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SC Court of Appeals

September 19, 2022
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(323) 245-6142
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The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate St.
Columbia, SC 29201
ctappfilings@sccourts.org

Re: New Filing

Notice of Appeal, Attached Orders, Proof of Service

Dear Ms. Kitchings and to ALL CONCERNED:

Good day to you!

Enclosed for filing, please find a copy of the Notice of Appeal, attached Orders, Proof of Service and a cover letter sent by United States Priority Mail, tracking # **9405509205568830911637** and attached is a proof of delivery earlier today. A check in the amount of \$250.00 made payable to the South Carolina Court of Appeals was included.

Please call the above number if you have any questions.

Thank you for your time and assistance regarding this matter.

Respectfully submitted,

_____/S/ Heidi Gersten_____

Heidi Gersten

Appellant/Petitioner

HG/Enclosures/ USPS Proof of Delivery/ Cover Letter/ Notice of Appeal/ Attached Orders/ Proof of Service /

Total pages: 59 including this cover sheet.

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September 19, 2022, 10:33 am

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September 19, 2022, 6:10 am

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September 18, 2022, 8:57 am

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September 18, 2022, 3:22 am

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September 17, 2022, 7:05 pm

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COLUMBIA SC PROCESSING CENTER

September 17, 2022, 4:08 pm

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September 16, 2022, 7:08 pm

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September 16, 2022, 6:08 pm

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Feedback

September 15, 2022
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(323) 245-6142
hanginhangout@gmail.com

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1220 Senate St.
Columbia, SC 29201

Re: New Filing

Notice of Appeal, Attached Orders, Proof of Service

Dear Ms. Kitchings and to ALL CONCERNED:

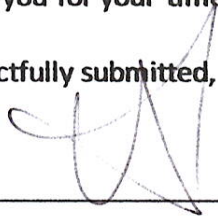
Good day to you!

Enclosed for filing, please find an original of the Notice of Appeal, attached Orders, Proof of Service and a check made payable to the South Carolina Court of Appeals in the amount of \$250.00. These documents will also be filed online via email as per court rules.

Please call the above number if you have any questions.

Thank you for your time and assistance regarding this matter.

Respectfully submitted,



Heidi Gersten
Appellant/Petitioner

HG/Enclosures/ Notice of Appeal/ Attached Orders/ Proof of Service / Check for \$250.00
Total pages: 55 including this cover sheet.

NOTICE of APPEAL in a CIVIL CASE

THE STATE of SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Honorable John C. Hayes III, Circuit Court Judge
Honorable Brian M. Gibbons, Circuit Court Judge

Case No. 2018-CP-12-00117
2028-AP-12-00074

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten is Appellant,

v.

Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide
Insurance Company, Interinsurance Exchange of the Automobile
Co, John Ammendola, Trustgard Insurance Company, Blackwell,
SC Department of Public Safety, Chevrolet, GMC, Unknown John
Does, Respondents.

NOTICE OF APPEAL

TO ALL CONCERNED:

The Appellant Heidi Gersten appeals the orders (judgments) of
the Honorable Judges Brian M. Gibbons and John C. Hayes III
dated April 26, 2018, May 22, 2018, September 19, 2018,

September 21, 2018, September 24, 2018, and March 7, 2022. The Appellant received written notice of the orders on August 15, 2022.

September 9, 2022



Heidi Gersten, Appellant
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PROOF OF SERVICE OF A NOTICE of APPEAL

THE STATE of SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTER COUNTY
Court of Common Pleas

Honorable John C. Hayes III, Circuit Court Judge
Honorable Brian M. Gibbons, Circuit Court Judge

Case No. 2018-CP-12-00117
2028-AP-12-00074

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard, Plaintiffs,

Of whom Heidi Gersten is Appellant,

v.

Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide
Insurance Company, Interinsurance Exchange of the Automobile
Co, John Ammendola, Trustgard Insurance Company, Blackwell,
SC Department of Public Safety, Chevrolet, GMC, Unknown John
Does, Respondents.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on the following
by depositing a copy of it in the United States Mail, postage prepaid,
and return address clearly marked on September 9, 2022:

Wesley Brian Sawyer, Esquire
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Des Moines, IA 50391-5582

Nationwide Mutual Insurance Company
One Nationwide Gateway Dept. 5582
Des Moines, IA 50391-5582



September 9, 2022

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USPS		21.60
LEGAL ENVELOP	9 @ 0.50	4.50 TX
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EMAIL		1.00
SUBTOTAL		46.00
TAX		
State Tax on 23.40		1.40
County Tax on 23.40		0.24
TOTAL		47.64
TEND MasterCard		47.64

Total shipments: 0
Customer: None selected
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Workstation: 4 - Auxiliary Workstation
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STATE OF SOUTH CAROLINA
COUNTY OF Chester
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP1200074

Heidi Gersten et al
PLAINTIFF(S)

Kevin Carter et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

This matter is outside the scope of an arbitration. This matter shall be placed on the regular Common Pleas docket for process. This case shall be consolidated with case number 2018-CP-12-00117.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on: 04/26/2018

Heidi Gersten for Heidi Gersten
Ivanka Ayoub
Heidi Gersten for Heidi Gersten

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.

ELECTRONICALLY FILED - 2018 Apr 26 4:14 PM - CHESTER - COMMON PLEAS - CASE#2018CP1200074



Chester Common Pleas

Case Caption: Heidi Gersten VS Kevin Carter , defendant, et al
Case Number: 2018CP1200074
Type: Order/Electronic Form 4

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

Electronically signed on 2018-04-26 13:01:30 page 3 of 3

True and correct copy of original paper
On file in this office
Heidi Gersten
Clerk of Court
Chester, PA
Date 8-5-2022

STATE OF SOUTH CAROLINA

BEFORE THE ARBITRATION PANEL

COUNTY OF CHESTER

CIVIL ACTION NO: 2018-CP-12-00074

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard,

Plaintiffs,

v.

Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide Ins. Co., Interinsurance Exchange of the Automobile Club, John Ammendola, Trustguard Ins. Co., S.C. Dept. of Public Safety, Blackwell, Chevrolet, GMC, Unknown Joh Does

Defendants.

ORDER OF PROTECTION

This matter comes before the Court on Motion of Wesley B. Sawyer for an Order of Protection from June 25, 2018 through July 2, 2018.

Based on the fact that Mr. Sawyer will be out of town on vacation with his family, he will not be available for Court. The Court finds that the request contained herein is reasonable.

IT IS THEREFORE ORDERED that Wesley B. Sawyer be protected from appearing on the dates listed below:

Wesley B. Sawyer: June 25, 2018 – July 2, 2018.

AND IT IS SO ORDERED

The Honorable Brian Gibbons
Common Pleas Court Chief Administrative
Sixth Judicial Circuit

May 21, 2018



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al
Case Number: 2018CP1200074
Type: Order/Protection from Court Appearance

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge

Electronically signed on 2018-05-21 21:06:01 page 2 of 2

True and
On file in
Clerk of Court
Chester
Ohio
5-2022

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHESTER

CIVIL ACTION NO: 2018-CP-12-00117

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard,

CIVIL ACTION NO: 2018-CP-12-00074

Plaintiffs,

ORDER GRANTING DEFENDANT INTERINSURANCE EXCHANGE OF THE AUTOMOBILE CLUB'S MOTION TO DISMISS

vs.

Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide Insurance Company, Interinsurance Exchange of the Automobile Club, John Ammendola, Trustguard Ins. Co., Blackwell, SC Department of Public Safety, Chevrolet, GMC, Unknown John Does,

Defendants.

This matter comes before the Court upon Defendant Interinsurance Exchange of the Automobile Club's ("AAA") Motions to Dismiss, to Strike, and to change venue. The Court held a hearing on its and the other Defendants' motions on September 5, 2018. All served Defendant's appeared by and through their attorneys and Plaintiffs Gersten and Ayoub appeared *pro se*; Plaintiff Hubbard did not appear. For the reasons set forth below, Defendant AAA's principal motions are granted.

PROCEDURAL BACKGROUND

This action arises out of an automobile collision that took place on March 19, 2015 between Ivanka Ayoub's vehicle operated by Heidi Gersten, and a vehicle both operated and owned by Kevin Carter. Plaintiff Gersten originally filed a property damage arbitration claim on February 21, 2018 (hereinafter "Arbitration Action"). The claim named Kevin Carter, Richard

Davis, Nationwide Mutual Insurance Company, Interinsurance of the Automobile Club, and Trustguard Insurance as defendants.

Gersten then created a "First Amended Claim for Property Damage Verified" (hereinafter "Amended Arbitration Complaint") on or about March 2, 2018, however, she did not then file the Amended Arbitration Complaint. The Trided Arbitration Complaint added Gersten's mother, Ivanka Ayoub, as a claimant and added Joseph Tirbovich and John Ammendola as additional defendants. Gersten and Ayoub never obtained an Amended Summons listing Ayoub as a claimant, and the Amended Arbitration Complaint was not filed until March 27, 2018.

On March 16, 2018, Gersten, Ayoub, and Daniel Hubbard filed the above-captioned case in this court seeking recovery for injuries arising out of the collision. In addition to the defendants named in the Amended Arbitration Complaint, the Plaintiffs named the South Carolina Department of Public Safety, Blackwell (*sic*), Chevrolet, GMC, and unknown John Doe defendants.

Kevin Carter, Richard Davis, and the other Defendants who have allegedly been served in the case filed motions to dismiss both cases.¹ AAA sought to dismiss the Arbitration Action, in part, claiming the arbitration panel lacked jurisdiction over some of the claims asserted in the Arbitration Action. On April 26, 2018, Judge Gibbons, acting as the Chief Administrative Judge for Chester County Circuit Court, entered an Order finding the claims asserted in the Arbitration Action were outside the scope of arbitration. He transferred the Arbitration Action to the Common Pleas docket and consolidated the case with the Circuit Court action. (April 26, 2018 Form 4 Order). Because the cases have been consolidated, this Order will address the allegations

¹ The Court has no record of Blackwell, GMC, Chevrolet or any John Doe defendants being served. Furthermore, John Ammendola and Joseph Tirbovich deny that they have been served.

set forth in the Circuit Court Complaint. However, the Court has reviewed all three Complaints, and the Court's ruling would be the same regardless which pleading(s) were in effect.

This case was set for hearing on the various pending motions for September 5, 2018. The case was also placed on the non-jury roster for a merits hearing for the same week. Plaintiff Heidi Gersten filed a motion for continuance. At the hearing, all defendants consented to continuing the merits hearing of the case but requested that the motions be heard. Gersten and Ayoub consented to proceeding with hearing the various motions.

LAW

AAA's Motion to Dismiss seeks the following relief:

- a) Dismissal of all claims asserted against it for failing to state facts constituting a cause of action,
- b) Dismissal for a lack of standing to pursue the claim asserted claims,
- c) Dismissal of Daniel Hubbard's claims,
- d) Dismissal of Ivanka Ayoub's claims,
- e) That certain specified allegations be stricken,
- f) Dismissal for lack of *in personam* jurisdiction, and a
- g) Change of Venue

The Court will address each item in turn.

A. All Causes of Action

The Complaint numbers eighteen separate causes of action. Except for the negligence claim, these causes of action merely allege the legal elements of various other causes of action, and some fail to even allege the basic legal elements.

Exactly four *facts* in its almost five score paragraphs are germane to AAA:

- At Paragraph 6, that AAA is a North Carolina Company,

- At 10, the collision occurred in Chester County,
- At 14, the date and time of the accident, and
- At 18, Gersten was insured for liability by AAA.

Rule 8(a) SCRPC states that a pleading setting forth a cause of action “shall contain . . . a short and plain statement of the facts showing the pleader is entitled to relief.” Rule 8(a), SCRPC. In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court’s analysis is limited solely to the Complaint itself, and no other documents may be considered. *See Woodell by Allen v. Marion School Dist. One*, 307 S.C. 297, 298, 414 S.E.2d 794, 794 (Ct. App. 1992). Moreover, a “trial court must dismiss a claim pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, if the pleadings, when taken in the light most favorable to the plaintiff, fail to allege sufficient facts to constitute a cause of action.” *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 552, 581 S.E.2d 858, 860 (Ct. App. 2003).

These facts do not constitute any cause of action against AAA. They do not specify any acts of negligence, nor describe the essential allegations of fraud, nor any false statement, nor any deceitful act, nor any conduct at all entitling the Plaintiffs to relief of any kind. The facts simply do not constitute a cause of action against AAA, so the Complaint against it must be **dismissed**.

B. Standing

The Plaintiffs argue they have asserted a cause of action against AAA. To the extent they seek to assert third-party claims against such a liability insurer, they lack standing to do so. *Kleckley v. Northwestern Nat. Cas. Co.*, 526 S.E.2d 218, 219 (S.C. 2000). In *Kleckley*, the Supreme Court held that third-party claimants have no standing to pursue a cause of action

against a liability insurer. Alternatively, even if the court were to have held that facts constituting a cause of action had been stated and that one or more of the Plaintiffs could continue its suit against the AAA, that suit would have been severed from the negligence claim. Allowing the two causes of action to go forward together would present a honey pot of potential prejudice and inefficiency which this court would avoid. **SCRCP, Rules 20 and 21.**

C. Daniel Hubbard's claims.

AAA moved to dismiss Daniel Hubbard's claims because South Carolina does not recognize a cause of action for loss of a sibling's *consortium*. The attorney for AAA exhibited to the court a letter mailing notice of this hearing to Hubbard with notice to him that it intended to move for a dismissal if he did not appear.

Daniel Hubbard did not appear for the hearing on the Motion to Dismiss. Therefore, his claims are **dismissed** for failure to prosecute pursuant to Rule 41(b), SCRCP.²

D. *Consortium* claims.

Only Plaintiff Gersten claims to be an insured of the AAA. Ayoub and Hubbard are total strangers to the AAA, the AAA was not involved in the accident, and the only complaint they make are for maternal or filial loss of *consortium*, respectively. Plaintiff Ayoub, the mother of Plaintiff Gersten, was not involved in the accident but the Complaint alleges that she "suffers, among other things, loss of consortium." Plaintiff Hubbard, Gersten's brother, alleges he "was unable to work for a period and, accordingly, loss (*sic*) wages... ." He was not involved in the accident.

² Even had Hubbard appeared at the hearing, his claim would fail for the reasons set out below.

Our Supreme Court has refused to recognize a cause of action for maternal or filial loss of *consortium*. South Carolina does recognize loss of spousal *consortium*, but that cause of action was expressly created: **SC Code Ann. 15-75-20**. The Supreme Court has held that the absence of a similar statutory cause of action for other loss of *consortia* is persuasive evidence that the General Assembly did not intend to recognize any such causes of action.

In *Taylor v. Medenica*, this Court held that the determination of which relationships may give rise to a loss of consortium claim in South Carolina is one best left to the discretion of the legislature. 479 S.E.2d 35, 47 (S.C. 1996) (declining to recognize a cause of action for loss of parental consortium). The United States District Court for the District of South Carolina adopted the *Taylor* analysis in finding that South Carolina law did not provide a cause of action for loss of consortium of a child or for filial consortium. *Kirkland v. Sam's East, Inc.*, 411 F.Supp. 2d 639, 641 (D.S.C. 2005). Today, we extend our *Taylor* analysis in holding that South Carolina law does not recognize claims for loss of filial consortium. Such rights did not exist under the common law, and the legislature has not provided such a right by statute.

Doe v. Greenville Cty. School District 651 S.E.2d 305, 308 (S.C. 2007)

The claims by Ayoub and Hubbard are hereby **dismissed**.

E. In Personam Jurisdiction

The Affidavit of Gail C. Louis, the Secretary of AAA, makes it clear that AAA does not have minimum contacts with South Carolina. Indeed, it has no contacts with South Carolina: no office, no business conducted, no insureds, no property, and no activity. Neither does the Complaint allege that AAA committed a tort within this state. Thus, the Complaint against AAA is **dismissed** because this court lacks personal jurisdiction.

F. Striking Allegations

In view of the other rulings made herein, this court need not reach, so it does not address the AAA motions made to strike various allegations. Such motions are thereby **moot**.

G. Change of Venue

Similarly this court need not reach, so it does not address, the AAA motion made to change the venue of the trial as it is also **moot**.

H. All Other Causes of Action asserted by Gersten

The existence of insurance is inadmissible in a tort suit. **Rule 411 SCRE**. Such mentions are highly prejudicial and there can be no doubt that reason and authority expressly forbid bringing into evidence or argument the fact that any defendant is protected by liability insurance. *Hartford v. Carolina Glass Co.*, 75 S.E.2d 533, 541 (S.C. 1912); *Landry v. Hilton Head Plantation Prop. Owners Ass'n, Inc.*, 452 S.E.2d 619, 622 (S.C. App. 1994); *Norris v. Ferre*, 432 S.E.2d 491, 493 (S.C. App. 1993) (“Furthermore, the Supreme Court has been meticulous in keeping the issue of insurance coverage away from the jury”). Since the existence of insurance is inadmissible, AAA must be stricken as a defendant and all allegations against it, to the extent there were any surviving, would have been stricken.

CONCLUSION

For the above-stated reasons, the Court finds AAA's Motions are granted in part and mooted in part. It is ORDERED, ADJUDGED, and DECREED that:

- 1) All causes of action asserted against AAA are dismissed pursuant to Rule 12(b)(6), SCRPC.
- 2) All causes of action asserted against AAA are dismissed for lack of personal jurisdiction by this court,
- 3) The causes of action asserted by Daniel Hubbard are dismissed pursuant to Rule 41(b), SCRPC for failure to prosecute.
- 4) Ivanka Ayoub's & Danial Hubbard's loss of consortium claims are dismissed pursuant to Rule 12(b)(6), SCRPC because South Carolina does not recognize a claim for filial or maternal loss of *consortium*.
- 5) All causes of action against AAA are dismissed because it would not be permissible to try them with the claims against the negligence Defendants.
- 6) AAA's Motions to Strike are denied as moot.
- 7) AAA's Motion to Change Venue is denied as moot.

It is so **ORDERED**.

John C. Hayes, III
Circuit Court Judge

, SC

, 2018



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al
Case Number: 2018CP1200117
Type: Order/Dismissal

So Ordered

s/John C. Hayes III 2049

Electronically signed on 2018-09-18 17:57:14 page 9 of 9

True and correct copy of original paper
On file in this office

John C. Hayes III
Clerk of Court
Chester County

8-5-2022



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHESTER

CIVIL ACTION NO: 2018-CP-12-00117

Heidi Gersten, Ivanka Ayoub, Daniel
Hubbard,

Plaintiff,

**ORDER GRANTING DEFENDANTS KEVIN
CARTER'S AND RICHARD DAVIS'
MOTION TO DISMISS**

vs.

Kevin Carter, Richard Davis, Joseph
Tribovich, Nationwide Insurance Company,
Interinsurance Exchange of the Automobile
Club, John Ammendola, Trustguard Insurance
Company, SC Department of Public Safety,
Chevrolet, GMC, Unknown John Does,

Defendants.

This matter comes before the Court upon Defendants Kevin Carter's and Richard Davis' Motion to Dismiss and Motion to Strike or, in the Alternative, Motion to Sever. The Court held a hearing on this Motion and a number of other motions on September 5, 2018. For the reasons set forth below, Defendants Carter's and Davis' Motion is granted in part and denied in part.

PROCEDURAL BACKGROUND

This action arises out of an automobile collision that took place on March 19, 2015 between a vehicle operated by Heidi Gersten and allegedly owned by Ivanka Ayoub and a vehicle operated and owned by Kevin Carter. Plaintiff Gersten originally filed a property damage arbitration claim on February 21, 2018 (hereinafter "Arbitration Action"). The claim named Kevin Carter, Richard Davis, Nationwide Mutual Insurance Company, Interinsurance of the Automobile Club, and Trustguard Insurance as defendants.

Gersten then created a “First Amended Claim for Property Damage Verified” (hereinafter “Amended Arbitration Complaint”) on or about March 2, 2018, however, she did not file the Amended Arbitration Complaint at that time. The Amended Arbitration Complaint added Gersten’s mother, Ivanka Ayoub, as a claimant and added Joseph Tirbovich and John Ammendola as additional defendants. Gersten and Ayoub never obtained an Amended Summons listing Ayoub as a claimant, and the Amended Arbitration Complaint was not filed until March 27, 2018.

On March 16, 2018, Gersten, Ayoub, and Daniel Hubbard filed the above-captioned case in Circuit Court purporting to seek recovery for injuries arising out of the same collision. In addition to the defendants named in the Amended Arbitration Complaint, the Plaintiffs named the South Carolina Department of Public Safety, Blackwell (*sic*), Chevrolet, GMC, and unknown John Doe defendants.

Kevin Carter, Richard Davis, and the other Defendants who have allegedly been served in the case filed motions to dismiss both cases.¹ Interinsurance Exchange sought to dismiss the Arbitration Action, in part, on the grounds that the arbitration panel lacked jurisdiction over some of the claims asserted in the Arbitration Action. On April 26, 2018, Judge Gibbons, acting as the Chief Administrative Judge for Chester County Circuit Court, entered an Order finding the claims asserted in the Arbitration Action were outside the scope of arbitration. Therefore, he transferred the Arbitration Action to the Common Pleas docket and consolidated the case with the Circuit Court action. (April 26, 2018 Form 4 Order). Because the cases have been consolidated, this Order will address the allegations set forth in the Circuit Court Complaint. However, the Court

¹ The Court has no record of Blackwell, GMC, Chevrolet or any John Doe defendants being served. Furthermore, John Ammendola and Joseph Tirbovich deny that they have been served.

has reviewed all three Complaints, and the Court's ruling would be the same regardless of which pleading(s) were in effect.

This case was set for a hearing on the various pending motions for September 5, 2018. The case was also placed on the non-jury roster for a merits hearing for the same week. Plaintiff Heidi Gersten filed a motion for continuance. At the hearing, the defendants all consented to continuing the merits hearing of the case, but they requested that the motions be heard. Gersten consented to the Court proceeding with hearing the various motions.

LAW

Carter and Davis' Motion to Dismiss seeks the following relief:

- a) Dismissal of all claims asserted against Richard Davis;
- b) Dismissal of Daniel Hubbard's claims;
- c) Dismissal of Ivanka Ayoub's claims; and
- d) Dismissal of all causes of action asserted by Heidi Gersten with the exception of the negligence cause of action.²

The Court will address each item in turn.

A. All Causes of Action as to Defendant Richard Davis.

The Complaint only references Richard Davis in one paragraph, stating "The Defendants Kevin Carter and Richard Davis reside in Iredell County, North Carolina." (Compl. ¶ 2). The Complaint does not allege Richard Davis was involved in the automobile collision. Pursuant to Rule 12(b)(6), SCRPC, a Complaint should be dismissed if it fails "to state facts sufficient to

² Carter and Davis also sought dismissal of the co-defendants. However, the co-defendants each moved on their own behalf for dismissal. Those motions were also heard at the September 5, 2018 hearing, and the Court will grant each of those motions in separate orders.

constitute a cause of action.” Rule 12(b)(6), SCRPC. The Complaint alleges no factual allegations against Defendant Richard Davis.³

Moreover, Richard Davis is a citizen and resident of the State of North Carolina. The Complaint does not allege any actions that Richard Davis took in this State. Therefore, this Court lacks personal jurisdiction over Richard Davis pursuant to Rule 12(b)(2), SCRPC. For both of these reasons, the claims against Richard Davis are dismissed.

B. Daniel Hubbard’s claims.

Kevin Carter and Richard Davis moved to dismiss Daniel Hubbard’s claims on the ground that South Carolina does not recognize a cause of action for loss of a sibling’s consortium. However, Daniel Hubbard did not appear for the hearing on the Motion to Dismiss. Therefore, his claims are dismissed for failure to prosecute pursuant to Rule 41(b), SCRPC.⁴

C. Ivanka Ayoub’s claims.

Plaintiff Ayoub appears to have asserted a property damage claim in the Amended Arbitration Complaint and a cause of action for loss of consortium in the Circuit Court Complaint. Ayoub is Gersten’s mother. The Circuit Court Complaint does not allege Ayoub was personally

³ The Arbitration Action Complaint alleges Davis co-owned the vehicle operated by Carter. Even if that were true, co-ownership of a vehicle does not support a cause of action. *See Fletcher v. Anderson*, 27 Kan. App. 2d 276, 3 P. 3d 558, 567-68 (2000) (because “no action for negligent entrustment can occur where the person entrusting the vehicle lacked a superior or exclusive right of control over the vehicle,” a nonowner is not liable for returning car to owner); *McGlothlin v. Municipality of Anchorage*, 991 P.2d 1273, 1280 (Alaska 1999) (“doctrine of negligent entrustment requires that the defendant have a greater right of possession or control of the chattel than the person to whom he entrusts it”); *De Blanc ex rel. De Blanc v. Jensen*, 59 S.W.3d 373 (Tex. Ct. App. 2001) (“In order for the [Defendant] to be liable under a theory of negligent entrustment, we would have to conclude that it is negligent for a nonowner to return control of a vehicle to its owner. We decline to so hold.”).

⁴ Even if Hubbard had appeared at the hearing, his claim would nonetheless fail for the reasons set out in Part C. below.

involved in the accident, but it does allege she “suffered, among other things, loss of consortium.” (Compl. ¶ 103).

Our Supreme Court has refused to recognize a cause of action in tort for filial loss of consortium. *See Doe v. Greenville County School Dist.*, 375 S.C. 63, 70, 651 S.E.2d 305, 308 (2007) (“Accordingly, in the absence of some action from the legislature, this Court has no authority upon which it could rely in finding that South Carolina law recognizes claims for loss of filial consortium.”).⁵ While South Carolina does recognize loss of spousal consortium, that cause of action was expressly recognized by the South Carolina General Assembly. *See* S.C. Code Ann. § 15-75-20. Our Supreme Court has held the absence of a similar statutory cause of action for filial loss of consortium indicates the General Assembly did not intend to recognize such causes of action. *See Greenville County School Dist.*, 375 S.C. at 69, 651 S.E.2d at 308.

Because South Carolina does not recognize claims for loss of filial consortium, the causes of action asserted by Ayoub in the Circuit Court Complaint must be dismissed.

Carter and Davis also seek to dismiss the property damage claim asserted by Ayoub in the Arbitration Action on Rule 12(b)(8) grounds. Because the Arbitration Action has been consolidated with the Circuit Court action, the Court finds that motion is now moot. At the hearing, Carter and Davis also raised the statute of limitations as an additional ground for dismissal of the property damage claim. The Court finds that a ruling on the statute of limitations issue is premature at this time, but Defendant Carter may file a separate motion on that issue in the future.

⁵ *See also Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996) (declining to recognize loss of filial consortium claim of child relating to injury to parent); *Kirkland v. Sam's East, Inc.*, 411 F. Supp. 2d 639, 641 (D.S.C. 2005) (“South Carolina does not recognize a cause of action for filial loss of consortium”).

D. All Other Causes of Action asserted by Gersten with the Exception of Negligence.

The Complaint lists eighteen separate causes of action. With the exception of the negligence claim, these causes of action merely allege the legal elements of various other causes of action, and several of these causes of action fail to even allege the basic legal elements. Rule 8(a) of the South Carolina Rules of Civil Procedure states that a pleading setting forth a cause of action “shall contain . . . a short and plain statement of the facts showing the pleader is entitled to relief.” Rule 8(a), SCRPC. In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court’s analysis is limited solely to the Complaint itself, and no other documents may be considered. *See Woodell by Allen v. Marion School Dist. One*, 307 S.C. 297, 298, 414 S.E.2d 794, 794 (Ct. App. 1992). Moreover, a “trial court must dismiss a claim pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, if the pleadings, when taken in the light most favorable to the plaintiff, fail to allege sufficient facts to constitute a cause of action.” *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 552, 581 S.E.2d 858, 860 (Ct. App. 2003).

Plaintiff must allege facts supporting each element of the causes of action asserted in the Complaint. She has failed to do so. Defendant Carter concedes the Complaint alleges sufficient facts to create a cause of action for negligence between Plaintiff Heidi Gersten and Defendant Kevin Carter. However, the Complaint alleges no facts that would support the other causes of action enumerated in the Complaint. Therefore, all causes of action with the exception of Gersten’s negligence claim will be dismissed pursuant to Rule 12(b)(6).

E. Carter and Davis’ other motions.

Carter and Davis also moved to dismiss the claims asserted against the various co-defendants or, in the alternative, to sever the causes asserted against those defendants. As noted above, the Court is granting the motions to dismiss the co-defendants via separate orders.

Therefore, Carter and Davis' motion to dismiss the co-defendants or, in the alternative, to sever is denied as moot.

In addition to moving to dismiss various claims asserted in the Complaint, Carter and Davis also moved to strike a number of paragraphs in the Complaints. Shortly before the hearing on the Defendants' various motions, Gersten apparently served an Amended Complaint on some of the defendants in the Circuit Court action. Counsel for Carter agreed at the hearing on this Motion that the Motion to Strike would need to be addressed after the Amended Complaint has been filed. Therefore, Carter's Motion to Strike is denied without prejudice and with leave to refile.

CONCLUSION

For the above-stated reasons, the Court finds Defendants Kevin Carter's and Richard Davis' Motions should be granted in part and denied in part. It is ORDERED, ADJUDGED, and DECREED that:

- 1) All causes of action asserted against Richard Davis are dismissed pursuant to Rule 12(b)(6), SCRPC.
- 2) The causes of action asserted by Daniel Hubbard are dismissed pursuant to Rule 41(b), SCRPC for failure to prosecute.
- 3) Ivanka Ayoub's loss of consortium claim is dismissed pursuant to Rule 12(b)(6), SCRPC because South Carolina does not recognize a claim for filial loss of consortium.
- 4) All of the remaining causes of action against Kevin Carter with the exception of Heidi Gersten's negligence cause of action for personal injuries and property damage and Ivanka Ayoub's negligence cause of action for property damage are dismissed pursuant to Rule 12(b)(6), SCRPC.
- 5) Carter's Motion to Dismiss the property damage claim by Ivanka Ayoub is denied, but Carter may file a separate motion based on his statute of limitations argument at a later time.
- 6) Carter's Motion to Sever is denied as moot.
- 7) Carter's Motion to Strike is denied without prejudice and with leave to refile in light of the recently-served Amended Complaint.

8) Carter's and Davis' Motion to Dismiss pursuant to 12(b)(8) is denied as moot.
It is so **ORDERED**.

John C. Hayes, III
Circuit Court Judge



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al
Case Number: 2018CP1200117
Type: Order/Other

So Ordered

s/John C. Hayes III 2049

Electronically signed on 2018-09-18 17:57:44 page 9 of 9

True and
Correct in
Signature
John C. Hayes III
Clerk of Court
Chester County
Date 8-5-2022

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF CHESTER)

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard,)

Civil Action No. 18-CP-12-117

Plaintiffs,)

ORDER

v.)

Kevin Carter, Richard Davis, Joseph Tirbovich, Nationwide Insurance Company, Interinsurance Exchange of the Automobile Club, John Ammendola, Trustguard Insurance Company, South Carolina Department of Public Safety, Blackwell, Chevrolet, GMC, Unknown John Does,)

Defendants.)

_____)

This matter came before the Court on a Motion to Dismiss filed by the South Carolina Department of Public Safety and Trooper Herbert Blackwell. Present at the hearing was Heidi Gersten and Ivanka Ayoub (mother of Ms. Gersten). Daniel Hubbard was not present at the hearing.

After hearing argument from the attorney for the Defendants South Carolina Department of Public Safety and Trooper Herbert Blackwell, and hearing the Plaintiffs' positions, the Court hereby grants South Carolina Department of Public Safety and Trooper Herbert Blackwell's Motion to Dismiss.

The Defendants South Carolina Department of Public Safety and Trooper Herbert Blackwell have moved to dismiss the Complaint on various grounds and between the time the Defendants South Carolina Department of Public Safety and Trooper Herbert Blackwell moved

to dismiss the Complaint, Plaintiffs' filed an Amended Complaint. In regard to these Defendants, South Carolina Department of Public Safety and Trooper Herbert Blackwell, the Amended Complaint was filed timely; however, as was explained by the attorney for Defendants South Carolina Department of Public Safety and Trooper Herbert Blackwell, the motion to dismiss is applicable not only to the original Complaint, but also the Amended Complaint. From a review of both the Complaint and Amended Complaint, it appears that the Plaintiffs are alleging that there were some irregularities in the investigation and preparation of the accident report surrounding the accident involving the Plaintiffs and Kevin Carter on March 19, 2015.

The Defendants South Carolina Department of Public Safety and Trooper Herbert Blackwell have moved to dismiss Trooper Blackwell from the Complaint pursuant to the South Carolina Tort Claims Act, §15-78-30.

The Court finds that Trooper Blackwell was acting as a South Carolina Department of Public Safety Officer in regard to his investigation of the accident involving the Plaintiffs and Kevin Carter. For this reason, Trooper Blackwell is dismissed from this case. See §15-78-30, of the Code of Laws of the State of South Carolina, 1976 as amended.

As to the remaining grounds raised by Defendants South Carolina Department of Public Safety and Trooper Herbert Blackwell, it is clear from allegations in the Complaints, that the Plaintiffs have alleged that the South Carolina Department of Public Safety through Trooper Blackwell issued a Traffic Accident Report which was later amended by the South Carolina Multi-Disciplinary Accident Reconstruction Team (MAIT).

From a review of the Complaint and Amended Complaint, Plaintiffs have failed to establish any private right of action against the Defendant South Carolina Department of Public Safety for "an improper investigation". Generally, there is no common law duty to act; however,

an affirmative legal duty may arise by statute, contractual relationship, status, property interest, or some other special circumstance. *See, Rayfield v. South Carolina Dep't of Corrections*, 297 S.C. 95, 105-06, 374 S.E.2d 910, 916 (Ct. App. 1998); *see also, Jensen v. Anderson Cnty. Dep't of Soc. Servs.*, 304 S.C. 195, 199 403 S.E.2d 615, 617 (1991). While a duty may arise by virtue of statutory law, courts in South Carolina recognize what is known as the "public duty" rule. *Rayfield*, 297 S.C. 95, 104, 374 S.E.2d 910, 915; *see also, Parker v. Brown*, 195 S.C. 35, 10 S.E.2d 625 (1940) (Supreme Court adopting the public duty rule as the law in South Carolina). A statute establishing the specific "duties of a public office does not, without more, impose on the person holding that office a duty of care towards individual members of the public in the performance of those duties." *Rayfield*, 297 S.C. 95, 105, 374 S.E.2d at 915-16; *see also, Jensen v. Anderson Cnty. Dep't of Soc. Servs.*, 304 S.C. 195, 403 S.E.2d 615 (1991) (Under the rule, public officials are not liable to individuals in negligence as a result of discharging duties as owed to the public at large rather than to anyone individually). In this case the Department, through its officers, are required to investigate and report on motor vehicle accidents involving serious injuries. See, South Carolina Code Ann. §56-5-1270, 1976 as amended. For this reason any duty imposed on these Defendants would be a public duty and not give rise to a private right of action.

Further any injuries received by the Plaintiffs arose out of the automobile accident and are not the proximate cause of any action undertaken by the South Carolina Department of Public Safety in the investigation of the accident and the issuance of the Uniform Traffic Report in this matter.

Finally, any claims that the Uniform Traffic Report could or would be evidence in this case fails to recognize that under §56-5-1290, accident reports are not evidence to establish due or lack of due care.

For these reasons, the Complaints (original and amended) failed to set forth a viable private right of action against Defendant South Carolina Department of Public Safety and therefore the Complaints are dismissed with prejudice.

IT IS THEREFORE ORDERED, that the action brought by the Plaintiffs is dismissed with prejudice.

IT IS FURTHER ORDERED, that the action brought by Michael Hubbard is dismissed as a result of the Plaintiff failing to appear at the hearing and therefore failed to prosecute the claim.

AND IT IS SO ORDERED.

The Honorable J.C. Hayes

SEPTEMBER __, 2018

CHESTER, SOUTH CAROLINA



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al

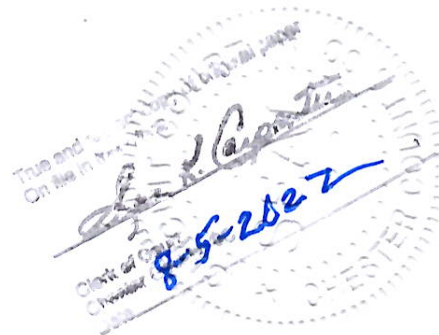
Case Number: 2018CP1200117

Type: Order/Dismissal

So Ordered

s/John C. Hayes III 2049

Electronically signed on 2018-09-21 14:22:40 page 5 of 5



STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF CHESTER

CIVIL ACTION NO: 2018-CP-12-00117

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard,

Plaintiff,

**ORDER GRANTING DEFENDANTS
NATIONWIDE INSURANCE COMPANY'S
AND JOSEPH TURBOVICH'S MOTION TO
DISMISS**

vs.

Kevin Carter, Richard Davis, Joseph Tribovich, Nationwide Insurance Company, Interinsurance Exchange of the Automobile Club, John Ammendola, Trustguard Insurance Company, SC Department of Public Safety, Chevrolet, GMC, Unknown John Does,

Defendants.

This matter comes before the Court upon Defendants Nationwide Mutual Insurance Company's ("Nationwide") and Joseph Tirbovich's ("Tirbovich") Motions to Dismiss. The Court held a hearing on these Motions and a number of other motions on September 5, 2018. For the reasons set forth below, Defendants Nationwide Mutual Insurance Company and Joseph Tirbovich's Motions are granted.

PROCEDURAL BACKGROUND

This action arises out of an automobile collision that took place on March 19, 2015 between a vehicle operated by Heidi Gersten and allegedly owned by Ivanka Ayoub and a vehicle operated and owned by Kevin Carter. Plaintiff Gersten originally filed a property damage arbitration claim on February 21, 2018 (hereinafter "Arbitration Action"). The claim

named Kevin Carter, Richard Davis, Nationwide Mutual Insurance Company, Interinsurance of the Automobile Club, and Trustguard Insurance as defendants.

Gersten then created a “First Amended Claim for Property Damage Verified” (hereinafter “Amended Arbitration Complaint”) on or about March 2, 2018, however, she did not file the Amended Arbitration Complaint at that time. The Amended Arbitration Complaint added Gersten’s mother, Ivanka Ayoub, as a claimant and added Joseph Tirbovich and John Ammendola as additional defendants. Gersten and Ayoub never obtained an Amended Summons listing Ayoub as a claimant, and the Amended Arbitration Complaint was not filed until March 27, 2018.

On March 16, 2018, Gersten, Ayoub, and Daniel Hubbard filed the above-captioned case in Circuit Court purporting to seek recovery for injuries arising out of the same collision. In addition to the defendants named in the Amended Arbitration Complaint, the Plaintiffs named the South Carolina Department of Public Safety, Blackwell (*sic*), Chevrolet, GMC, and unknown John Doe defendants.

Kevin Carter, Richard Davis, and the other Defendants who have allegedly been served in the case filed motions to dismiss both cases.¹ Interinsurance Exchange sought to dismiss the Arbitration Action, in part, on the grounds that the arbitration panel lacked jurisdiction over some of the claims asserted in the Arbitration Action. On April 26, 2018, Judge Gibbons, acting as the Chief Administrative Judge for Chester County Circuit Court, entered an Order finding the claims asserted in the Arbitration Action were outside the scope of arbitration. Therefore, he transferred the Arbitration Action to the Common Pleas docket and consolidated the case with the Circuit Court action. (April 26, 2018 Form 4 Order). Because the cases have been

¹ The Court has no record of Blackwell, GMC, Chevrolet or any John Doe defendants being served. Furthermore, John Ammendola and Joseph Tirbovich deny that they have been served.

consolidated, this Order will address the allegations set forth in the Circuit Court Complaint. However, the Court has reviewed all three Complaints, and the Court's ruling would be the same regardless of which pleading(s) were in effect.

This case was set for a hearing on the various pending motions for September 5, 2018. The case was also placed on the non-jury roster for a merits hearing for the same week. Plaintiff Heidi Gersten filed a motion for continuance. At the hearing, the defendants all consented to continuing the merits hearing of the case, but they requested that the motions be heard. Gersten consented to the Court proceeding with hearing the various motions.

LAW

Nationwide's and Tirbovich's Motion to Dismiss seeks dismissal of all claims asserted against Nationwide and Tirbovich on the following grounds:

- a) Dismissal of all causes of action for failure to state facts sufficient to constitute a cause of action;
- b) Dismissal of all causes of action due to lack of standing;
- c) Dismissal of Daniel Hubbard's claims;
- d) Dismissal of Ivanka Ayoub's claims;
- e) Dismissal of all claims against Joseph Tirbovich for failure to properly serve the Summons and Complaint;

The Court will address each of these grounds in turn.

A. All Causes of Action as to Defendants Nationwide and Tirbovich.

The Complaint only references Joseph Tirbovich in the caption and is not mentioned anywhere else in the Complaint. Nationwide is only mentioned in one paragraph, stating "The Defendant Nationwide Mutual Insurance Company is a company maintaining and operating and

doing business in the State of North Carolina.” (Compl. ¶ 5). Pursuant to Rule 12(b)(6), SCRPC, a Complaint should be dismissed if it fails “to state facts sufficient to constitute a cause of action.” Rule 12(b)(6), SCRPC. The Complaint alleges no factual allegations against Defendants Nationwide and Tirbovich.

B. Dismissal Due to Lack of Standing

The Plaintiffs argue they have asserted a cause of action against Nationwide and Tirbovich. To the extent they seek to assert third-party claims against such a liability insurer, they lack standing to do so. *Kleckley v. Northwestern Nat. Cas. Co.*, 526 S.E.2d 218, 219 (S.C. 2000). In *Kleckley*, the Supreme Court held that third-party claimants have no standing to pursue a cause of action against a liability insurer. Thus, Plaintiffs do not have standing to assert any claims against Nationwide or its adjuster, Tirbovich in either the Civil Action Complaint or the Arbitration Action.

C. Daniel Hubbard’s claims.

Nationwide and Tirbovich moved to dismiss Daniel Hubbard’s claims on the ground that South Carolina does not recognize a cause of action for loss of a sibling’s consortium. However, Daniel Hubbard did not appear for the hearing on the Motions to Dismiss. Therefore, his claims are dismissed for failure to prosecute pursuant to Rule 41(b), SCRPC.²

D. Ivanka Ayoub’s claims.

Plaintiff Ayoub appears to have asserted a property damage claim in the Amended Arbitration Complaint and a cause of action for loss of consortium in the Circuit Court Complaint. Ayoub is Gersten’s mother. The Circuit Court Complaint does not allege Ayoub

² Even if Hubbard had appeared at the hearing, his claim would nonetheless fail for the reasons set out in Part D.

was personally involved in the accident, but it does allege she “suffered, among other things, loss of consortium.” (Compl. ¶ 103).

Our Supreme Court has refused to recognize a cause of action in tort for filial loss of consortium. *See Doe v. Greenville County School Dist.*, 375 S.C. 63, 70, 651 S.E.2d 305, 308 (2007) (“Accordingly, in the absence of some action from the legislature, this Court has no authority upon which it could rely in finding that South Carolina law recognizes claims for loss of filial consortium.”).³ While South Carolina does recognize loss of spousal consortium, that cause of action was expressly recognized by the South Carolina General Assembly. *See* S.C. Code Ann. § 15-75-20. Our Supreme Court has held the absence of a similar statutory cause of action for filial loss of consortium indicates the General Assembly did not intend to recognize such causes of action. *See Greenville County School Dist.*, 375 S.C. at 69, 651 S.E.2d at 308.

Because South Carolina does not recognize claims for loss of filial consortium, the causes of action asserted by Ayoub in the Circuit Court Complaint must be dismissed.

E. All Other Causes of Action asserted by Plaintiffs

The Complaint lists eighteen separate causes of action. As it relates to Nationwide and Tirbovich, these causes of action merely allege the legal elements of various other causes of action, and several of these causes of action fail to even allege the basic legal elements. Rule 8(a) of the South Carolina Rules of Civil Procedure states that a pleading setting forth a cause of action “shall contain . . . a short and plain statement of the facts showing the pleader is entitled to relief.” Rule 8(a), SCRPC. In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court’s analysis is limited solely to the Complaint itself, and no other documents may be

³ *See also Taylor v. Medenica*, 324 S.C. 200, 479 S.E.2d 35 (1996) (declining to recognize loss of filial consortium claim of child relating to injury to parent); *Kirkland v. Sam’s East, Inc.*, 411 F. Supp. 2d 639, 641 (D.S.C. 2005) (“South Carolina does not recognize a cause of action for filial loss of consortium”).

considered. See *Woodell by Allen v. Marion School Dist. One*, 307 S.C. 297, 298, 414 S.E.2d 794, 794 (Ct. App. 1992). Moreover, a “trial court must dismiss a claim pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, if the pleadings, when taken in the light most favorable to the plaintiff, fail to allege sufficient facts to constitute a cause of action.” *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 552, 581 S.E.2d 858, 860 (Ct. App. 2003).

Plaintiff must allege facts supporting each element of the causes of action asserted in the Complaint. She has failed to do so. Therefore, all causes of action against Nationwide and Tirbovich will be dismissed pursuant to Rule 12(b)(6).

CONCLUSION

For the above-stated reasons, the Court finds Defendants Nationwide Mutual Insurance Company’s and Joseph Tirbovich’s Motions should be granted. It is ORDERED, ADJUDGED, and DECREED that:

- 1) All causes of action asserted against Nationwide and Tirbovich are dismissed pursuant to Rule 12(b)(6), SCRPC.
- 2) All causes of action asserted against Nationwide and Tirbovich are dismissed for lack of standing;
- 3) The causes of action asserted by Daniel Hubbard are dismissed pursuant to Rule 41(b), SCRPC for failure to prosecute.
- 4) Ivanka Ayoub’s loss of consortium claim is dismissed pursuant to Rule 12(b)(6), SCRPC because South Carolina does not recognize a claim for filial loss of consortium.
- 5) All causes of action against Tirbovich are dismissed pursuant to Rule 12(b)(5) for Plaintiffs’ failure to serve him with the Summons and Complaint in either the Arbitration Action or the Civil Action.

It is so **ORDERED**.

John C. Hayes, III
Circuit Court Judge



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al
Case Number: 2018CP1200117
Type: Order/Dismissal

So Ordered

s/John C. Hayes III 2049

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John C. Hayes III
8-5-2022
Seal of the Chester Common Pleas Court

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHESTER)
)
 Heidi Gersten and Ivanka Ayoub,)
)
 Plaintiffs,)
)
 vs.)
)
 Kevin Carter; Richard Davis; Joseph)
 Tirbovich, Nationwide Mutual Insurance)
 Company; Interinsurance Exchange of the)
 Automobile Club; John Ammendola;)
 Trustgard Insurance Company, *et al.*)
)
 Defendants.)
)

IN THE COURT OF COMMON PLEAS
 Case No. 2018-CP-12-000074
 and
 Case No. 2018-CP-12-000117

**ORDER ON
 MOTION TO DISMISS**

These matters come before the Court pursuant to Defendants' Trustgard Insurance Company ("Trustgard") and John Ammendola's Motions to Dismiss, and Trustgard's Motion to Quash Discovery. The Court held a hearing on these and other Defendants' motions on September 5, 2018. Trustgard and John Ammendola appeared by and through their attorneys. Plaintiffs Gersten and Ayoub appeared *pro se*. Plaintiff Hubbard did not appear. For the reasons set forth below, the Motions to dismiss of Trustgard and John Ammendola are granted. Trustgard's Motion to Quash is dismissed, without prejudice, as moot.

I. STATEMENT OF THE CASE

These two actions arise out of an automobile collision that took place on March 19, 2015. Plaintiff Heidi Gersten, was driving on I-77 in Chester County when she was involved in a motor vehicle accident with Kevin Carter. Carter was operating a vehicle insured by Nationwide Insurance. Gersten was driving a van owned by her mother, Plaintiff Ivanka Ayoub, which was insured by Trustgard.

Gersten filed a property damage arbitration claim on February 21, 2018, Case No. 2018-CP-12-000074, (hereinafter "Arbitration Action"). The claim also named as defendants Kevin Carter, Richard Davis, Nationwide Mutual Insurance Company, Interinsurance of the Automobile Club, and Trustgard.

Gersten later prepared a "First Amended Claim for Property Damage Verified" (hereinafter "Amended Arbitration Complaint") dated March 2, 2018. The Amended Arbitration Complaint added Gersten's mother, Ayoub, as a claimant, and added Joseph Tirbovich and John Ammendola as additional defendants. Gersten and Ayoub never obtained an Amended Summons listing Ayoub as a claimant. The Amended Arbitration Complaint was filed March 27, 2018.

On March 16, 2018, Gersten, Ayoub, and Daniel Hubbard filed a civil lawsuit, 2018-CP-12-000117, ("Circuit Court Action") in this court, seeking, *inter alia*, recovery for injuries arising out of the collision. In addition to the Defendants named in the Amended Arbitration Complaint, the Plaintiffs named the South Carolina Department of Public Safety, Blackwell (sic), Chevrolet, GMC, and unknown John Doe defendants.

On April 26, 2018, Judge Gibbons, acting as the Chief Administrative Judge, for Chester County Circuit Court, entered an Order finding the claims asserted in the Arbitration Action were outside the scope of arbitration. He transferred the Arbitration Action to the Common Pleas docket and consolidated the case with the Circuit Court action. (April 26, 2018, Form 4 Order). Gersten and Ayoub filed a Motion to Alter or Amend that order.

Just before the hearing on the motions under consideration, Plaintiff served, via mail, an Amended Complaint dated August 29, 2018

The Court has reviewed the original Arbitration Action, the Amended Arbitration Action, the Complaint in the Circuit Court Action, and the Amended Complaint the Circuit Court Action;

the ruling is the same regardless of whether the cases have been consolidated or not, and regardless of which Complaint in the Circuit Court Action is operable.

This case was set for a hearing on the various pending motions for September 5, 2018. The case was placed on the non-jury roster for a merits hearing for the same week. Plaintiff Gersten filed a motion for continuance. At the hearing, the defendants all consented to continuing the merits hearing of the case, but they requested that the motions be heard. Gersten consented to the Court proceeding with hearing the various motions.

II. STANDARD OF REVIEW AND DISCUSSION

A. SCRPC 12(b)(6) Failure to State Facts Sufficient to Constitute a cause of Action as to both Trustgard and John Ammendola

SCRPC 12(b)(6) allows a party to move to dismiss an action for “failure to state a claim upon which relief can be granted.” A decision on a 12(b)(6) motion “must be bottomed and premised solely upon the allegations set forth by the plaintiff.” Williams v. Condon, 347 S.C. 227, 233 (Ct. App. 2001). “The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief.” Id. “If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper.” Doe v. Marion, 373 S.C. 390 (2007). See Skywaves I Corp. v. Branch Banking & Tr. Co., 814 S.E.2d 643, 656 (S.C. Ct. App. 2018), reh'g denied (June 21, 2018). “[A] mere conclusory allegation, unsupported by any particularized allegations of fact, is insufficient” to withstand a 12(b)(6) motion to dismiss. Jones v. Gilstrap, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986)).

1. The Circuit Court Action

The only reference to Trustgard in the original Complaint in the Circuit Court Action is that it is “a company maintaining and operating and doing business in the State of North Carolina”

and that it insured Gersten and Ayoub. See Complaint at ¶ 7, 17, 19. The Complaint includes causes of action for Negligence against Kevin Carter, and against all Defendants for Fraud, Fraudulent Inducement, Intentional Inflection of Emotional Distress, Loss of Consortium, Product Liability, Breach of Contract, Invasion of Privacy, Strict Liability, Conspiracy, Misrepresentation, Deceit, Duress and Undue Influence, Slander, Libel, Defamation, Malicious Prosecution, and prayers for damages, all asserted against all defendants. However, there are no facts alleged which support any of the causes of action. The Compliant merely pleads some of the legal elements of the causes of action. The Court notes that Trustgard states that it is based on Ohio and that Gersten was not personally insured with Trustgard (only the vehicle she was driving), but regardless of the validity of these statements, absent any further allegations Plaintiffs have not alleged facts under which they would be entitled to relief under any legal theory.

John Ammendola's name does not appear anywhere in the body of the original Complaint in the Circuit Court Action, although he is listed in the caption. With no allegations made against Mr. Ammendola whatsoever, this action is factually insufficient on its face without the necessity of any further analysis. Potter v. Clark, 497 F.2d 1206, 1207 (7th Cir.1974) (per curiam)(dismissing complaint that was silent as to defendant except for his name appearing in caption).

This Court notes that a short time prior to the hearing in which the Motions to Dismiss were heard, Plaintiffs served an Amended Complaint in the Common Pleas Action. The Amended Complaint also includes causes of action for Negligence against Kevin Carter, and against all Defendants for Fraud, Fraudulent Inducement, Intentional Inflection of Emotional Distress, Negligent Inflection of Emotional Distress, Loss of Consortium, Product Liability, Breach of Contract, Invasion of Privacy, Strict Liability, Conspiracy, Misrepresentation, Deceit, Duress and

Undue Influence, Slander, Libel, Defamation, Malicious Prosecution, and prayers for damages, all asserted against all defendants. This Amended Complaint does not allege any material additional facts as to Trustgard or John Ammendola. The Amended Complaint alleges that both Ayoub and Gersten were insured with Trustgard. (¶. 46, 48.) Paragraph 65 alleges that Trustgard and John Ammendola (and other defendants) are all, "...in breach of contract, among other things." There is no allegation as to the terms of the contract, or how it was breached. Paragraph 71 alleges Trustgard, among other defendants, "...made a representation of false statements of material fact." There is no allegation of any representation made by Trustgard or John Ammendola. Paragraph 98 alleges Ayoub and Gersten had a contract with Trustgard, without any other detail. Paragraph 99 alleges the "Defendants breached their duty." Otherwise, the Amended Complaint merely attempts to set forth legal requirements of causes of action. It does not include any facts supporting any cause of action as to Trustgard or John Ammendola. Accordingly, the Circuit Court Action is dismissed as to Trustgard and John Ammendola pursuant to Rule 12(b)(6), SCRPC.

2. The Arbitration Action

In the Arbitration Action, the only references to John Ammendola are conclusory allegations that he violated the law without any specific facts to support such a violation. See First Amended Claim ¶ 168, 173, 174, 183, 188, 193, 198 (alleging Ammendola is in violation of S.C. Code Section 38-59-20); ¶ 203 and 208 (seeking damages for Ammendola's violation of S.C. Code Section 38-59-20). Without any specific facts that would support the violations, these legal conclusions are simply insufficient to withstand a Motion to Dismiss. Moreover, there is no private cause of action under S.C. Code Section 38-59-20.

Beyond these conclusory allegations and the undisputed fact that Trustgard issued an insurance policy involved in the accident, the only specific allegations in the Arbitration Claim

against Trustgard relate to certain communications between representatives of Trustgard and Gersten about a claims or claims regarding the accident. First Amended Claim at ¶ 229, 230, 232, 233. These allegations reference a payment from Trustgard to Gersten for Medpay and an offer of payment for a property damage claim. Setting aside that Trustgard has objected to Plaintiffs' characterization of these exchanges, and assuming they are true for the purpose of this Motion, Plaintiffs make no specific allegations made as to how Trustgard's handling of any claim regarding this accident violates either a statute or the term of any insurance policy. Neither these allegations nor any other allegations in the Arbitration Claim against Trustgard support Plaintiffs' claim for legal relief under any theory.

The same or similar unsupported conclusory allegations are made against Trustgard in the Amended Arbitration Claim. See First Amended Claim ¶ 215 (alleging Trustgard breached a contractual duty, was negligent, and acted in bad faith); ¶ 167, 172, 177, 182, 187, 192, 197 (alleging Trustgard is in violation of S.C. Code Section 38-59-20); ¶ 202 and 207 (seeking damages for Trustgard's violation of S.C. Code Section 38-59-20).¹

Further, the legal basis for the arbitration claim, S. C. Code § 38-77-710, provides solely for the arbitration of "property damage liability claims arising out of motor vehicle collisions...." It is not a mechanism for bringing any other type of claim.

Finally, S. C. Code § 38-59-20 does not create a private cause of action. Gaskins v. Southern Farm Bureau Cas. Ins. Co., 343 S.C. 666, 541 S.E.2d 269 (Ct.App.2000). Therefore,

¹ A number of allegations in both the Common Pleas Action and the Arbitration Claim broadly assert legal violations against all "Defendants," sometimes with formulaic recitations of the elements of causes of action. These allegations which do not distinguish in any way between the various Defendants in these actions are not creditable because they are both "conclusory" and "unsupported by any particularized allegations of fact." Skywaves I Corp. 814 S.E.2d at 656.

even if the conclusory allegation that Trustgard or John Ammendola were "...in violation of the South Carolina Code of Laws, Title 38, CHAPTER 59, ARTICLE 1, SECTION 38-59-20 Improper claim practices." stated facts which were otherwise sufficient constitute a cause of action (it does not), there is no private cause of action for violation of that code section. It provides only for an administrative remedy before the Department of Insurance.

B. SCRCP 12(b)(2) Lack of Jurisdiction over John Ammendola

SCRCP 12(b)(6) allows a party to move to dismiss an action for "lack of jurisdiction over the person." The burden of showing personal jurisdiction is on Plaintiffs. "At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a prima facie showing of jurisdiction." Coggeshall v. Reprod. Endocrine Assocs. of Charlotte, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007)(internal citation omitted)). To determine the propriety of personal jurisdiction over a nonresident defendant, the relevant analysis is whether "there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." Cockrell v. Hillerich & Bradsby Co., 363 S.C. 485, 491, 611 S.E.2d 505, 508 (2005). Plaintiffs have not pled any facts as to Mr. Ammendola. They have not referred to his state of residency, the identity of his employer, or any other fact, and they have failed to make this prima facie showing by demonstrating the "minimum contacts" necessary for this court to have jurisdiction over him. To the extent it is argued that any minimum contacts that exist as to Trustgard be imputed to Mr. Ammendola, this argument fails because "the focus must center on the contacts generated by [Mr. Ammendola], and not on the unilateral actions of some other entity." *Id.* at 492. As there are no allegations as to "minimum contacts" or that Mr. Ammendola took any action with respect to the accident or resulting claims, there is not even a starting point for a court to analyze the fundamental fairness of making him defend this lawsuit in

South Carolina. Plaintiffs have failed to meet their burden as to personal jurisdiction of Mr. Ammendola and the case against him must be dismissed pursuant to SCRPC 12(b)(2).

C. 12(b)(5) Insufficiency of Service of Process as to John Ammendola

Because John Ammendola was never served in either the Arbitration Action or the Circuit Court Action, dismissal is appropriate under SCRPC 12(b)(5). See Brown v. Evatt, 322 S.C. 189, 194, 470 S.E.2d 848, 850 (1996) (“A summons is not a mere notice, but a means for giving jurisdiction to the court, and unless it is waived, the court cannot otherwise obtain personal jurisdiction.”)(internal citation omitted). Service of the summons within the parameters of the rules of procedure is more than a mere formality, as without it a court has no power to render a personal judgment against a defendant. Louden v. Moragne, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (Ct. App. 1997).

D. Dismissal of Loss Of Consortium Claims

Plaintiff Ayoub, the mother of Plaintiff Gersten, was not involved in the accident but the Complaint alleges that she “suffers, among other things, loss of consortium.” Plaintiff Hubbard, Gersten’s brother, alleges he “was unable to work for a period and, accordingly, loss (sic) wages...” He was not involved in the accident. Our Supreme Court has refused to recognize a cause of action for maternal or filial loss of consortium. South Carolina does recognize loss of spousal consortium, but that cause of action was expressly created: SC Code Ann. 15-75-20. The Supreme Court has held that the absence of a similar statutory cause of action for other loss of consortia is persuasive evidence that the General Assembly did not intend to recognize any such causes of action:

In Taylor v. Medenica, this Court held that the determination of which relationships may give rise to a loss of consortium claim in South Carolina is one best left to the discretion of the legislature. 479 S.E.2d 35, 47 (S.C. 1996) (declining to recognize a cause of action for loss of parental consortium). The United States District Court

for the District of South Carolina adopted the *Taylor* analysis in finding that South Carolina law did not provide a cause of action for loss of consortium of a child or for filial consortium. *Kirkland v. Sam's East, Inc.*, 411 F.Supp. 2d 639, 641 (D.S.C. 2005). Today, we extend our *Taylor* analysis in holding that South Carolina law does not recognize claims for loss of filial consortium. Such rights did not exist under the common law, and the legislature has not provided such a right by statute.

Doe v. Greenville Cty. School District 651 S.E.2d 305, 308 (S.C. 2007).

Moreover, Daniel Hubbard did not appear at the hearing. Ivanka Ayoub appeared at the hearing, but did not offer any argument. The claims by Ayoub and Hubbard are therefore dismissed.

ORDER

For all of the above-stated reasons, this Court hereby GRANTS Trustgard Insurance Company and John Ammendola's Motion to Dismiss the Complaints and Amended Complaints in both 2018-CP-12-000074 and 2018-CP-12-000117, with prejudice. Because the Motion to Dismiss is granted as to Trustgard, its pending Motion to Quash is hereby dismissed without prejudice as moot.

AND IT IS SO ORDERED!

John C. Hayes, III
Circuit Court Judge



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al
Case Number: 2018CP1200117
Type: Order/Dismissal

So Ordered

s/John C. Hayes III 2049

Electronically signed on 2018-09-21 16:29:13 page 10 of 10

True and correct copy of original paper
On file in this court
Kevin K. Carter
8-5-2022
CHESTER COMMON PLEAS

STATE OF SOUTH CAROLINA
COUNTY OF CHESTER

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2018-CP-12-00117

Heidi Gersten, Ivanka Ayoub, Daniel Hubbard,

Plaintiffs,

v.

Kevin Carter, Richard Davis, Joseph
Tribovich, Nationwide Insurance Company,
Interinsurance Exchange of the Automobile
Club, John Ammendola, Trustguard Insurance
Company, SC Department of Public Safety,
Chevrolet, GMC, Unknown John Does,

Defendants.

**ORDER FOR PROTECTION FROM
COURT APPEARANCE**

This matter comes before the Court on Motion of Wesley B. Sawyer for an Order of Protection from April 11, 2022 through and including April 18, 2022.

Based on the fact that Mr. Sawyer will be out of town on vacation with his family, he will not be available for Court. The Court finds that the request contained herein is reasonable.

IT IS THEREFORE ORDERED that Wesley B. Sawyer be protected from appearing on the dates listed below:

Wesley B. Sawyer, SC Bar #100229: April 11, 2022 – April 18, 2022.

AND IT IS SO ORDERED

MURPHY & GRANTLAND, P.A.

S/Wesley B. Sawyer

Wesley B. Sawyer, Esquire

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Columbia, South Carolina 29260

(803) 782-4100

Attorneys for the Defendant Kevin Carter

Columbia, South Carolina
March 4, 2022



Chester Common Pleas

Case Caption: Heidi Gersten , plaintiff, et al VS Kevin Carter , defendant, et al

Case Number: 2018CP1200117

Type: Order/Protection from Court Appearance

So Ordered

s/Brian M. Gibbons #2168 Circuit Judge