurisdiction cannot do. It is expressly prohibited by the Rules themselves. Rule 407, Scope [4], SCACR.

Therefore, the Commission has sole jurisdiction to adjudicate Hutson's allegations of ethics violations. This Court lacks authority to decide whether or not Respondents violated the Rules of Professional Conduct.

Hutson advised that he has filed complaints against Respondents with the Commission on Lawyer Conduct. (See Resp'ts Reply Mem. filed Jan. 25, 2021, Exh. 7.) If this Court rules upon

the question of whether an ethical violation occurred, it could prejudice the proceedings before the Commission. Rulings in both proceedings could reach inconsistent results.

By the Constitution, Statute, the inherent authority of the Supreme Court, and the Rules promulgated by the Court, exclusive jurisdiction to decide questions of ethics violations has been referred to the Commission. To the extent Hutson's claims are based upon alleged violations of the ethical rules, his claims must be dismissed for lack of subject matter jurisdiction.

B. Hutson cannot rely solely upon his allegations to establish jurisdiction.

Furthermore, Hutson may not invoke the subject matter jurisdiction of the courts by misrepresenting facts and mischaracterizing his claims as civil matters. The Court of Appeals has authority to review the entire record and decide the jurisdictional facts in accord with the preponderance of the evidence. Swicegood v. Thompson, 431 S.C. 130, 137, 847 S.E.2d 104, 108 (Ct. App. 2020). Affidavits and other evidence outside the pleadings may be considered. Id.; Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 74 (1999).

Evidence outside the pleadings may be considered whether or not the facts are disputed. Ramming v. U.S., 281 F.3d 158, 161 (5th Cir. 2001); Williamson v. Tucker, 645 F.2d 404, 412-13 (5th Cir. 1981), cert. denied, 454 U.S. 897 (1981). Because subject matter jurisdiction involves the authority of a court to hear a case, courts are not bound by a plaintiff's allegations when jurisdictional facts are contested. Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3rd Cir. 1977) (citing Wetmore v. Rymer, 169 U.S. 115 (1898)). Courts have authority to weigh the evidence to satisfy themselves as to the existence of subject matter jurisdiction. Id. No presumptive truthfulness attaches to the plaintiff's allegations. Id. The plaintiff has the burden of establishing subject matter jurisdiction. Id.; Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982).

Hutson has prolonged this litigation by misrepresenting facts that are easily falsifiable by reference to the public record. A review of the operative facts establishes that the relief Hutson seeks in this appeal is an impermissible advisory opinion relating to subject matter—alleged ethics violations—over which this Court has no jurisdiction. The key facts are as follows:

- Hutson cannot seek recovery against TLC because his claims are barred by a release. Long before Respondents were even aware of this litigation, Hutson was adjudicated to have breached a settlement agreement with TLC, triggering a conditional release. See Reed v. Big Water Resort, LLC, No. 2:14-1583-DCN-MGB, 2016 WL 7435620 at *8-*16 (D.S.C. Apr. 5, 2016), report and recommendation adopted, 2016 WL 2935891 (D.S.C. May 20, 2016). Justice George C. James, Jr. made this ruling before being elevated to the Supreme Court. This unappealed Order is a final judgment. [1]

- Hutson suffered no damages as to TLC's claims against him because he was fully defended and indemnified by Respondent PAIC against TLC's claims against him. (Order attached to Notice of Appeal, p. 10.) [2]

- Respondents Murphy and Newton have never represented Hutson in any matter. Nor are they are employed by PAIC. They are with a Columbia-area firm that PAIC retained to represent it in a declaratory judgment contesting PAIC's coverage for Hutson. Penn-America Ins. Co. v. Big Water Resort, LLC, et al., No. 2:16-cv-01943-DCN (D.S.C. filed June 4, 2016). [3] Murphy and Newton represented a party adverse to Hutson in the declaratory judgment action. Hutson sued the lawyers who represented him with respect to his settlement with TLC and the proceeding before Justice James in separate actions. M B Hutson v. A. Paul Weissenstein, Appellate Case No. 2019-000873 (S.C. Ct. App. Filed May 22, 2019); HB Hutson/MB Hudson vs. Stephen "Chip" Burn, *et al.*, Civ. Action No. 2018-CP-32-03879 (Lex. County Comm. Pl. filed Nov. 8, 2010). [4]

- Hutson has repeatedly claimed that the theory upon which he seeks relief in this case is extrinsic fraud upon the court. Fraud upon the court is a mechanism for mounting a collateral attack on a prior judgment. See Chewning v. Ford Motor Co., 354 S.C. 72, 579 S.E.2d 605 (2003). Hutson claims Respondents knew about fraud committed by

[1] Justice James' Order has been designated for the Record on Appeal. Hutson has not yet filed a copy of the Record on Appeal that complies with this Court's rules and orders. That issue is the subject of a separate motion. Nevertheless, the content of the Record has been established. (Order filed May 5, 2021.) A copy of Justice James' Order has been filed in the February 22, 2021 draft Record at pp. 456-67.)

[2] Draft ROA pp. 516-17, 529-30.

[3] Draft ROA pp. 198-216.

[4] Draft ROA pp. 532-57.

TLC—a non-party to this action—and failed to report it. [5] Thus, the target of Hutson's collateral attack is Justice James' Order in a separate proceeding. Such a claim would require offensive—not defensive—litigation seeking affirmative relief.

- It is undisputed that when Respondents learned of *allegations* that could support a collateral attack on Justice James' Order based upon extrinsic fraud, Respondents communicated those concerns to Hutson. In Newton's August 13, 2018 e-mail, [6] which Hutson has repeatedly filed and quoted in this appeal, Respondents communicated to Hutson that they do not represent him; they provided Hutson with certain facts that might support a collateral attack; and they encouraged Hutson to retain counsel should he choose to pursue that relief.

- Hutson has never filed an action to set aside Justice James' Order. There is no statute of limitations for filing such a claim. Chewning, 354 S.C. at 80, 579 S.E.2d at 609-10. Hutson retains the right to file it regardless of the outcome of this case.

- Hutson's ethics-violations claim is barred by statute because he has not provided an expert affidavit to support it. (Order filed with Notice of Appeal, p. 17.) Additionally, Hutson executed a release in favor of all Respondents in exchange for his dismissal from PAIC's declaratory judgment action. (Id. at pp. 23-24.) [7]

The above facts are either undisputed or readily verifiable as matters of record in prior actions. Based upon the above, this Court has subject matter jurisdiction to affirm. However, this Court is without subject matter jurisdiction to reverse. The relief Hutson seeks would require this Court to opine as to matters that are not before it.

C. Hutson's requested relief seeks an impermissible advisory opinion.

Nothing this Court does will affect Hutson's claims against TLC, who Hutson alleges defrauded him. No pending "tribunal" exists at this time to which Respondents could report suspected fraud upon the court because no such action has been filed. Until such action is filed,

[5] Respondents have repeatedly shown that Laura Paton's so-called investigative report containing 77 counts of fraud was in fact a pleading—a counterclaim—signed only by Hutson in his *pro se* capacity. These allegations were reported to the court and ruled upon. The court ruled adversely to Hutson based upon *res judicata*, finding the issue had already been litigated and decided by Justice James. Draft ROA, pp. 97-121, 469-93, 397-408.

[6] Draft ROA, pp. 123-25; see also Hutson final br. filed Sept. 21, 2020, p. 20.

[7] Draft ROA, pp. 495-99.

Hutson's claim that Respondents owe a duty to report suspected fraud is not yet ripe. Colleton Cty. Taxpayers Ass'n v. Sch. Dist. of Colleton Cty., 371 S.C. 224, 242–43, 638 S.E.2d 685, 694-95 (2006) (holding that an issue that is contingent, hypothetical, or abstract is not ripe for judicial review). Hutson retains the right to file such an action regardless of the outcome of this case.

The question of whether Respondents have a duty to report suspected fraud is a matter over which this Court has no jurisdiction. The Commission on Lawyer Conduct has sole and exclusive jurisdiction over alleged ethics violations. In re Berger, 408 S.C. 313, 322, 759 S.E.2d 716, 720 (2014).

Hutson can claim no damages against Respondents that are unrelated to his collateral claims against TLC. It is undisputed that PAIC defended Hutson in both underlying actions and that PAIC settled both cases at no cost to Hutson. (Order filed with Notice of Appeal, p. 10.) PAIC even paid the sanctions award that Hutson incurred due to his misconduct as a *pro se* litigant. (Id.) PAIC's declaratory judgment action has been fully settled and dismissed. (Id. at p. 11.)

The damages Hutson claims were incurred in his 2010 Land Deal and associated litigation with TLC, which were adjudicated in separate litigation. This Court is without authority to overturn an unappealed final judgment.

Courts lack subject matter jurisdiction to render purely advisory opinions. City of Columbia v. Sanders, 231 S.C. 61, 68, 97 S.E.2d 210, 213 (1957). As the Supreme Court vividly explained, parties may not seek opinions to "put on ice to be used if and when occasion might arise" or to "fish in judicial ponds for legal advice." Id. This is precisely what Hutson seeks to accomplish in this appeal. The ruling Hutson seeks from this court could serve no purpose other

than to (a) poison the well in the disciplinary proceeding, and (b) provide evidence to support Hutson's collateral attack against TLC in a separate, yet-to-be-filed, proceeding.

Courts lack subject matter jurisdiction to render advisory opinions that can only affect matters in other proceedings. Charleston County Sch. Dist. v. S.C. State Dairy Comm'n, 274 S.C. 250, 252, 262 S.E.2d 901, 902-03 (1980). Charleston County is instructive because it was decided in a posture similar to this case.

In Charleston County, the school district entered into a contract with Coburg Dairy, Inc. for milk products. Id. at 251, 262 S.E.2d at 902. Anticipating that the State Dairy Commission, on advice from the Attorney General, would charge them with entering into an illegal contract, the school district and Coburg filed a declaratory judgment action. Id. The contract was fulfilled. Id. The trial court in the declaratory judgment action ruled that the contract was valid, and the Dairy Commission did not appeal. Id. at 252, 262 S.E.2d at 902. However, the Attorney General appealed the order. Id.

The Supreme Court rejected the Attorney General's appeal. The court recognized that regardless of its ruling, the result would be the same. Charleston County, 274 S.C. at 252, 262 S.E.2d at 902. The court opined as follows:

> We are not at all sure that the Attorney General of this State is a proper party-litigant under the facts. At most, this court could advise him whether the School District and Coburg were guilty of misconduct for which penalties and/or prosecution might be pursued. This we refuse to do. Our ruling could be, at most, only an advisory opinion.

Id. at 252, 262 S.E.2d at 902.

Charleston County is controlling. Hutson's claims against TLC have been adjudicated to a final judgment. Any fraud TLC may have committed, and any duty on the part of Respondents to report that fraud, could only be the subject of an action to set aside that judgment. In this

action, like in Charleston County, Hutson is merely seeking an advisory opinion that Respondents committed misconduct.

"What doesn't make a difference, doesn't matter." McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987). Even if Respondents committed ethical violations (which Respondents strenuously deny), Hutson is not permitted to capitalize upon them. This Court has no authority to opine as to whether Respondents committed ethical violations.

This Court has subject matter jurisdiction to affirm. However, it lacks subject matter jurisdiction to reverse. This Court cannot remand to the trial court for proceedings over which it has no subject matter jurisdiction. Therefore, Hutson's appeal should be dismissed.

II. Hutson's failed to comply with applicable rules and orders.

Hutson filed a proof of service and certificate of counsel for his Final Brief. However, his Final Reply Briefs remain non-compliant. Hutson's arguments in opposition concern a ruling in a different proceeding.

Respondents agree with Hutson that no further filings are necessary. (See Hutson Resp. filed June 21, 2021, p. 5, ¶ 3.) If this Court finds it has jurisdiction, Respondents request that the Court proceed solely upon Respondents' final brief filed September 21, 2020.

III. Dismissal is appropriate based upon misconduct.

In yet another court filing, Hutson failed to make any substantive arguments. His Response filed September 21, 2020 is riddled with misrepresentations and *ad hominem* attacks. Almost nothing said in the Response is true. Hutson's argument appears to proceed as follows:

(1) Hutson is right in his own mind.

(2) Based upon (1), Respondents must be crooks.

(3) Based upon (1) and (2), Hutson has no obligation to follow the rules.

Hutson asked this Court to waive its own Orders. (Hutson Resp., p. 5, ¶ 2.) Hutson's proposed double standard for *pro se* litigants (specifically Hutson) should be disregarded because it violates due process and equal protection.

Furthermore, Hutson took it upon himself to threaten a Respondent Newton's legal assistant. (Hutson Resp. p. 4.) Hutson claims she "put herself in the line of fire." (Id.) This represents gross misconduct that cannot continue. This Court should sanction Hutson.

Rule 260(a) mandates dismissal when a party has failed to comply with the requirements of the Appellate Court Rules. Furthermore, dismissal is appropriate when an appellant repeatedly fails to follow the appellate rules. Tinsley v. Ervin Co., 264 S.C. 487, 495, 216 S.E.2d 170, 173 (1975).

CONCLUSION

Hutson's requested relief is not within the power of this Court. His continued prosecution of this appeal serves only to harass Respondents, waste judicial resources, and incur litigation costs. Hutson's continued pattern of frivolous arguments, non-compliance with rules and orders, misrepresentations to the court, and threats against innocent non-parties warrants dismissal. Respondents request that this appeal be dismissed.

[*Signature page follows*]

Respectfully submitted,

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Dated: June 23, 2021

CERTIFICATE OF SERVICE

I, the undersigned, attorney for Respondents Penn America Insurance Company and Global Indemnity Group, Inc., do hereby certify that I have this date served the foregoing RESPONDENTS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS by causing the same to be deposited in a United States Postal Service mailbox, postage prepaid, and via electronic mail, addressed to the following:

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