RECEIVED
Oct 18 2021
SC Court of Appeals

In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas
James B. Jackson, Master-in-Equity

Appellate Case No. 2020-001254

Kacey Green and Charinrath Green, Appellant-Respondent,

v.

Mervin Lee Johnson, Respondents-Appellants.

FINAL REPLY BRIEF OF APPELLANTS- RESPONDENTS

October 18, 2021

s/ Virginia W. Williams
David R. Williams, 77899
Virginia W. Williams, 77898
WILLIAMS & WILLIAMS
1281 Russell Street
Post Office Box 1084
Orangeburg, S.C. 29116-1084
Phone: (803) 534-5218
williamsdr@williamsattys.com
williamsvw@williamsattys.com

E. Mason West, Esquire
WEST LAW FIRM, P.A.
P.O. Box 1869
207 Carolina Avenue
Moncks Corner, SC 29461
(843) 761-5626

Attorneys for Appellants-Respondents

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

REPLY ARGUMENT

I. The Greens preserved their timeliness argument for appeal

The Greens' appeal argues the court improperly entertained an untimely motion to amend/alter the June 5, 2019 Damages Order. Johnson's second motion presented the same issues as the first motion. See R. pp. 104 – 106; R. pp. 117-120. The effect of the second motion ultimately altered the original damages order, which was final at that time and to alter anything pertaining to that order, Johnson should have filed an appeal, which he failed to do.

In Johnson's response, he argues the Greens did not preserve this issue for appeal. The issue was not ripe until Johnson filed the second motion, which was argued July 13, 2020. At that hearing, counsel for the Greens explicitly argued:

> What we're hearing right now are basically all the same arguments you heard after the motion to dismiss. So they're getting two chances to make the same arguments. We don't think the 59(e) argument is appropriate at this time. Their remedy would have been to appeal your motion to dismiss, your order on that case.

R. p. 79, lines 3-12. The discussion then continues to the principles regarding a second Rule 59 motion in the *Coward Hund* case.

After the court's Amended Damages Order, the Greens, in the abundance of caution, file a motion to reconsider articulating these same concerns to the lower court on or about August 24, 2020: "Plaintiff contends that Defendants have not complied in the timeliness of their filings in motions as per the South Carolina Rules of Civil Procedure." R. pp. 162-165.

The issues of untimeliness were not before the court until Johnson filed his second motion. The Greens clearly articulated those concerns at that time and thus, properly preserved them for appeal.

II. The Greens preserved their new evidence objections for appeal

The Greens' appeal argues the lower court erred by relying on new evidence on the second motion presented by Johnson. This new evidence was presented in support of Johnson's *McClurg* argument in the first motion and also to suggest the property damage issue had already been resolved. The new evidence issue was thus not ripe until it was presented, at the hearing on Johnson's second motion.

Throughout the hearing, Johnson consistently relied on the new evidence in support of his second motion, acknowledging that it was submitted in conjunction with his second motion. R. p. 63, lines 20-21; *See also* R. pp. 121-122, 132-151. In response, the Greens specifically argued this information as improper for the court's consideration at that time. R. p. 79, lines 3-12; R. p. 81, lines 1-3; R. p. 83, line 25 – p. 85, line 14. The arguments were also in the Greens' Motion to Reconsider:

> 3. Plaintiff contends that Defendants have not complied in the timeliness of their filings in motions as per the South Carolina Rules of Civil Procedure.
> 4. Plaintiff contends that pre-suit discussions and correspondence are not a basis for findings at a damages hearing.
> …
> 9. Plaintiff contends that a factual finding that all property damage claims were released by Plaintiffs is inappropriate as no proper evidence has been presented to suggest the same.
> …
> 11. Plaintiff contends the Court inappropriately considered factors in Rule 60, SCRCP, wherein said factors had previously been considered in its November 4 Order.

R. pp. 162-163.

The issues of untimeliness of the evidence in Exhibit A were not before the court until Johnson filed his second motion. The Greens clearly articulated those concerns at that time and subsequently in their motion to reconsider. Thus, the question has been properly preserved for appeal.

III. *McClurg* considers the participation of the defaulting party in denying the motion to set aside default

Johnson fails to recognize the *McClurg* court denied setting aside the default based on the role of the at-fault driver, Deaton, who was placed in default. The court stated "[a]s noted by the trial court, there is simply no evidence the McClurg's counsel committed any kind of fraud that deprived Deaton of the opportunity to be present or heard in the matter, or that counsel made any misrepresentations to Deaton or engaged in any misconduct toward Deaton." *McClurg v. Deaton*, 380 S.C. 563, 576, 671 S.E.2d 87, 94.

Similarly, in the case at hand, there is absolutely no indication Johnson was defrauded or deprived of the ability to be heard on the matter. The Greens properly served Johnson. There is no affidavit from Johnson explaining what he did with the complaint once served. Indeed, it is questionable that counsel for Johnson have even actually talked with Johnson. The adjusters submitted affidavits of alleged health conditions that Johnson had. Even if the conduct of the Greens counsel with Johnson's insurer gave rise to a duty to tell them suit has been filed, it is absolutely clear the Greens gave Johnson notice. He just chose to do nothing about it.

CONCLUSION

For the foregoing reasons, the Greens respectfully request this court vacate the Amended Order of the Honorable James B. Jackson, dated August 10, 2020, and reinstate the Order of Damages dated June 5, 2019.

[*Signature page to follow*]

October 18, 2021

s/ Virginia W. Williams

David R. Williams, 77899
Virginia W. Williams, 77898
WILLIAMS & WILLIAMS
1281 Russell Street
Post Office Box 1084
Orangeburg, S.C. 29116-1084
Phone: (803) 534-5218
williamsdr@williamsattys.com
williamsvw@williamsattys.com

E. Mason West, Esquire
WEST LAW FIRM, P.A.
P.O. Box 1869
207 Carolina Avenue
Moncks Corner, SC 29461
(843) 761-5626

Attorneys for Appellants-Respondents