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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge
Joseph M. Strickland, Master-in-Equity

Appellate Case No. 2021-000539
Case No. 2020-CP-40-3674

Ammon L. “Treigh” Sullivan, Respondent,

v.

Richland County School District One and
South Carolina Department of Education, Defendants,

Of which, South Carolina Department of Education, is Appellant.

INITIAL REPLY BRIEF OF APPELLANT

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- Quail Hill, LLC v. Richland County*,
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- Stark Truss Co., Inc. v. Superior Construction Corp.*,
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Rule 55(e), SCRPC.

Rule 55(d), FRCP.

S.C. Code Regs. § 43-57.2.

ARGUMENTS

I. The Appellant's issues on appeal are properly preserved for appellate review.

The Respondent Ammon L. "Treigh" Sullivan has raised a myriad of preservation arguments in a desperate attempt to convince this Court not to address the merits of the defenses to the entry of default and default judgment as raised in the court below. None of the Respondent's preservation arguments remotely have any merit, and in fact, if the Respondent's position is credited, he appears to actually be asserting that he never even filed a motion for default judgment. That alone, if true, merits a reversal.

The Respondent appears to be under the misconception that a Rule 59(e) motion is required or mandatory under all circumstances to preserve an issue for appeal. That is not the law. In fact, in *State Farm Mutual Automobile Ins. Co. v. Goyeneche*, 429 S.C. 211, 837 S.E.2d 910 (Ct. App. 2019), this Court drew a distinction between a "permissive motion for reconsideration" and "a mandatory motion necessary to preserve an unaddressed error." 837 S.E.2d at 918. This Court cited the leading case of *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), where the Supreme Court explained:

[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

602 S.E.2d at 780. (Emphasis in original). Thus, where an issue has been raised to and ruled upon by the court below, the appealing party may seek reconsideration but is not required to do so.

Interestingly, the case at bar demonstrates both of scenarios, and the Appellant followed existing precedent perfectly. In denying the Appellant SCDE's Motion to Set Aside Entry of Default, the trial court did not explicitly rule on the Appellant's specific arguments for setting aside the entry of default, including its Rule 55(e) argument and its position that the Respondent's negligence claim fails to state a cause of action against the Appellant. Because the trial court did not rule on those issues, it was *mandatory* for the Appellant to file a Rule 59(e) to preserve those issues for appeal. Accordingly, the Appellant filed a detailed Rule 59(e) motion re-asserting those arguments and, despite an order summarily denying the Rule 59(e) motion, those issues are properly preserved for appellate review.

The trial court's later Order on Damages presents a different scenario. In both a memorandum of law submitted ahead of the hearing on the Respondent's

motion for default judgment, and also during the hearing itself, the Appellant renewed its arguments opposing the entry of a default judgment. In its order, the trial court acknowledged that "[a]t the start of the hearing, Defendant's counsel renewed its prior motion that Plaintiff: (1) had not proven entitlement to judgment by default against a state agency; (2) had failed to state a cause [of action] upon which relief may be granted; and/or (3) entry of default judgment is/was premature." (Order II, p. 2). The trial court even referenced the memorandum of law that was submitted. (Order II, p. 2). The trial court then ruled on those arguments: "Having reviewed the memorandum, prior motions of Defendant, and argument of counsel, the Court is not persuaded by such arguments." (Order II, p. 2). The trial court then denied the "renewed motion." (Order II, p. 2). That excerpt from the Order on Damages demonstrates that the issues were raised to *and* ruled on by the trial court. Hence, there was no need for the Appellant to file a Rule 59(e) motion. The issues are preserved for appellate review. The filing of a Rule 59(e) motion at that point was permissive, and given the trial court's ruling, coupled with the trial court's initial reluctance during the hearing to even consider those renewed arguments, a Rule 59(e) motion to reconsider would most likely be futile.

As a preservation argument, the Appellant also makes the curious argument that "the record is absent a 'Motion for Default Judgment.'" *See*, Respondent's

Brief, p. 11. He thus reasons that the Appellant should not have filed a memorandum of law in opposition to a Motion for Default Judgment that did not exist.¹ However, if the Respondent never filed a Motion for Default Judgment, then the trial court clearly erred in granting him a default judgment.

There is no question that the Respondent created a bit of a quagmire of the lower court proceedings, but ultimately he did file what was treated by the trial court as a motion for default judgment. By way of explanation, on October 26, 2020, the Respondent filed a motion captioned as a "Motion for Entry of Default against Defendant South Carolina Department of Education." That motion contains a misnomer in the caption given that an entry of default is a ministerial function performed by the Clerk of Court which does not require a motion or court action. *See*, Rule 55(a), SCRCF. *See also*, *Stark Truss Co., Inc. v. Superior Construction Corp.*, 360 S.C. 503, 602 S.E.2d 99, 102 (Ct. App. 2004) ("[e]ntry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party"). In contrast, the entry of a default judgment requires an application or motion to be made and requires an order of the court. Rule 55(b)(1), SCRCF (requiring a "motion or application of the party seeking default");

¹ The Respondent indeed suggests that the Appellant's memorandum is "ripe to be stricken from the record and should not be included in the record on appeal." *See*, Respondent's Brief, p. 11. The Respondent, of course, has not filed a motion to that effect in either the trial court or in this Court. Nonetheless, the record clearly shows that the memorandum was submitted to the lower court, was argued to the lower court, and was referenced in the Order on Damages. (Order II., 2). It is properly in the appellate record.

Rule 55(b)(2), SCRCP ("the party entitled to a judgment by default shall apply to the court therefor"); Rule 55(b)(2), SCRCP (the defaulting party "shall be served with written notice of the motion or application for judgment"). However, the motion filed by the Respondent on October 26, 2020, also requested a "default judgment as to Plaintiff's claims against said Defendant [SCDE]." (Motion). Thus, it appears that a motion for default judgment was made by the Respondent (despite his unusual protestation to the contrary), and it further appears that the trial court issued a default judgment in the amount of \$37,724.13 in favor of the Respondent and against the Appellant SCDE.²

Moreover, the Respondent argues that the trial court (Judge Manning) ruled that the *Wham* factors were moot. There is no such ruling. Judge Manning only found the Appellant's accompanying Motion to Dismiss to be moot. (Order, I., p. 2). The Respondent then argues – again falsely – that "Appellant's motion to reconsider also lacked specificity as to the arguments of the *Wham* factors." *See*, Respondent's Brief, p. 10. Yet, the Appellant's Rule 59(e) motion includes four pages citing and discussing the *Wham* factors at length as part of its Rule 55(c) showing of "good cause." (Rule 59(e) Motion, pp. 7-10).

² Notably, if the Court agrees with the Respondent's unusual argument that no motion for default judgment was ever filed, then the default judgment should be reversed and vacated.

And finally, the Respondent argues that the Appellant's position that the entry of a default judgment is premature based on the *Frow* doctrine³ is not preserved. However, the issue was only appropriate to argue at the judgment stage. It is not a basis for denying entry of default on the record. The *Frow* doctrine requires a court to delay the entry of a default *judgment* where one of multiple defendants who is alleged to be jointly liable is in default. The Appellant raised that argument at the proper stage. In its Order of Damages which entered judgment for the Respondent, the trial court acknowledged that the Appellant argued "entry of a default judgment is/was premature" and then denied the motion because it was "not persuaded by such arguments." (Order II., p. 2). The *Frow* doctrine was properly raised to and decided by the trial court. The issue is preserved for appellate review.⁴

As the foregoing discussion demonstrates, the Respondent's preservation arguments, while numerous, are all meritless. The Respondent mischaracterizes the record below and the very orders issued in the trial court, all in an attempt to avoid an appellate decision on the merits. Suffice it to say, each of the issues raised on appeal is properly preserved and ripe for review by this Court.

³ See, *Frow v. De La Vega*, 82 U.S. (15 Wall.) 552 (1872).

⁴ It is worth noting that the Respondent fails to address the *Frow* doctrine in its entirety, other than to claim that the issue was not preserved for appellate review.

II. The Respondent has not proven his entitlement to a judgment by default against a state agency per the requirements of Rule 55(e), SCRPC.

As a state agency, the Appellant SCDE cannot have a default judgment entered against it without compliance with Rule 55(e), SCRPC, which provides that “[n]o judgment by default shall be entered against the State of South Carolina or an officer or agency thereof ... unless the claimant establishes his claim to relief by evidence satisfactory to the Court.” Rule 55(e), SCRPC. The record demonstrates that the Respondent did not satisfy that heightened standard. In fact, in an attempt to circumvent the bar of Rule 55(e) on his default judgment, the Respondent resorts to "watering down" the standard itself. Rule 55(e) requires that a claimant must establish his "claim to relief by evidence satisfactory to the Court." However, in arguing that he met that standard, the Respondent insists that the claimant need only establish "relief by evidence satisfactory to the Court." *See*, Respondent's Brief, p. 13. He literally removes the words "claim to" from the rule. It is not the "relief" that a plaintiff must prove – that is the burden of proof in any default not involving a state agency and would render Rule 55(e) meaningless or superfluous.⁵ Instead, a plaintiff must prove his "claim to relief," meaning he must

⁵ "In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes." *Ex Parte Wilson*, 367 S.C. 7, 625 S.E.2d 205, 209 (2005). In *Duke Power Co. v. Laurens Electric Cooperative, Inc.*, 344 S.C. 101, 543 S.E.2d 560 (Ct. App. 2000), this Court rejected a statutory construction which "robbed" the statute "of any meaning and render [ed] it superfluous." 543 S.E.2d at 563.

show his entitlement to a judgment as a matter of law. Only upon that showing may the State or a state agency be held in default.

In its opening brief, the Appellant cites a host of federal cases interpreting the equivalent Rule 55(e), FRCP, which is now codified as Rule 55(d), FRCP. The Respondent ignores all of that case law except two cases, and his attempt to distinguish those two cases is seriously flawed. In *Burr v. United States*, 2010 WL 11674099 (D.S.C. 2010), the District Court in South Carolina ruled that “Rule 55(d) is intended to prevent the entry of default judgments against the United States for mere procedural missteps.” 2010 WL 11674099, *3. The Respondent attempts to distinguish *Burr* by arguing that it involved criminal proceedings. However, contrary to the Respondent's misreading, *Burr* involves a habeas claim which is a civil case and is governed by civil – not criminal -- procedure, hence, the district court's reliance on Rule 55(d), FRCP. *See, State v. Bailey*, 248 S.C. 438, 151 S.E.2d 87, 90 (1966) (“[h]abeas corpus is in its nature a civil rather than a criminal proceeding”).

The Respondent similarly attempts to feebly distinguish the case of *Sun v. United States*, 342 F.Supp.2d 1120 (N.D. Ga. 2004), by wrongfully stating that *Sun* is “a criminal conviction case.” *See, Respondent's Brief*, p. 13. However, undisguised in the second paragraph of its opinion, the district court explains that the plaintiff “filed this civil rights action against the United States, alleging that his conviction violated his First, Fifth, and Fourteenth Amendment rights.” 342 F.Supp.2d at 1122.

Again, it is a civil case to which Rule 55(e) was correctly applied.

In sum, Rule 55(e) provides that a default judgment cannot be entered against the State or its agencies without a showing that a plaintiff will prevail as a matter of law on the merits. Here, the Respondent has not shown that SCDE is actually liable as a matter of law. In fact, SCDE has demonstrated numerous meritorious defenses, including the absence of an actionable duty of care. Thus, where the Respondent cannot establish his claim to relief, Rule 55(e) requires the no judgment by default may be entered against SCDE. The default judgment should be reversed.

III. The Respondent's negligence claim fails to state a cause of action against the Appellant SCDE, and based on Supreme Court precedent, the rendering of a default judgment thereon is without authority of law.

As the Appellant argued in the trial court and in its opening brief, South Carolina law provides that "if a complaint fails to state a cause of action, then rendering of a default judgment thereon is without authority of law and therefore reversible error." *Masters v. Rodgers Development Group*, 283 S.C. 251, 321 S.E.2d 194, 196 (1984). "An objection that the complaint does not state facts sufficient to constitute a cause of action is not waived by a default." *Id.* See also, *Mutual Savings & Loan Assn. v. McKenzie*, 274 S.C. 630, 266 S.E.2d 423 (1980). The Appellant proceeded to show that the simple negligence claim alleged against SCDE fails as a matter of law, and for that very reason, it cannot support a default judgment under the

rationale of *Masters*.

In response, the Respondent focuses only on the "facts" as pled in his Complaint. He states that "well pled facts" are to be treated as true, which is a correct proposition. *See, Masters*, 321 S.E.2d at 196 (defaulting party admits "facts well pleaded in complaint"). The Respondent then insists that his Complaint includes "well-pled" facts including "the basis of the duty, the breach, damages and that such damages were a proximate cause of the breach." *See*, Respondent's Brief, p. 18. However, under clear South Carolina authority, the issue of legal duty is an issue of law. *See, Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47, 49 (1996) ('[w]hether the law recognizes a particular duty is an issue of law to be determined by the court"). Thus, duty is not an issue of fact.

The Respondent describes the negligence claim as premised on the following duty: "the failure to Appellant to advise Respondent." *See*, Respondent's Brief, p. 18. In its Order on Damages, the trial court ruled:

Sullivan testified that in 2019 he learned from a colleague about a SCDE Experience Verification Form that was to be completed to provide him credit for the time at LCSD as provided for in S.C. Code Reg. § 43-57.2. Sullivan testified that SCDE never advised him of the form and/or regulation.

(Order II, p. 3). In effect, the Respondent's negligence claim is premised solely on his factual allegation that he called SCDE and spoke to unidentified persons in 2010, and was not advised of S.C. Code Regs. § 43-57.2. (Tr. 56-58). Significantly, these

very facts are not well-pled or even pled at all in the Complaint, and therefore, may not be taken as true. But more importantly, the Respondent's claim is premised solely on the alleged failure by SCDE to advise him as to S.C. Code Regs. § 43-57.2, which is a law. Yet, South Carolina law clearly hold that misrepresentations or even silence regarding a matter of law are not actionable as a negligence misrepresentation. *See, Carolina Chloride, Inc. v. Richland County*, 394 S.C. 154, 714 S.E.2d 869, 875 (2011) ("no action will generally lie for a misrepresentation as to a matter of law"). In other words, the failure to provide advice as to what the law requires is not actionable.⁶ The Respondent never addresses – let alone refutes -- this fatal flaw in his default judgment. Indeed, the default judgment is premised on a legal duty that is not actionable, and under the rationale of *Masters*, that default judgment cannot be permitted to stand.

⁶ In *Quail Hill, LLC v. Richland County*, 387 S.C. 223, 692 S.E.2d 499, 508 (2010), the Supreme Court determined that the plaintiff's negligence claim "should be treated as solely one for negligent misrepresentation." The same is true here.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Department of Education respectfully renews its request that the Court reverse the default judgment entered in favor of the Respondent Ammon L. “Treigh” Sullivan and remand with instructions that the default be set aside and the South Carolina Department of Education be allowed to file an answer and defend the Respondent's negligence claim on its merits. In the alternative, under the *Frow* doctrine, the default judgment should be reversed and the action should be remanded for further proceedings consistent therewith.

Respectfully submitted,

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Of which, South Carolina Department of Education, is Appellant.

CERTIFICATE OF SERVICE

Pursuant to Section (d)(1) of the Supreme Court’s Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, the undersigned employee of Lindemann & Davis, P.A., counsel for the Appellant, does hereby certify that service of the **Initial Reply Brief of Appellant and Appellant’s Designation of Matter to be Included in the Record on Appeal** was made upon all counsel of record by email only at the below email address this the 21st day of March 2022, as follows:

Ryan K. Hicks, Esquire
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s/ Andrew F. Lindemann



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March 21, 2022

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Via Email Only

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: ctappfilings@sccourts.org

RE: Ammon L. "Treigh" Sullivan v. Richland County School District One and South Carolina Department of Education
Appellate Case Number: 2021-000539
Civil Action Number: 2020-CP-40-3674
Our File Number: 79.20406

Dear Ms. Kitchings:

In accordance with Section (b)(2) of the Supreme Court's Order RE: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, please find enclosed for filing the **Initial Reply Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. In accordance with Section (d)(1) of this same order, I am hereby serving copies on all counsel of record by email only.

If you have any questions, please advise.

Sincerely,

LINDEMANN & DAVIS, P.A.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: Ryan K. Hicks, Esquire (w/ Enclosures, Via Email Only)