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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Opinion No. 2023-UP-070 (S.C. Ct. App. filed Feb. 22, 2023)
Appellate Case No. 2019-001501

James John Todd Kincannon,

Petitioner,

v.

Ashely Suzanne Griffith, Moore Taylor Law Firm, P.A., Vance Stricklin, and Amber Fulmer,

Respondents.

PETITION FOR ISSUANCE OF WRIT OF CERTIORARI TO THE COURT OF APPEALS

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PETITION FOR ISSUANCE OF WRIT OF CERTIORARI TO THE COURT OF APPEALS

INTRODUCTION

Petitioner James John Todd Kincannon respectfully petitions this Honorable Court to issue a writ of certiorari to the South Carolina Court of Appeals in the case captioned Kincannon v. Griffith, Appellate Case No. 2019-001501, for the purpose of correcting an error by the Court of Appeals in issuing a decision that directly conflicts with this Court's decisions in: (1) Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967), the seminal case on the abuse of process tort in South Carolina jurisprudence; (2) Broadmoor Apts. of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991), which establishes that an abuse of process action may be maintained against any person who advises, consents to, aids, abets, or ratifies an abuse of process; and (3) Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983), which establishes that efforts by an alleged crime victim to obtain restitution in exchange for the termination of a criminal prosecution are not abuse of process but does *not* immunize efforts by a crime victim to obtain money or property that is *not* restitution in exchange for the termination of a criminal prosecution.

Petitioner accordingly contends that this Court, in an exercise of sound judicial discretion, should issue the requested writ of certiorari pursuant to Rule 242(b)(3), SCRCP, because the Court of Appeals has issued a decision that is plainly in conflict with prior decisions of this Court concerning the tort of abuse of process.

STATEMENT OF THE CASE

Facts

On April 6, 2015, Appellant was charged with criminal domestic violence and Respondent Griffith ("Respondent") was the alleged victim. (J.A. 17.) Approximately a year later, while the criminal charge was still pending, an unrelated civil dispute developed between Appellant and Respondent Griffith as to the ownership of a dog. (J.A. 18.) The dog dispute had absolutely no connection whatsoever to the criminal domestic violence matter. Id.

The prosecutor ultimately determined that the criminal domestic violence charge against Appellant should be dropped. Id. When the prosecutor notified Respondent of her intention to drop the charge, Respondent asked the prosecutor to demand that Appellant surrender the dog to Respondent as a condition of the charge being dropped. Id. The prosecutor agreed to Respondent's request and advised Appellant that she would drop the criminal domestic violence charge against Appellant but only if Appellant agreed to surrender the dog to Respondent. Appellant refused to surrender the dog, whereupon the State refused to drop the criminal domestic violence charge and proceeded with the prosecution against Appellant. (J.A. 18-19.)

Procedural History

On February 23, 2019, Appellant filed a civil complaint alleging a cause of action for abuse of process against Respondent[1] based on the foregoing facts.

1 Appellant also included additional causes of action and additional defendants in the original Complaint. Appellant has elected to abandon all claims against defendant-respondents other than

(J.A. 16-34). In response to the complaint, Respondent filed a Rule 12(b)(6) motion and memorandum arguing that Appellant's abuse of process claim failed to state facts sufficient to constitute a cause of action for abuse of process. (J.A. 56.) Appellant argued that the abuse of process claim in the original complaint was factually sufficient but also asked the circuit court to grant Appellant a single opportunity to file an amended complaint if the circuit court was unsatisfied with the original complaint, as Appellant contended that any alleged pleading defects could be easily cured given the actual facts of the controversy and sought leave to submit an amended complaint in the event the circuit court dismissed the original complaint. See Transcript p. 14 ll. 11-18 (J.A. 50.).

The circuit court issued an order dismissing the abuse of process claim pursuant to Rule 12(b)(6) *with prejudice* and refused to grant Appellant leave amend the complaint. (J.A. 3.) Appellant preserved these issues for appeal by timely filing a motion for reconsideration (J.A. 120.) which the circuit court denied. (J.A. 13.) Appellant timely appealed and properly raised the amendment issue which is the subject of this Petition for Rehearing. See Appellant's Notice of Appeal and Appellant's Brief, Section III, at p. 19. This Court issued a ruling against Appellant on February 22, 2023, holding that the circuit court committe no error in dismissing Appellant's abuse of process cause of action pursuant to Rule 12(b)(6) with prejudice and denying Appellant the opportunity to submit an amended complaint because such amendment would be futile.

Respondent Griffith and has also elected to abandon all claims against Respondent Griffith except the abuse of process claim.

ISSUES FOR REHEARING

I. Did the Court err by concluding that the circuit court properly dismissed Appellant's Complaint with prejudice pursuant to Rule 12(b)(6) and properly denied Appellant's request to submit an amended complaint based on the Court's finding that any such amendment would be futile?

ARGUMENT

I. The Court erred by ruling that the circuit court properly dismissed Appellant's Complaint with prejudice pursuant to Rule 12(b)(6) and properly denied Appellant's request to submit an amended complaint. This ruling was entirely based on the Court's erroneous conclusion that any such amendment would be futile. Appellant could and would have submitted an amended complaint setting forth facts sufficient to constitute a cause of action for abuse of process pursuant to Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967), Broadmoor Apts. of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991), and Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983).

Appellant's Proposed Amended Abuse of Process Claim

The fundamental issue for the Court to consider in this Petition for Rehearing is whether Appellant could amend the complaint in this matter to set forth facts sufficient to constitute a cause of action for abuse of process. If so, then the Court's ruling that amendment would be futile is erroneous, and the Court should issue a new opinion reversing the circuit court's denial of Appellant's request to amend the complaint and remanding the case with instructions to the circuit court to allow Appellant to submit an amended complaint setting forth a single cause of action for abuse of process as described in Appellant's briefs and herein.

As explained in detail in Appellant's Brief, with a few minor alterations, Appellant's complaint can state an ironclad cause of action for abuse of process squarely within the scope of Huggins, supra, and Broadmoor, supra, that cannot be dismissed pursuant to Rule 12(b)(6). Appellant would plead the following facts, all of which are within Appellant's personal knowledge or which Appellant has a good faith basis to believe are true. For the Court's convenience, the

following list includes facts that appear in the original complaint together with additional allegations that Appellant would add as described in Appellant's Brief:

1. Appellant would make the same jurisdictional allegations that appear in Paragraphs 1-10 of the original complaint. (R. 15.)[2]

2. On April 6, 2015, Appellant was charged with misdemeanor criminal domestic violence first offense, and Respondent Griffith was the alleged victim.[3]

3. Approximately a year later, while the criminal charge was still pending, a dispute arose between Appellant and Respondent Griffith as to the rightful ownership of a dog that was, at the time, in Appellant's possession.[4]

4. The dispute over the dog had no connection of any kind to the criminal domestic violence matter.[5]

5. While the dog dispute was ongoing, the prosecutor handling the CDV charge came to the conclusion that the CDV charge should be dropped.[6]

6. On or about June 30, 2016, the prosecutor notified Respondent Griffith of her intention to drop the CDV charge. Respondent Griffith advised the prosecutor of the dog dispute and asked the prosecutor to demand that Appellant surrender the dog to Respondent Griffith as a condition of the charge being dropped.[7]

7. Surrender of the dog was not restitution with respect to the CDV charge because the dog dispute had no connection whatsoever to the CDV matter. This allegation does *not* appear in the original complaint but is proposed in Appellant's

2 Appellant would remove the allegations relating to defendants other than Respondent Griffith.
3 This allegation already appears in Paragraph 11 of the original complaint. (R. 15.)
4 This allegation already appears in Paragraph 14 of the original complaint. (R. 16.)
5 This allegation already appears in Paragraph 14 of the original complaint. (R. 16.)
6 This allegation already appears in Paragraph 13 of the original complaint. (R. 16.)
7 This allegation already appears in Paragraphs 14-15 of the original complaint. (R. 16.)

Brief, see Appellant's Brief at 24-25, and is included to prevent dismissal pursuant to Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983) as explained infra.

8. The prosecutor agreed to Respondent Griffith's request that she demand Appellant surrender the dog to Respondent as a condition of dropping the CDV charge, and the prosecutor made that proposal to Appellant.[8]

9. By asking the prosecutor to attach the "dog surrender" condition to dropping the CDV charge, Respondent Griffith advised, consented to, aided, and abetted the prosecutor's demand that Appellant surrender the dog to Respondent Griffith as a condition of the CDV charge being dropped. This allegation does *not* appear in the original complaint but is proposed in Appellant's Brief, see Appellant's Brief at 23-24, and is included to clearly bring the claim within the scope of Broadmoor Apts. of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991) so as to prevent dismissal on the theory that Respondent Griffith is not liable for the actions of the prosecutor as explained infra.

10. Appellant rejected the demand that he surrender the dog in exchange for the CDV charge being dropped, and the State proceeded with the CDV prosecution, never again offering to drop the CDV charge. The State eventually upped the charges to kidnapping and CDV of a high and aggravated nature, two major felonies, and demanded that Appellant plead guilty to the original misdemeanor CDV first offense charge.[9]

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8 This allegation already appears in Paragraph 14-15 of the original complaint. (R. 16-17.)

9 This allegation already appears in Paragraph 17 of the original complaint. (R. 17.) Appellant,

12. Appellant was harmed by the conduct of Respondent Griffith. Respondent Griffith's successful request to the prosecutor in the CDV prosecution to attach the "dog surrender" condition to the dropping of the CDV charge directly caused the charge to not be dropped, since Appellant rejected the improper and unlawful demand. That caused the criminal domestic violence prosecution to continue and become substantially worse—morphing into a felony prosecution—when it otherwise would have ended favorably to Appellant. Accordingly, Respondent Griffith's conduct proximately caused harm to Appellant.[10]

13. Appellant would make the same damages allegations that appear in the Damages section of the original complaint at Paragraphs 44-47. (R. 28-32).

Appellant's Proposed Amended Abuse of Process
Claim Would Definitely Survive a Rule 12(b)(6) Motion

None of the Rule 12(b)(6) slings and arrows fired by Respondent and the circuit court at Appellant's original abuse of process cause of action would succeed against Appellant's proposed amended abuse of process cause of action described in Appellant's Brief and set out supra. The proposed amended facts are precisely within the scope of Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967), which establishes the basic elements of abuse of process, and Broadmoor Apts. of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991), which establishes that abuse of process claims may be pursued against

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despite believing himself to be innocent, eventually pleaded guilty to the misdemeanor CDV first offense charge solely to avoid the possibility, however remote, of a major felony conviction. This information does not appear in the original complaint or Appellant's briefs in the appeal because it occurred after Appellant had filed the briefs.

10 These allegations already appear in Paragraph 14-15 and 45 of the original complaint. (R. 16-17, 28.)

persons who advise, consent, aid, or abet an abuse of process directly committed by another.

Additionally, the proposed amended abuse of process cause of action is immune to attack pursuant to Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983), which holds that it is not an abuse of process for an alleged crime victim to seek restitution from the criminal defendant in exchange for asking the prosecutor to drop a criminal charge. The amended facts include an express allegation that the property sought by Respondent, a dog, was not restitution for the criminal domestic violence charge. These factual allegations prevent dismissal pursuant to Johnson.

HUGGINS V. WINN-DIXIE GREENVILLE, INC.

The foregoing facts are sufficient to constitute a cause of action for abuse of process under South Carolina law. The South Carolina Supreme Court first held that the abuse of process tort exists under South Carolina common law in Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967), a case involving the abuse of criminal process. In that case, the Supreme Court described the abuse of process tort as follows:

> The essential elements of abuse of process, as the tort has developed, have been stated to be: first, an ulterior purpose, and second, a wilful act in the use of the process not proper in the regular conduct of the proceeding. Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the

> use of the process as a threat or club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance of any formal use of the process itself, which constitutes the tort.

Id. at 209 (quoting Prosser, Handbook of the Law of Torts, Second Edition, Section 100, 668-69).

The Supreme Court further explained that:

> To cause process to issue without justification is an essential element of malicious prosecution, but not of abuse of process. In the latter, the issuance of the process may be justified in itself, it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process.

Id.

The facts that Appellant would plead in an amended complaint are plainly within the scope of the abuse of process tort as established by Huggins as to the prosecutor.[11] The prosecutor used the criminal domestic violence prosecution for an ulterior purpose, to force Appellant to surrender a dog to Respondent Griffith that was the subject of a civil dispute entirely unrelated to the criminal domestic violence matter. That was plainly an ulterior purpose because forcing Appellant to surrender a dog to Respondent was not a proper objective of the criminal domestic violence prosecution.

The prosecutor's conduct also establishes the second element of abuse of process, "a wilful act in the use of the process not proper in the regular conduct of the proceeding." Id. The prosecutor willfully demanded that Appellant surrender

11 Even though Appellant had a legitimate claim against the prosecutor, Appellant did not sue the prosecutor because Appellant was fearful that the State would find a way to retaliate in the criminal domestic violence prosecution.

possession of the dog to Respondent as a condition of dropping the CDV charge against Appellant. That was obviously a willful act, and it was not proper in the regular conduct of the criminal domestic violence proceeding. The dog dispute was a purely civil dispute that had absolutely nothing to do with the CDV matter. A prosecutor demanding that a criminal defendant surrender property that is the subject of an unrelated civil dispute as a condition of dropping a criminal charge is obviously "not proper in the regular conduct" of the criminal proceeding.

What the prosecutor did in this case is precisely what the Supreme Court described in Huggins:

> The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance of any formal use of the process itself, which constitutes the tort.

Id.

In this case, the prosecutor used the criminal domestic violence charge as a club in an extortionate effort to force Appellant to surrender property unrelated to the criminal matter, a dog, to Respondent Griffith. That conduct is squarely within the tort of abuse of process, and Appellant's proposed amended facts clearly set out a valid cause of action for abuse of process against the prosecutor.

BROADMOOR APTS. OF CHARLESTON V. HORWITZ

But Appellant did not sue the prosecutor. Appellant sued Respondent Griffith on the theory that Respondent Griffith asked the prosecutor to commit the abuse of process, and, therefore, Respondent Griffith is also liable for it.

Appellant's initial complaint is perhaps a bit hazy on the specific facts that allow Appellant to sue Respondent Griffith for an abuse of process directly committed by the prosecutor in the CDV prosecution, but Appellant's proposed amended cause of action for abuse of process contains all the detailed factual allegations necessary to proceed on such a theory per the South Carolina Supreme Court case of Broadmoor Apts. of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991).

Broadmoor establishes that the victim of an abuse of process can name as a defendant anyone who knowingly participated in, advised, consented to, aided, abetted, or subsequently ratified an abuse of process. See generally id. Liability is *not* limited strictly to the person who directly committed the abuse of process. As the Supreme Court explained:

> As a general rule, liability for an abuse of process extends to all who knowingly participate, aid, or abet in the abuse. Those who advise or consent to the unlawful acts, or subsequently ratify them, are liable as joint tortfeasors. Where there is any evidence of aiding or abetting, the question is one for the jury. As was stated by the Supreme Judicial Court of Massachusetts in 1887:
>
> The principle is general, and is applicable to all kinds of abuses outside of the proper service of lawful process, whether civil or criminal, that for every such wrong there is a remedy, not only against the officer whose duty it is to protect the person under arrest, but also against all others who may united with him in inflicting the injury.

Id. at 486 (citations omitted).

Appellant's proposed amended factual allegations plainly bring this case within the ambit of Broadmoor. Appellant would allege, in an amended complaint, the clear and specific fact that Respondent Griffith, upon learning that the prosecutor intended to drop the criminal domestic violence charge against

Appellant, asked the prosecutor to demand that Appellant surrender the dog to Respondent as a condition of dropping the criminal domestic violence charge.

That specific factual allegation, which would appear in an amended complaint, would clearly allow Appellant to state a claim for abuse of process pursuant to Broadmoor. Broadmoor indisputably extends liability for abuse of process to anyone who knowingly participates in, advises, consents to, aids, abets, or subsequently ratifies an abuse of process. The factual allegation that Respondent Griffith asked the prosecutor to demand that Appellant surrender the dog to Respondent as condition of dropping the CDV charge obviously meets the Broadmoor standard. It plainly qualifies as "advising" because that is literally what it is. Asking someone to engage in certain conduct is "advising" the person to engage in that conduct.

Accordingly, Appellant's proposed amended cause of action for abuse of process would, without any doubt, set forth a prima facie claim for abuse of process per Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967) and Broadmoor Apts. of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991).

JOHNSON V. PAINTER, 279 S.C. 390, 307 S.E.2D 860 (1983)

Despite the foregoing, Respondent could still theoretically secure a Rule 12(b)(6) dismissal of Appellant's proposed amended cause of action for abuse of process if Respondent could show that the property she sought to obtain in connection with the criminal matter, a dog, was restitution for the alleged criminal domestic violence incident. If Appellant's factual allegations established that the

dog was a form of restitution within the four corners of the amended complaint, or if Respondent could establish that in some other way at the 12(b)(6) stage (such as by judicial notice or by reference to a document cited in the amended complaint), then Respondent Griffith would be able to secure dismissal of the amended complaint on that basis.

The reason for this is Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983), which establishes that an alleged crime victim's efforts to obtain restitution through the criminal process are not actionable as abuse of process. In other words, while the general rule is that an alleged crime victim cannot demand money or property from a criminal defendant in exchange for the dropping of criminal charges, an exception exists when the only thing demanded is restitution. See generally id. In that scenario, no cause of action for abuse of process exists.

But Respondent will be unable to secure dismissal of Appellant's amended cause of action for abuse of process on this basis because Appellant will expressly plead in the amended complaint that surrender of the dog was not and could not be any form of restitution in the criminal domestic violence case because the dog had nothing whatsoever to do with the criminal domestic violence matter. The dog was not involved in any way in the criminal domestic violence case, and the dispute over the dog did not even arise until approximately a year after the criminal domestic violence prosecution was commenced.

Further, there is nothing in any material beyond the four corners of Appellant's proposed amended complaint that would in any way establish that the dog would be a proper form of restitution for the criminal domestic violence

matter. There is nothing in the record of this case that would even arguably support such a finding (and, frankly, there is nothing outside the record that would do so either). The reason is that the dog simply had no relationship of any kind to the criminal domestic violence incident, and there is absolutely no way Respondent Griffith could prevail on a Rule 12(b)(6) motion to dismiss premised on a claim that the dog was some sort of restitution for the CDV incident and therefore the abuse of process claim should be dismissed pursuant to Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983).

Appellant will plead in an amended complaint that the dog was *not* any form of restitution, and there is absolutely nothing in any other material that a court might consider at the Rule 12(b)(6) stage, in the record or outside of it, that could establish that the dog was some sort of restitution. The dog had no connection at all to the criminal domestic violence incident, and Appellant's express pleading of that in an amended complaint would eliminate any possibility that the Respondent could secure dismissal of the amended complaint pursuant to Johnson v. Painter.

THE CIRCUIT COURT'S MISUNDERSTANDING OF JOHNSON V. PAINTER

The circuit court ruled in its order dismissing Appellant's original complaint that Johnson v. Painter doomed Appellant's cause of action for abuse of process because, per the circuit court, "Johnson provides that a Solicitor and a victim may agree to drop charges in exchange for out-of-pocket medical expenses. It is not a far stretch to apply that same premise to a Solicitor and a victim that agree to drop charges in exchange for a pet." See Order of Dismissal at

4 (R. 4.).

This was clearly error, and this Court should say so on remand. Johnson v. Painter does *not* establish some sort of "safe harbor" for crime victims who demand out-of-pocket medical expenses, nor does it establish a safe harbor for crime victims who demand the surrender of pet animals. Johnson v. Painter establishes a safe harbor for *restitution*, not any particular sort of property or payment. If medical expenses or a pet animal qualify as restitution in a particular criminal case, then the alleged victim is free to pursue them in exchange for termination of the criminal prosecution. But if medical expenses or a pet animal, or any other type of property, do *not* qualify as restitution in a particular criminal case, then the alleged victim *cannot* lawfully pursue them in exchange for termination of the criminal prosecution, and an alleged victim who nonetheless does so commits the tort of abuse of process.

Consider a case where someone complains about noise coming from a neighbor's house, and the police charge the neighbor with a noise violation. If the person approached the neighbor and asked for the neighbor to pay medical expenses associated with a facelift in exchange for the person dropping the noise complaint, that would obviously be an abuse of process under Huggins, supra, and would not be permitted by Johnson. By its own terms, Johnson is *strictly* limited to situations where the alleged crime victim seeks restitution:

> The uncontradicted testimony at trial was that respondent's attorney, who was counsel for Mr. Johnson in both the criminal and this proceeding, telephoned appellant while the criminal charge was pending. Appellant testified he agreed to drop the charges, if the solicitor also agreed, upon payment of $2,500.00

> restitution for lost time and medical and hospital expenses.
>
> Additionally, appellant candidly admitted that if respondent had been found guilty at the criminal trial, appellant would have requested the court for restitution from respondent.
>
> The court does not always have to accept uncontradicted evidence as establishing the truth; however, it should be accepted unless there is reason for disbelief. Elwood Construction Co. v. Richards, 265 S.C. 228, 217 S.E. (2d) 769 (1975).
>
> A search of the record shows the only reasonable inference that can be drawn from the evidence is that respondent's counsel telephoned appellant and got him to agree to drop the criminal charge against respondent if appellant were reimbursed for his lost time, medical and hospital expenses, and if the solicitor agreed. Appellant and respondent were across-the-street neighbors who had had no prior difficulties. We have always looked with favor upon restitution and reconciliation. We see nothing wrong with the attorney calling or appellant telling him the amount of his out-of-pocket expenses.

Id. at 391-92.

Applying Johnson to this case, it would have been entirely proper for Respondent Griffith to ask the prosecutor to demand Appellant surrender the dog to her *if Appellant had been charged with stealing the dog*. In that situation, the dog would have been *bona fide* restitution. But Appellant was never charged with stealing the dog; Appellant was charged with committing criminal domestic violence and the criminal domestic violence charge had absolutely no relationship to the dog whatsoever. In that context, surrender of the dog was in no way restitutionary, and it was an abuse of process for Respondent Griffith to ask the prosecutor to make a demand of that nature in exchange for dropping the criminal domestic violence charge.

On remand, this Court should instruct the circuit court that Johnson v.

Painter *only* applies to cases where an alleged crime victim seeks restitution in exchange for termination of a criminal prosecution. In cases where restitution is not at issue, such as this case, Johnson v. Painter has no application at all.

THE CIRCUIT COURT'S CONCLUSION THAT APPELLANT WAS NOT CHARGED WITH CRIMINAL DOMESTIC VIOLENCE FOR AN ULTERIOR PURPOSE AND ERRONEOUS RULING THAT NO ABUSE OF PROCESS CLAIM COULD SURVIVE AS A RESULT

The circuit court concluded, correctly, that Appellant was not charged with criminal domestic violence for an ulterior purpose. See Order of Dismissal at 3 (R. 3.). However, the circuit court went on to rule—erroneously—that because the criminal domestic violence prosecution was not *initiated* with an ulterior purpose, it could never be used for an ulterior purpose at some future time. Therefore, per the circuit court, Appellant's abuse of process claim necessarily failed because the abuse only began after the criminal domestic violence prosecution had commenced and was not present when the criminal domestic violence prosecution first came into existence. Id.

This was obviously error, and this Court should make that clear on remand. The fact that a legal process is *initiated* without an ulterior purpose does not prevent it from being abused with an ulterior purpose later on. This case presents that exact scenario. When the criminal domestic violence prosecution was initiated, the dog dispute did not exist. In fact, the dog dispute did not arise until approximately a year after the criminal domestic violence prosecution had begun. Despite this, Respondent Griffith, with the prosecutor acting as her willing puppet, nonetheless abused the criminal domestic violence prosecution by demanding that Appellant surrender the dog to Respondent as a condition of

dropping the criminal domestic violence charge.

This is clearly an abuse of process under South Carolina law. There is no South Carolina abuse of process case that requires the process to have been *initiated* with an ulterior purpose. The only requirement is that, at some point, negotiations to end the process involve an ulterior purpose. See Huggins, supra. An abuse of process tortfeasor cannot immunize himself from liability by pointing out that his abuse of process only began *after* the initiation of the process that was abused. All that is necessary for an abuse of process to occur is that the tortfeasor abuse a process, which ordinarily occurs when the tortfeasor offers to discontinue the process in exchange for the victim surrendering some sort of property or money that is not a proper object of the process. See Huggins, supra; cf. Johnson, supra. It does not matter whether the process was commenced with an ulterior purpose, only that it was, at some point, used for an ulterior purpose.

This Court should make clear to the circuit court on remand that Appellant's amended claim for abuse of process cannot be dismissed on the grounds that the criminal domestic violence prosecution was *commenced* without an ulterior purpose, since Appellant alleges that even though it was commenced without an ulterior purpose, the abuse of process did occur later on during negotiations to terminate the prosecution. Appellant will allege in an amended complaint that the prosecutor's offer to discontinue the prosecution involved an ulterior purpose, and that is sufficient to permit Appellant to proceed on an abuse of process claim. The fact that a tortfeasor only elected to begin abusing a process *after* the process had already come into existence is plainly not a defense to an

abuse of process claim under South Carolina law. Huggins contains absolutely no requirement that the ulterior purpose exist when the process is initiated, only that it manifest at some point during the pendency of the process.

THE CIRCUIT COURT'S MISPLACED RELIANCE ON FAMILY COURT ORDERS IN DISMISSING THE ABUSE OF PROCESS CAUSE OF ACTION

Finally, the circuit court appears to have concluded that since the family court issued a temporary order directing Appellant to surrender the dog to Respondent Griffith, Appellant's cause of action for abuse of process was legally invalid. This was plainly erroneous and this Court should advise the circuit court of that error on remand.

The fundamental validity of an abuse-of-process tortfeasor's claim to the property or money improperly sought via abuse of process is *not* a defense to a civil action for abuse of process. Even if the abuse of process tortfeasor has every right to the property or money sought in connection with an abuse of process, there is still liability where the tortfeasor abuses a process to obtain the property or money. This is crystal clear from the Huggins case, supra. The facts of that case are as follows:

In 1962, a gentleman (or perhaps a shoplifter, in which case the "gentleman" label might be inappropriate) named B.C. Huggins appeared at a Greenville County Winn-Dixie grocery store and secured possession of some cooking oil, potatoes, and two packages of boiled ham suitable for sandwiches. Huggins, supra, at 210. Mr. Huggins did not use a shopping cart to carry his intended purchases to the register. Id. Mr. Huggins proceeded to the checkout,

where he paid for the cooking oil and potatoes, but not the ham, which cost 59¢ per package.[12] Id. A store manager then confronted Mr. Huggins regarding his failure to pay $1.18 cents for the two packages of ham he had picked up, which were within his pockets due to his non-use of the shopping carts. Id. Mr. Huggins claimed to have forgotten about the ham in his pockets and immediately proffered two one-dollar bills to pay for it, which was more than sufficient. Id. at 210-11.

The store manager refused Mr. Huggins' proffer of two dollars to pay the $1.18 for the ham. Id. Instead, the store manager told Mr. Huggins he would have to pay *ten* dollars, on account of the fact that the store manager believed Mr. Huggins had shoplifted from the store at previous times and had taken something around ten dollars worth of merchandise. Id. at 210-12. Mr. Huggins refused to pay the ten dollars, whereupon the store manager had him arrested and charged with shoplifting. Id.

The South Carolina Supreme Court concluded that this was an abuse of process. Id. at 212. At no point did the Supreme Court concern itself with whether or not the ten dollar demand was legitimately based on prior shoplifting by Mr. Huggins. Id. It may well have been completely legitimate. But the Supreme Court found there was an abuse of process regardless of whether the ten dollar demand represented a legitimate claim by the Winn-Dixie store manager and a legitimate debt owed by Mr. Huggins. Id. The reason for this is clear: it is no defense to an abuse of process claim that the alleged tortfeasor had a legitimate right to the

12 Appellant was not yet born when packages of sandwich-suitable boiled ham cost only 59¢. What a wonderful world that must have been.

money or property sought by way of the abuse of process. That is simply not a defense to abuse of process.

This is entirely consistent with closely related legal principles of extortion and blackmail. Suppose Smith, a Baptist preacher, owes Jones a million dollars.. Further suppose Jones discovers that Smith is an adulterer, and Jones threatens to expose Smith as such and destroy Smith's marriage, career, and reputation if Smith does not immediately pay Jones the million dollars owed. On these facts Jones has plainly committed the crime of blackmail, and it is absolutely no defense that Smith actually owes Jones the million dollars. The law condemns blackmail and extortion *regardless* of whether the extortionist is legally entitled to the money or property sought by way of extortion.

These legal principles also apply to abuse of process, which is quite literally a civil cause of action for extortion via legal process. Huggins at 209 ("There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance of any formal use of the process itself, which constitutes the tort [of abuse of process]."). Any claim by Respondent that she was legally entitled to Appellant surrendering the dog to her, by virtue of family court orders or for any other reason, is not a defense to Appellant's abuse of process claim. Respondent's claimed legal entitlement to possession of the dog is irrelevant in this abuse of process case, and this Court should make that clear on remand.[13]

13 Although Appellant contends that the "rightful ownership" of the dog is irrelevant to this particular case, the Court should be aware that Appellant eventually prevailed in the legal dispute

APPELLANT'S SUBMISSION OF AN AMENDED COMPLAINT WOULD NOT BE FUTILE

As explained herein, and in Section III of Appellant's Brief, Appellant is fully capable of submitting an amended complaint that pleads facts sufficient to constitute a cause of action for abuse of process. Appellant is perfectly capable of submitting an amended complaint pleading a single cause of action for abuse of process that is fully within the scope of Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967) and Broadmoor Apts. of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991) and cannot be dismissed at the Rule 12(b)(6) stage pursuant to Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983) or for any other reason.

Accordingly, this Court's conclusion that the circuit court properly denied Appellant's request to submit an amended complaint because any such amendment would be futile was an erroneous conclusion. Appellant's proposed amended cause of action for abuse of process would survive a Rule 12(b)(6) motion and, therefore, would not be futile. Accordingly, this Court erred in concluding that Appellant was properly denied an opportunity to submit an amended complaint by the circuit court. The circuit court's refusal to permit Appellant to amend was error because Appellant's request was not futile—Appellant can and would submit an amended complaint that states facts sufficient to constitute a cause of action for abuse of process against Respondent Griffith, and such cause of action would clearly survive a Rule 12(b)(6) motion by

over the rightful ownership of the dog. After much litigation in the Lexington County Family Court and the Greenville County Court of Common Pleas, Respondent Griffith eventually relinquished all claims to the dog and Appellant prevailed in the dog dispute.

Respondent Griffith.

Rule 15(a), SCRCP states that "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15, SCRCP. Justice obviously requires that a party be permitted to correct minor errors in a complaint at the outset of litigation, and Respondent would plainly not be prejudiced by a pleading amendment made in response to an order on a Rule 12(b)(6) motion, in particular a pleading amendment which makes only minor modifications to the original complaint, as would be the case here.

CONCLUSION

Based on the foregoing, Appellant respectfully requests the Court grant rehearing as to the amendment issue addressed in Section III of Appellant's Brief and rule as follows:

1. That Appellant's request to submit an amended complaint setting forth a single cause of action for abuse of process is *not* futile, as the amended cause of action would be within the scope of Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967) and Broadmoor Apts. of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991) and not subject to dismissal pursuant to Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983) or for any other reason.

2. That the case should be remanded to the circuit court with instructions to permit Appellant to submit an amended complaint asserting a single cause of action for abuse of process along the lines of that described in Appellant's Brief (see Appellant's Brief at 19-27) and herein.

Respectfully submitted,

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