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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No.: 2015-CP-02-00667
Appellate Case No. 2020-000070

Ex Parte: Donald L. Smith,..Appellant,

In Re: Greg Battersby,..Plaintiff,

v.

J. Kirkman Moorhead, Krause, Moorhead
& Draisen, P.A., Allstate Insurance Company,
and Allstate Northbrook Indemnity Company,..Defendants

of which:

J. Kirkman Moorhead and Krause, Moorhead
& Draisen, P.A. are,..Respondents.

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STATEMENT OF THE CASE

1. On March 20, 2015, Plaintiff, by and through his attorney, Appellant, filed a Summons and Complaint and on March 31, 2015 filed a "Second Amended Complaint" alleging that Respondents were liable to Plaintiff for damages arising out of Respondents' performance of professional activities as attorneys for a client. Plaintiff asserted seven causes of action against Respondents. The seven causes of action are: (1) false imprisonment; (2) defamation; (3) intentional infliction of emotional distress ("IIED"); (4) malicious prosecution; (5) conspiracy; (6) fraud; and (7) abuse of process. (ROA pp. 36-46).

2. Respondents filed their Motion to Dismiss as to all causes of action asserted by the Plaintiff. (ROA p. 47).

4. On April 30, 2015, the Allstate defendants filed a Motion to Dismiss Plaintiff's (second) Amended Complaint. (ROA p. 51).

5. All parties filed memoranda in support of and in opposition to the Motions to Dismiss. (ROA pp. 55-64; 66-75; 77-85; 87-99).

6. On June 4, 2015, a hearing was held before the Honorable R. Lawton McIntosh, Circuit Court Judge, who converted Respondents' Motions to Dismiss to Summary Judgment with the consent of the parties and granted summary judgment as to all causes of action based upon attorney immunity and the other grounds presented by Respondents' attorney. (ROA pp. 339-351).

7. On July 8, 2015, the Honorable R. Lawton McIntosh, Circuit Court Judge, issued a formal Order granting Respondents' Motion for Summary Judgment and Motion to Dismiss. (ROA pp. 26-32).

8. In the interim, between the time the trial court issued its Form 4 Order and the formal Order, on June 30, 2015 Plaintiff's attorney, Appellant, filed a Motion to Withdraw

Pleading (ROA p. 111), and on July 1, 2015 Appellant filed a Motion to be Relieved as Counsel for the Plaintiff.(ROA p. 120)

9. The trial court's ruling granting Respondents' Motion for Summary Judgement and Motion to Dismiss *was not appealed* by the Plaintiff or the Appellant.

10. On July 24, 2015, Respondents filed a Motion for Sanctions pursuant to Rule 11, SCRCP and The South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10, et seq. (the "Frivolous Proceedings Act"). (ROA p. 122)

11. After due notice, a hearing was held in this matter on October 2, 2015. Plaintiff was represented by the Appellant, Donald L. Smith, Esq., and Respondents were represented by Steven M. Krause, Esq., of Krause, Moorhead, and Draisen, P.A.

12. On October 2, 2015, the trial court held a hearing on Respondents' Motion for Sanctions and, having considered the Order, arguments and evidence submitted by counsel, granted Respondents' Motion for Sanctions as to Appellant (attorney for the Plaintiff) pursuant to South Carolina Rules of Civil Procedure (SCRCP), Rule 11. (ROA pp. 9-15). The court denied Respondents' Motion as to the Plaintiff and did not find any violation of the SC Frivolous Civil Proceedings Act. (Id.)

13. Appellant objected to the trial court's jurisdiction over the sanctions motion. Appellant's objection came only after the trial court rendered its initial decision on January 8, 2016 which was communicated via email to all parties instructing the Respondents to prepare an order granting the Motion for Sanctions. (ROA pp. 154-155).

14. In a Memorandum filed on January 27, 2016, Appellant argued that Respondents' post-trial motion for sanctions was filed more than ten (10) days after the filing of the Order and therefore the court was divested of jurisdiction.(Id.) The trial court held that Appellant

misunderstood the law governing the timely filing of post-trial motions and found, in accordance with Rule 59(e), SCRCP, "[a] motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order" In re Beard, 359 S.C. 351, 597 S.E.2d 835 (Ct. App. 2004), but that a motion for sanctions must be filed within ten days of the notice of entry of judgment. Russell v. Wachovia Bank, N.A., 370 S.C. 5, 633 S.E.2d 722 (2006), Pitman v. Republic Leasing Co., Inc., 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002).(Id.)

15. On January 29, 2016, Respondents filed with the court a verified Memorandum attesting that they received the Order on July 23, 2015. (ROA pp. 157-161). A true copy of the Order filed July 10, 2015 from the Clerk of Court stamped July 23, 2015 was included with the verified Memorandum. (ROA pp. 162-169) The Motion for Sanctions was filed with the Clerk of Court the next day, on July 24, 2015.(ROA p 122). Accordingly, the trial court found that the Motion for Sanctions was timely filed and that the court retained jurisdiction over the Motion. See USAA Prop. & Cas. Ins. Co. v. Clegg, 377 S.C. 643, 661 S.E.2d 791 (2008)(upholding trial court's finding that a motion to reconsider was timely filed after counsel, an officer of the court bound by the ethical and professional rules of this state, informed the court that she did not receive written notice of the order until more than a month after final judgment was entered).(ROA p. 10).

16. On February 3, 2016, the trial court issued a formal Order granting Respondents' Motion for Sanctions pursuant to Rule 11, SCRCP. (ROA pp. 9-15)

17. Thereafter, on February 18, 2016, Appellant filed his Motion to Reconsider.(ROA pp. 171-173).

18. On April 21, 2016, the trial court denied Appellant's Motion to Reconsider. (ROA p. 6).

19. The trial court's ruling granting Respondents' Motion for Sanctions *was not*

appealed by the Appellant.

20. On October 15, 2019, Appellant having not paid the monetary sanction as ordered by the court, Respondents filed a Motion for Entry of Sanctions awarded against Appellant as a Judgment on the Judgment Rolls. (ROA pp. 175-176).

21. On December 16, 2019, after a hearing on the matter, the trial court granted Respondents' Motion and directed that the monetary sanction awarded to the Respondents against the Appellant be entered as a Judgment against Appellant on the Judgment Rolls. (ROA pp. 2-4).

22. On January 13, 2020, Appellant filed his Notice of Appeal This appeal arises out of the trial court's order directing that the monetary sanctions award be entered upon the Judgment Rolls against the Appellant. (ROA p. 183).

STANDARD OF REVIEW

As an initial matter, Respondents incorporate by reference thereto all arguments, defenses, and assertions set forth in their Motion to Dismiss Appeal filed in this matter as if fully set forth herein verbatim.

Respondents assert that only the order of the trial court dated December 16, 2019 (ROA. Pp. 2-4) submitted by Appellant, subject to proper perfection of the appeal, is eligible for appellate review. That order is administrative in nature and merely directs that the monetary sanctions previously awarded by the court to Respondents and against Appellant, which were not paid as directed by the court, be entered as a judgment against Appellant on the Judgment Rolls. Respondents assert that any request for review of the order awarding monetary sanctions pursuant to SCRCP, Rule 11, itself is untimely and improper as the order awarding sanctions was not appealed in accordance with SCACR, Rule 203.

The standard of review applicable in this matter is, after taking the Court's own view of the evidence, whether the trial court abused its discretion in awarding monetary sanctions against

the Appellant.

Pursuant to Rule 11, SCRCP, Rule 11(a) provides, in part, as follows:

> The signature of an attorney or party [on a pleading, motion, or other paper] constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.
>
> If a pleading, motion, or other paper is signed in violation of this Rule, **the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.** (emphasis added)

On appeal, the imposition of sanctions pursuant to this rule (SCRCP, Rule 11) will not be disturbed absent an abuse of discretion. Runyon v. Wright, 322 S.C. 15, 471 S.E.2d 160 (1996). Further, as held by the South Carolina Supreme Court in Holmes v. Haynsworth, Sinkler & Boyd, P.A., 408 S.C. 620, 760 S.E.2d 399 (2014), the standard of review in this matter is:

> The determination of whether attorney's fees should be awarded under Rule 11 or under the [FCPSA] is treated as one in equity. **Therefore, an appellate court reviews the findings of fact with respect to the decision to grant sanctions under the FCPSA by "taking its own view of the evidence."** Father, 353 S.C. at 260, 578 S.E.2d at 14 (citing S.C. Const, art. V, § 5); see also S.C. Code Ann. §14-3-320 (Supp.2012). However, "[t]he 'abuse of discretion' standard ... does ... play a role in the appellate review of a sanctions award." Father, 353 S.C. at 261, 578 S.E.2d at 14. For example, "where the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard." Ex parte Gregory, 378 S.C. 430, 437, 663 S.E.2d 46, 50 (2008) (citation omitted); Se. Site Prep, 394 S.C. at 104, 713 S.E.2d at 654. **"An abuse of discretion occurs where the decision is controlled by an error of law or is based on unsupported factual conclusions."** Father, 353 S.C. at 261, 578 S.E.2d at 14. (emphasis added)

ARGUMENT

I. The right to appeal in this matter, if any, is limited to the trial court's most recent Order directing that monetary sanctions be entered as a judgment against Appellant dated December 16, 2019.

The issue before the Court is not whether the imposition of monetary sanctions pursuant to SCRCP, Rule 11, was proper in this matter. Rather, the only issue before the Court is whether the trial court abused its discretion by ordering that the monetary sanctions, which had not been paid as directed by the court in over three (3) years by Appellant, be entered as a judgment against the Appellant on the Judgment Rolls.

Because monetary sanctions in this matter were awarded against the Appellant attorney, individually, who was not a party to the underlying case, there was confusion in the Clerk of Court's Office as whether and how the Clerk of Court could enter a judgment against an individual that was not a party in the case. The issuance of the December 16, 2019 order (ROA pp. 2-4) by the trial court was administrative in nature and merely directed the Clerk of Court to enter the monetary sanctions as a judgment against the Appellant on the Judgment Rolls. Without such order, Respondents' had a limited ability to make any efforts to collect the sums owed (i.e., only through contempt proceedings).

An abuse of discretion may be found if the conclusions reached by the court are without reasonable factual support. Russell v. Wachovia Bank, N.A., 370 S.C. 5, 633 S.E.2d 722 (2006). However, the burden of showing abuse of discretion is on the party challenging the trial court's ruling. Watson v. U.S. Rubber Co., 260 S.C. 129, 194 S.E.2d 395 (1973)." State ex rel. McLeod v. Wilson, 310 S.E.2d 818, 279 S.C. 562 (S.C. App. 1983)

It is not uncommon in South Carolina that criminal defendants are ordered to pay monetary restitution to victims as part of their punishment. It is also not uncommon in South Carolina that,

on occasion, criminal defendants do not pay the restitution ordered by the court. In such circumstances, the courts often order the restitution amounts to be entered as a civil judgment against the defendant. The circumstances here are analogous.

Respondents assert there is no basis in fact or in law to support Appellant's assertions that the trial court abused its discretion in issuing an administrative order to assist the Clerk of Court directing that the (unpaid) monetary sanctions be entered as a judgment against Appellant on the Judgment Rolls. Factually, it is not disputed that the trial court issued an order on February 3, 2016 directing the Appellant to pay monetary sanctions to the Respondents for violations of SCRCP, Rule 11 (ROA pp. 9-15). It is not disputed that the order granting sanctions was *not appealed.* It is not disputed that the Appellant had not, in some three (3) years, paid the Respondents the monetary sanctions as directed by the Court, and that without a judgment Respondents had little ability to pursue collection of the sums owed. As such, Respondents moved the court for an order entering the monetary sanctions as a judgment against the Appellant.(ROA pp. 175-176).

Appellant made no cognizable arguments to this Court that entry of an order by the trial court directing that the monetary sanctions be entered as a civil judgment was an abuse of discretion by the court. In fact, Respondents assert that in the instant case there are sufficient facts in the record, as are more fully set forth herein below, to support the trial court's decision to issue an administrative order directing that the monetary sanctions be entered as judgment on the Judgment Rolls against the Appellant. Appellant should not, by extension of the administrative order, be allowed to challenge the underlying order granting monetary sanctions. This Court's review should be limited to a review of the December 16, 2019 order.

II. Should the Court determine that the failure of the trial court to enter a formal order denying Appellant's Motion to Reconsider warrants a remand of the matter (which is denied), the abuse of discretion standard applies to the court's decision to award monetary sanctions against Appellant for Rule 11 violations.

In Kinghorn v. Sakakini, 426 S.C. 147, 825 S.E.2d 748 (Ct.App. 2019), the Court of Appeals held that the circuit court is not required to state its findings of fact and conclusions of law on motions to dismiss, summary judgment motions, or any other motion except those dealing with involuntary dismissal pursuant to SCRCP, Rule 52(a). While the Form 4 Order issued by the trial court on Appellant's Motion to Reconsider mentions the preparation of a formal order, no formal order was ever issued by the trial court. (ROA p. 6). Therefore, the Form 4 Order was the final order of the court. The trial court's ruling granting Respondents' Motion for Sanctions *was not appealed* by the Appellant.

Assuming, arguendo, that the trial court had issued a formal order denying Appellant's Motion to Reconsider, and held:

Having reviewed the pleadings in this matter and heard fully the arguments of counsel, I find that the court did not misapprehend the facts or the law applicable to the matter. Therefore, Defendant's Motion for Reconsideration is denied.

Such formal order would not have changed the substance of the court's ruling as contained in the Form 4 Order. At best, if the matter were remanded for this reason and the trial court then issues a formal order, doing so would merely give Appellant yet another opportunity to file an appeal of the underlying Order Awarding Monetary Sanctions against Appellant (a licensed SC attorney).

Under Rule 11,

Every pleading, motion or other paper of a party represented by an attorney shall be signed in his individual name by at least one attorney of record.... The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay....

If a pleading, motion or other paper is not signed or does not comply with this Rule, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this Rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

Rule 11(a), SCRCP.

Under Rule 11(a), SCRCP, a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments. Runyon v. Ex parte Gregory, 378 S.C. 430, 663 S.E.2d 46 (2008) citing Wright, 322 S.C. 15, 471 S.E.2d 160 (1996). The party and/or attorney may also be sanctioned for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it. Id. It is irrefutable that a lawyer owes their client zealous advocacy, but that zeal must be constrained within the bounds placed upon them as an officer of the court and under the court's rules. Specifically, Rule 11, SCRCP, expressly sets forth the outer boundaries of acceptable attorney conduct by requiring that there be good ground to support any pleading filed before the court. Thus, that rule prohibits a lawyer from asserting claims or legal positions that are not supported by fact, well-founded under existing law, or through the modification, extension, or expansion of existing law.

Turning to the merits of the present case, at the outset of the hearing on the summary judgment motion Appellant stipulated that Respondents were entitled to summary judgment on all causes of action except civil conspiracy. (ROA p. 27). The law in this state is that an attorney is generally immune from liability to third person arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client *See* Pye v. Estate of Fox ex rel. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006). The trial court determined that the Appellant filed the claims in this matter without researching the law on attorney immunity to

determine whether the claims were viable and supported by law. Appellant made no argument to the contrary. The trial court found that no reasonable attorney would have brought the claims against Respondents given the well-established case law on attorney immunity and the facts of the case. (ROA pp. 11-12)

Regarding Appellant's conspiracy cause of action, the trial court found that Appellant's claim was based upon mere suspicion without any supporting evidence. Moreover, after reviewing Appellant's arguments in support of the conspiracy cause of action, the trial court found that counsel merely attempted to "throw it against the wall and see if it sticks." (ROA p. 12) The Appellant made several arguments in an attempt to give some cognizable basis for his conspiracy claim, none of which the trial court found were supported by law or fact. (ROA pp. 9-15))

First, the Appellant argued to the court at the summary judgment hearing that the Respondents stepped out of the scope of the representation of their client when they advised then-client to report possible criminal acts to the police and further advised their client to recommend to another alleged victim that she also report her own, similar encounters with the Plaintiff. (ROA p. 12). More troubling the trial court found, is that Appellant also argued that an attorney is not acting in his capacity as an attorney when assisting a client filing a complaint before a state administrative agency. (Id.). Appellant argued that Respondents stepped outside their role as attorneys when they assisted their client with an online complaint against Plaintiff filed with the South Carolina Department of Labor, Licensing, and Regulation because the client did not need an attorney to file the complaint nor were the Respondents representing the client when they completed the complaint form. (Id.). The trial court found that "there is simply no cognizable basis in law or fact to conclude these acts fall outside the scope of Attorneys' representation of Client." (Id.)

Second, the court rejected the Appellant's argument that Respondents created, embellished or made up better facts to strengthen their client's claims, and therefore conspired with their client because Respondents would share in any judgment obtained as a result of the suit because such an allegation is contrary to well-established law. (ROA pp. 12-13). The court found that Appellant presented no evidence to support his bald assertions that Respondents made up or embellished facts to strengthen their client's case. (ROA p. 13). The court also found, in accordance with case law, that an attorney does not act outside of the scope their representation simply by collecting a fee. (citing Gaar v. Myrtle Beach Realty Co., Inc., 287 S.C 525, 339 S.E.2d 887 (Ct. App. 1986)(holding that an attorney normally conducts the litigation solely in his professional capacity and he has no personal interest in the suit). The court then found that there is no evidence here that Respondents had any personal interest in their representation of their client. (Id.)

Third, Appellant argued that Respondents violated SCACR, Rule 407, Rule 3.3, Candor Toward the Tribunal, of the South Carolina Rules of Professional Conduct and that the rule also imposed a duty on Respondents to the Plaintiff. (Id.).The trial court dismissed Appellant's argument that Rule 3.3 imposed on Respondents a duty to the Plaintiff, finding that the plain language of the rule creates no such duty. (Id.). The court also found that even if a duty was owed, the Respondents breached no such duty. Appellant alleged that Respondents should have recognized their client was lying when she informed them that Plaintiff was wearing a robe during the incident, but then later reported to law enforcement that Plaintiff was wearing a towel. (Id.).The court found that 'these are subtle difference of no material distinction, both figuratively and literally, to put Respondents on notice that Client may be lying." *(Id.)*.. Second, the court found that the police report which contained the allegedly different descriptions of Plaintiff's attire was not created until after Respondents advised their client to report to the police. (ROA p. 14).

Therefore, the court found that Respondents "would not have had the benefit of the very report Appellant claims should have put them on notice." The trial court found Appellant's argument was not reasonably supported by the facts, and that Appellant's theory is on its face factually implausible. (Id.).

Based upon the foregoing, the trial court held that sanctions were warranted against Appellant (attorney for the Plaintiff) under Rule 11, SCRCP. (Id.). The court held that a sanction under Rule 11, SCRCP, may include an order to pay the reasonable costs and attorney's fees incurred by the party or parties defending against the frivolous action or action brought in bad faith, a reasonable fine to be paid to the court, or a directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future frivolous action or action in bad faith. Runyon v. Wright, 322 S.C. 15, 471 S.E.2d 160 (1996). (Id.).Further, if appropriate under the facts of the case, the court may order a party and/or the party's attorney to pay a reasonable monetary penalty to the party or parties defending against the frivolous action or action brought in bad faith. Rule 11(a), SCRCP. (Id.).

The trial court held, given the facts and circumstances of this case, that Appellant should be assessed a monetary sanction calculated based upon the Respondents' Attorneys' fees and costs expended in defending the underlying lawsuit and in bringing the Motion for Sanction. (Id.). The court found that Respondents were forced to notify their malpractice carrier and to retain outside counsel, that Respondents contributed considerably to the defense of the Professional Association (Krause, Moorhead and Draisen, P.A.). (Id.). The court awarded a monetary sanction, including reasonable expenses and attorney's fees, against the Appellant for the sums incurred by Respondents in defending the action of $11,206.20 which the trial court found reasonable under the totality of the facts and circumstances in this matter. (ROA. Pp. 14-15).)

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the trial court's December 16, 2019 order be affirmed, that the matter be remanded to the trial court, and that the Appellant be sanctioned under SCACR, Rule 269, for filing this frivolous appeal in an effort to delay the entry of a judgment against him for refusing to pay the monetary sanctions as ordered.

Respectfully submitted,

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September 16, 2021
Anderson, South Carolina

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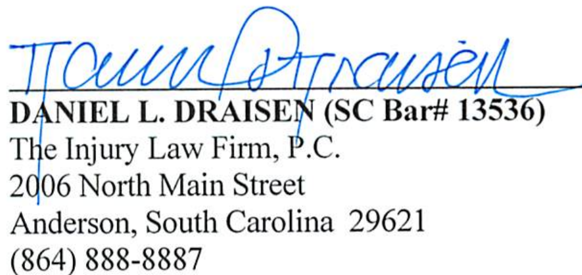
CERTIFICATE OF COUNSEL

I hereby certify that the Final Brief of Respondents complies with the requirements of Rule 211(b).



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