

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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.

JOINT APPENDIX

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001501

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Sep 14 2020

SC Court of Appeals

James John Todd Kincannon,

Appellant,

v.

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

Respondents.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
James John Todd Kincannon,	)	C/A No. 2019-CP-32-01168
	)	
Plaintiff,	)	
vs.	)	ORDER GRANTING
	)	DEFENDANTS' MOTION TO DISMISS
Ashely Suzanne Griffith,	)	
Moore Taylor Law Firm, P.A.,	)	
Vance Stricklin, and Amber Fulmer,	)	
	)	
Defendants.	)	
_____	)	

I. INTRODUCTION

This matter came before the Court on May 29, 2019 pursuant to Defendants' Motion to Dismiss. Plaintiff James John Todd Kincannon ("Kincannon") appeared pro se. James Edward Bradley, Esquire appeared for the defendants. After careful consideration to this matter, the Court grants the Defendants' Motion to Dismiss with Prejudice.

II. FACTS

On April 6, 2015, the Lexington County Solicitor's Office charged Plaintiff with criminal domestic violence arising out of an assault on his then wife, Ashley Griffith ("Griffith") that occurred on March 26, 2015. On September 1, 2015, Griffith filed for divorce from Kincannon in Lexington County Family Court. Griffith hired Defendant Vance Stricklin ("Stricklin") and Defendant Amber Fulmer ("Fulmer") to represent her in the divorce. Stricklin and Fulmer are employed as attorneys at the Moore Taylor Law Firm ("Moore Taylor"). The next day, the Honorable W. Greg Seigler granted Griffith an *Ex Parte* Restraining Order against Plaintiff. The Family Court case ended with a hearing on January 24, 2017 at which time the Honorable Peter R. Nuessle approved an agreement between Kincannon and Griffith and granted a divorce to

Griffith. The Decree of Divorce and Order Approving Agreement were issued on February 17, 2017 and filed on March 1, 2017 with the Lexington County Clerk of Court Office.

Two years later, on March 21, 2019, Plaintiff filed a Complaint alleging the following causes of action: abuse of process, civil conspiracy, trespass on the case, unfair trade practices, negligent supervision, and a violation of the South Carolina Omnibus Adult Protection Act. On April 23, 2019, Defendants filed an Answer and Motion to Dismiss with Prejudice. The Defendants moved to dismiss on the following basis: the Plaintiff was charged with Criminal Domestic Violence by a Solicitor in the Lexington County Solicitors' Office; the Defendants are not in control of the actions of the Lexington County Solicitors' Office; and the Defendants cannot be held liable for actions of the Lexington County Solicitors' Office. On May 24, 2019, Defendants filed a Memorandum in Support of their Motion to Dismiss. Subsequently, Plaintiff filed a Memorandum in Opposition to Defendants' Motion to Dismiss on May 29, 2019.

III. DISCUSSION

Defendants' counsel argue Defendants are entitled to dismissal on all Plaintiffs' causes of action. The Court addresses each one in turn.

a. Abuse of Process

To establish a claim for abuse of process, the plaintiff must assert (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding. *Food Lion, Inc. v. United Food & Commercial Workers Int'l. Union*, 351 S.C. 65, 71, 567 S.E.2d 251, 253 (Ct. App. 2002). "The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Id.* "To sustain a claim for the tort, a party must allege facts sufficient to show not only that the lawsuit was brought for an ulterior purpose, i.e., for collateral reasons, but that willful acts were taken through which

the process was misapplied.” *Id.* “One who uses a legal process, whether criminal or civil against another *primarily* to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process.” *Id.* “The significance of [‘primarily’] is that there is no action for abuse of process when the process is used for the purpose for which it is intended.” *Id.*

The Court finds and rules that Defendants are entitled to dismissal as to the Plaintiff’s cause of action for Abuse of Process on the grounds that: Plaintiff has failed to sufficiently allege that he was charged with criminal domestic violence for an ulterior purpose and Plaintiff’s claims do not establish abuse of process pursuant to *Johnson*.

The 11th Circuit Solicitors Office charged Plaintiff with criminal domestic violence five months before Ms. Griffith sought a divorce and over a year before the civil dispute over Griffith’s dog. Plaintiff was later indicted for felony kidnapping and felony criminal domestic violence of a high and aggravated nature. The charges are still pending. There is no evidence in the record that Ms. Griffith nor her lawyers had control or involvement in the Solicitor’s decision to pursue the criminal domestic violence charges against Plaintiff. Thus, Plaintiff has failed to sufficiently allege an ulterior purpose to his criminal domestic violence charge or a willful act as required by South Carolina law. It is also curious to note that there is no contest from any party but that probable cause existed to initiate the prosecution.

Defendants argue that *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (S.C. 1983) supports dismissal of the abuse of process action. In *Johnson*, a fight occurred between two parties which resulted in physical injuries to one of the parties. After being acquitted of simple assault and battery, respondent brought a lawsuit against appellant on the basis that it was improper to bring a criminal charge and then seek a monetary gain by offering to drop the charges upon payment of

\$2,500.00. The Court in *Johnson* held: “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.*

Plaintiff responds that *Johnson* should not apply for the following reasons: (1) *Johnson* is about restitution and (2) in *Johnson* the respondent’s attorney contacted appellant first.

Plaintiff claims Griffith offered to drop the criminal charges if the Plaintiff would return her pet. Although not relevant for their motion, the Defendants deny this claim. As to the immediate issue, even if Griffith was willing to cooperate for a request to dismiss the charges, it would not rise to the level of abuse of process. The *Johnson* case would still apply. The fact that *Johnson* is about restitution and this case is not has no bearing on whether or not Defendants’ actions were appropriate. *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. Specifically, the Family Court and Court of appeals determined the pet belonged to the victim in 2016. (see Interim Temporary Order filed July 1, 2016 attached as Exhibit A; Order on Plaintiff’s Motion for Temporary Relief filed July 26, 2016 attached as Exhibit B; and South Carolina Court of Appeals Order filed September 30, 2016 attached as Exhibit C). Thus, Plaintiff has failed to sufficiently distinguish the alleged facts from the facts of *Johnson* and Defendant is entitled to dismissal as a matter of law.

Additionally, the Court takes judicial notice that the Plaintiff alleges what he deems as an improper offer occurred for a hearing scheduled for June 30, 2016. The Court also takes judicial notice that the Family Court issued an Interim Temporary Order on July 1, 2016 from a June 30, 2016 hearing ordering a return of the pet. (see Exhibits A, B, and C). Therefore, the matter

regarding return of a pet was resolved through a Family Court Order, making the resolution of the subject criminal case immaterial.

b. Civil Conspiracy

To establish a claim for civil conspiracy, the plaintiff must prove three elements: (1) a combination of two or more persons, (2) for the purpose of injuring plaintiff, and (3) causing plaintiff special damage. *Hackworth v. Greywood at Hammett, LLC*, 335 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009). “In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim.” *Id.* See *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981) (dismissing plaintiff’s civil conspiracy claim because “the civil conspiracy action does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy. No additional acts in furtherance of the conspiracy [were] plead”). Similarly, “if a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed.” *Id.* at 117.

The Court finds that Plaintiff failed to properly plead civil conspiracy. Plaintiff relied on the allegations contained in his cause of action for abuse of process. Specifically, Plaintiff failed to inform Defendants of what acts have been committed in furtherance of the alleged conspiracy they are being accused of. Moreover, he failed to identify any special damages that have been caused as a result of the alleged civil conspiracy.

In addition, “a civil conspiracy cannot exist when the alleged acts arise in the context of a principal-agent relationship because by virtue of the relationship such acts do not involve separate entities.” *McMillan v. Oconee Memorial Hosp., Inc.*, 367 S.C. 559, 626 S.E.2d 884 (S.C. 2006). Stricklin and Fulmer are agents of Moore Taylor. Therefore, Plaintiff’s claim of civil conspiracy is dismissed as a matter of law.

c. Trespass on the Case

Trespass on the case is no longer recognized by the state of State of South Carolina. Trespass on the case has been abolished since 1895. *Michalson v. All*, 43 S.C. 459, 21 S.E. 323 (S.C. 1895).

The Court finds that Defendants are entitled to dismissal as to the Plaintiff’s cause of action for Trespass on the Case.

d. Unfair Trade Practices

“To be actionable under the UTPA, the unfair or deceptive act or practice must have an impact upon the public interest.” *Wogan v. Kunze*, 366 S.C. 583, 607, 623 S.E.2d 107, 120 (Ct. App. 2005) citing *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000). “An impact on the public interest may be shown if the acts or practices have the potential for repetition.” *Id. citing Singleton v. Strokes Motors, Inc.*, 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004). “The potential for repetition may be shown by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence.” *Id.*

Plaintiff failed to allege an impact on the public interest or any actual damage. The acts Plaintiff alleges are appropriate within an attorney client relationship. Plaintiff has not plead that the same kind of actions occurred in the past. Plaintiff’s pleadings show that he was charged with

criminal domestic violence one year before the dispute over the dog began and he was later indicted for two felonies.

The Court finds dismissal is proper because Plaintiff has failed to allege an impact on the public interest or any actual damage.

e. Negligent Supervision

A claim of negligent supervision against a law firm hinges on whether or not the law firm owed a duty. *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young*, 359 S.C. 635, 644-645, 598 S.E.2d 717, 722 (Ct. App. 2004). Generally, the common law imposes no duty to act. *Id.* If the law firm owes no duty then any harm suffered would be irrelevant. *Id.*

Moore Taylor, Attorney Stricklin, and Attorney Fulmer owed no duty to Plaintiff. Moore Taylor, Attorney Stricklin, and Attorney Fulmer represented Plaintiff's wife in the divorce. Plaintiff was not their client. As a result, Plaintiff has no basis to sue Moore Taylor, Attorney Stricklin, or Attorney Fulmer in negligence because they owe him no duty.

Further, Plaintiff's own pleadings admit a victim in a criminal case has no authority to direct a prosecutor to dismiss a criminal charge. He alleges regardless of the lack of duty, Griffith can be liable for supervising the prosecutor when she was the victim. Plaintiff also admits Moore Taylor, Attorney Stricklin, and Attorney Fulmer have no legal duty or ability to supervise a solicitor's prosecution of a criminal case.

The Court finds that neither Moore Taylor, Attorney Stricklin, Attorney Fulmer, nor Griffith had a duty or the ability to supervise the solicitor in Plaintiff's criminal domestic violence prosecution. Thus, Defendants are entitled to dismissal as a matter of law.

f. South Carolina Omnibus Adult Protection Act

Pursuant to the South Carolina Omnibus Adult Protection Act, psychological abuse is defined as “deliberately subjecting a vulnerable adult to threats or harassment or other forms of intimidating behavior causing fear, humiliation, degradation, agitation, confusion, or other forms of serious emotional distress.” S.C. Code Ann. § 43-35-10(10).

Defendants argue that Plaintiff has not alleged facts to show he is a vulnerable adult. Defendants further argue that if Plaintiff is in fact incompetent then he does not have standing to bring claims without a Guardian ad Litem.

The Court finds that Plaintiff has failed to allege facts to show he was a vulnerable adult. Thus, Defendants are entitled to dismissal as a matter of law.

IV. CONCLUSION

The Court finds Plaintiff has failed to set forth any cause of action upon which relief can be granted and it is proper to grant the Defendants’ Motion to Dismiss with Prejudice. As an additional determining factor, it is instructive for this Court to state what is obvious to any person who reviews the relevant history of Plaintiff’s litigation, claims, and prosecutions. The Plaintiff is no doubt aggrieved by the circumstances of the dissolution of his marriage. The Court is sensitive to the inexorable effect of obsessive interpersonal passion. However, lawsuits against third parties who may have had some connection to the marital fallout are not the responsible or legally appropriate method of redressing interpersonal grievances. These Defendants, in part, were the Wife’s lawyers who were simply representing her interests in keeping with their prescribed ethical duties. The Plaintiff is flailing about wildly through misplaced litigation to recover something which has been lost. Sadly, the Courts are not the venue for recovering this type of loss or for exacting personal retribution. It is simply contrary to sound public policy to allow this lawsuit, given all attendant and obvious circumstances, to proceed against faultless third parties.

Therefore, for the reasons discussed herein, Defendants are entitled to dismissal as a matter of law.

IT IS SO ORDERED, this _____ day of _____, 2019.

The Honorable Robin B. Stilwell
Presiding Judge
11th Judicial Circuit



Lexington Common Pleas

Case Caption: James John Todd Kincannon VS Ashely Suzanne Griffith

Case Number: 2019CP3201168

Type: Order/Dismissal

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-07-02 11:21:00 page 10 of 10

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
	)	
James John Todd Kincannon,	)	ORDER DENYING PLAINTIFF'S
	)	MOTION FOR RECONSIDERATION
Plaintiff,	)	
	)	
vs.	)	
	)	
Ashely Suzanne Griffith, Moore Taylor Law	)	
Firm, P.A., Vance Stricklin, and Amber	)	
Fulmer,	)	
	)	
Defendants.	)	C. A. No.: 2019-CP-32-01168
_____	)	

This matter comes before the Court pursuant to the Plaintiff's Motion to Reconsider the Court's Order Granting Defendants' Motion to Dismiss and for Additional Relief entered on or about July 2, 2019. The Plaintiff's Motion to Reconsider, dated July 22, 2019, was made pursuant to Rules 59(e), 52(b), 60(a), and 60(b) of the South Carolina Rules of Civil Procedure. After having had the opportunity to carefully review the Plaintiff's Motion, this Court elects to respectfully deny the same.

AND IT IS SO ORDERED.

ROBIN B. STILWELL

July 29, 2019
Greenville, South Carolina



Lexington Common Pleas

Case Caption: James John Todd Kincannon VS Ashely Suzanne Griffith

Case Number: 2019CP3201168

Type: Order/Other

So Ordered

s/ Robin B. Stilwell 2158

Electronically signed on 2019-07-30 09:14:08 page 2 of 2

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

JAMES JOHN TODD KINCANNON,

Plaintiff,

v.

ASHELY SUZANNE GRIFFITH, MOORE
TAYLOR LAW FIRM, P.A., VANCE
STRICKLIN, and AMBER FULMER,

Defendants.

Case No. 2019CP3201168

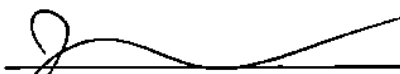
VERIFIED COMPLAINT
(Jury Trial Demanded)

FILED
2019 MAR 21 PM 2:49
CLERK OF COURT
LEXINGTON COUNTY
SOUTH CAROLINA

TO DEFENDANTS ABOVE-NAMED:

You are hereby summoned and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the Complaint on the Plaintiff (whose address is below) within thirty days after the service thereof, exclusive of the date of such service, and if you fail to answer the Complaint within the time aforesaid, the Plaintiff in this action will apply to the Court for the relief demanded in the Complaint and a judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,


JAMES JOHN TODD KINCANNON
216 Jones Avenue
Simpsonville, South Carolina 29681
864-963-4374
ToddKincannon@gmail.com
Plaintiff Pro Se

February 23, 2019

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

JAMES JOHN TODD KINCANNON,
Plaintiff,

Case No.

2019 CP3201168

v.

ASHELY SUZANNE GRIFFITH, MOORE
TAYLOR LAW FIRM, P.A., VANCE
STRICKLIN, and AMBER FULMER,
Defendants.

VERIFIED COMPLAINT
(Jury Trial Demanded)

ORIGINAL

2019 MAR 21 PM 2:49
LISA M. CONNER
CLERK OF COURT
LEXINGTON CO. SC

FILED

PARTIES AND JURISDICTIONAL ALLEGATIONS

1. This is an action for abuse of process, civil conspiracy, trespass on the case, unfair trade practices, negligent supervision, and related torts arising out of a criminal domestic violence prosecution in Lexington County and a civil dispute in Greenville County. The South Carolina Court of Common Pleas has subject matter jurisdiction over these claims, and venue is proper in Lexington County based on the facts of the case.
2. Plaintiff James John Todd Kincannon is a resident of Greenville County.
3. Defendant Ashely Suzanne Griffith is, so far as Plaintiff is aware, a resident of Lexington County.
4. Defendant Moore Taylor Law Firm, P.A. is a professional association organized and existing under the law of the State of South Carolina with a principal place of business in Lexington County.
5. Defendant Vance Stricklin is, upon information and belief, a resident of Lexington County.

6. Defendant Amber Fulmer is, upon information and belief, a resident of Lexington County.

7. Defendants Moore Taylor Law Firm, P.A., Stricklin, and Fulmer are collectively referred to as the "Moore Taylor Defendants" herein.

8. Defendant Griffith is vicariously liable for all conduct of the Moore Taylor Defendants described herein, and Defendant Moore Taylor Law Firm, P.A. is vicariously liable for all conduct of Defendant Vance Stricklin and Defendant Amber Fulmer described herein.

9. All Defendants are jointly and severally liable, both directly as joint tortfeasors and vicariously, for the actionable conduct of one Nicole Howland of the Lexington County Sheriff's Department described herein, as Defendants and Howland willfully acted in concert with respect to these matters. All actionable conduct engaged in by Howland and other agents of the State of South Carolina, including all tortious acts and omissions, was procured by Defendants and engaged in by Howland and/or other agents of the State of South Carolina at the direction of Defendants and with their express approval.

10. The Lexington County Court of Common Pleas has personal jurisdiction over all Defendants based on the facts of the case.

GENERAL FACTUAL ALLEGATIONS

11. On April 6, 2015, Plaintiff was charged with criminal domestic violence by the Lexington County Sheriff's Department arising out of a marital dispute occurring on March 26, 2015 between Plaintiff and Defendant Griffith.

12. Plaintiff vigorously protested that he was innocent at all times and in fact was innocent, as there was (and remains) no evidence whatsoever that he had engaged in any criminal conduct of any kind during the March 26, 2015 marital dispute.

13. Plaintiff accordingly demanded the Lexington County Sheriff's Department drop the criminal domestic violence charge, and eventually Plaintiff's demands appeared to meet with success when Nicole Howland of the Lexington County Sheriff's Department, the prosecutor assigned to the case, offered to drop the criminal domestic violence charge on June 30, 2016.

14. However, Howland's offer was unacceptable because it was unlawfully conditioned upon Plaintiff surrendering his pet golden retriever to Defendant Griffith that was the subject of an entirely unrelated civil dispute between Plaintiff and Defendant Griffith as to the rightful ownership and possession of the animal. That civil dispute had absolutely nothing whatsoever to do with the criminal domestic violence case, having arisen over a year after the commencement of the criminal domestic violence prosecution under circumstance entirely unrelated to any allegations of criminal domestic violence. The civil dispute over the golden retriever was ultimately resolved entirely in Plaintiff's favor by way of a civil declaratory judgment action in the Greenville County Court of Common Pleas.

15. Howland made this unlawful demand after being propositioned by Defendant Griffith and her legal counsel in the civil dispute involving Plaintiff's animal, the Moore Taylor Defendants, in connection with a court appearance in the criminal domestic violence case on June 30, 2016. Howland willingly agreed to attach that unlawful

condition relating to an unrelated civil dispute to the offer to drop the criminal domestic violence charge and did so.

16. Plaintiff rejected Defendants' and Howland's demand that he surrender possession of the animal to Defendant Griffith in exchange for Howland dropping the criminal domestic violence charge against him and instead moved to disqualify Howland for prosecutorial misconduct, a motion which was successful.

17. The new prosecutors appointed in the action bizarrely refused to drop the minor misdemeanor criminal domestic violence charge without conditioning such offer on an illegal requirement that Plaintiff surrender the animal to Defendant Griffith and instead procured Plaintiff's indictment on felony kidnapping and felony criminal domestic violence of a high and aggravated nature charges, then offering to dismiss those charges if Plaintiff would plead guilty to the original minor misdemeanor criminal domestic violence charge. Plaintiff rejected this new offer for multiple reasons, not the least of which was that it required Plaintiff to perjure himself in the plea colloquy by testifying under oath he had committed a crime which he had not committed and for which there was not a single shred of evidence of guilt.

18. As a result, the sole and proximate cause of the continuation of the criminal domestic violence prosecution after June 30, 2016 and the elevation of charges from the minor misdemeanor charge to the two major felony charges was the unlawful conduct of Howland, procured by Defendant Griffith and the Moore Taylor Defendants, which resulted in Howland's lawful and proper offer to drop the bogus criminal domestic violence charge against Plaintiff being unlawfully conditioned on Plaintiff surrendering

his animal to Defendant Griffith to enable her to prevail in the wholly unrelated civil dispute between Plaintiff and Defendant Griffith.

19. Plaintiff has been severely injured by this unlawful and actionable conduct and seeks a recovery of all nominal, compensatory, and punitive damages available under the following causes of action.

FOR THE FIRST CAUSE OF ACTION
ABUSE OF PROCESS

20. The foregoing conduct by Defendants constitutes the tort of abuse of process.

21. Obviously, the sole proper purpose of a criminal prosecution for criminal domestic violence is to secure the criminal conviction of an individual reasonably believed by the State to have committed the crime of criminal domestic violence.

22. It is black letter South Carolina law that using a criminal prosecution as a club to extract concessions from a criminal defendant in an unrelated civil dispute or otherwise gain advantage in an unrelated civil dispute is an abuse of the criminal process, and it is indisputable that Defendants did precisely that in this case. The civil dispute over the animal had absolutely nothing whatsoever to do with the criminal domestic violence case, yet Defendants sought to use the criminal domestic violence prosecution as leverage against Plaintiff in the unrelated civil dispute and did so, conditioning dismissal of the criminal domestic violence charge against Defendant on his agreement to abandon his rights in the civil dispute.

23. Howland admittedly believed the proper outcome of the minor misdemeanor criminal domestic violence prosecution against Plaintiff was that the criminal domestic violence charge be dropped, and her belief in that regard was absolutely correct in light of Plaintiff's obvious innocence. Howland therefore had a legal duty to drop the charge

accordingly without demanding any concessions of any kind from Plaintiff in regards to the unrelated civil dispute over the animal, and Defendant Griffith and the Moore Taylor Defendants had a legal duty not to enlist Howland in their abuse of process scheme by convincing her to condition the dismissal of the criminal domestic violence charge on Plaintiff making concessions to them in the unrelated civil dispute. Defendants' joint conduct was indisputably extortionate and therefore actionable as an abuse of process, and a particularly egregious and malicious abuse of process in light of the facts that Defendants sought to force Plaintiff to surrender possession of an animal to Defendant Griffith that Plaintiff was the rightful legal owner of, as later confirmed in the declaratory judgment litigation in Greenville County involving Plaintiff, Defendant Griffith, and the Moore Taylor Defendants and that Plaintiff was obviously innocent of the criminal domestic violence charge in the first place, as Defendant Griffith had admitted under oath in connection with the initial investigation by the Lexington County Sheriff's Department.¹

24. Further, although actual malice and intent to harm are not elements of abuse of process, their presence in an abuse of process case is typically sufficient to prove that "the use of the process [was] to coerce or extort," the gravamen of the tort of abuse of process. Swicegood v. Lott, 665 S.E.2d 211, 379 S.C. 346 (Ct. App. 2008). That is most

¹ Abuse of process cases often involve situations where the tortfeasor sought to use criminal process to gain an advantage in civil litigation that the tortfeasor should rightfully win, such as using a criminal prosecution for theft solely to leverage the defendant into returning possession of property to the tortfeasor that the tortfeasor is the rightful owner of. This case involves something far worse: a case where the tortfeasors sought to use criminal process to leverage the defendant into surrendering possession of property to the tortfeasors that the tortfeasors had no legal right to possess, which was entirely unrelated to the subject matter of the criminal prosecution, and which was the subject of civil litigation that the tortfeasors rightfully should have lost and ultimately did lose. The egregiously malicious nature of this particular type of abuse of process is not an element of abuse of process—the extortionate conduct is sufficient to give rise to a cause of action regardless of the fundamental "righteousness" of the tortfeasor's cause—but is nonetheless something the jury must consider in determining punitive damages.

certainly the situation here. Each Defendant acted with actual malice and had an intent to harm Plaintiff by using criminal process in an effort to coerce and extort Plaintiff in the civil dispute over the animal despite having actual knowledge at all times that the civil dispute had not the slightest connection whatsoever to the criminal domestic violence prosecution and having sophisticated legal knowledge as to what conditions may and may not be lawfully attached to a prosecutorial offer to dismiss a criminal charge.

25. Defendant Griffith and the Moore Taylor Defendants further had actual knowledge that Plaintiff was innocent of the criminal domestic violence charge and never should have been charged in the first place, and further had actual knowledge that Plaintiff was the lawful owner of the animal and that Defendant Griffith had no good faith claim to the contrary, which Defendants are estopped from denying in light of the litigation result in Greenville County.

FOR THE SECOND CAUSE OF ACTION
CIVIL CONSPIRACY

26. In the highly unlikely situation where the court concludes that some or all of the conduct alleged to be abuse of process is not actionable as such, Plaintiff alternatively pleads a cause of action for civil conspiracy as to such conduct. Defendants obviously and admittedly conspired with respect to the conduct at issue in this case, and such conduct is plainly actionable as civil conspiracy if it is not actionable as abuse of process. Plaintiff seeks all damages available under the tort of civil conspiracy to the extent the court might find that all or part of the abuse of process cause of action should instead be characterized as a civil conspiracy cause of action.

**FOR THE THIRD CAUSE OF ACTION
TRESPASS ON THE CASE**

27. In the highly unlikely situation where the court concludes that some or all of the conduct alleged to be abuse of process or, alternatively, civil conspiracy is not actionable under either theory, Plaintiff alternatively pleads a cause of action for trespass on the case as to such conduct. Defendants conduct is plainly unlawful and if it is not actionable under any named tort it must necessarily be actionable as trespass on the case, the general cause of action for tortious conduct that is not within the ambit of any named tort. Plaintiff seeks all damages available under the general tort of trespass on the case to the extent the court might find that all or part of the conduct complained of herein is outside the ambit of both the primary abuse of process cause of action or the alternative cause of action for civil conspiracy.

**FOR THE FOURTH CAUSE OF ACTION
SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT**

28. Plaintiff further contends and alleges that the particular conduct complained of in this case is an unfair trade practice in violation of the South Carolina Unfair Trade Practices Act.

29. The basis of this claim is that it is black letter law that the only proper client of a South Carolina prosecutorial officer is the Sovereign, the People of the State of South Carolina. South Carolina prosecutorial officers are expressly forbidden by South Carolina law from "moonlighting" as de facto or de jure civil litigators acting on behalf of alleged victims in their cases with the narrow and inapplicable exception of situations where a prosecutor may assist a victim in obtaining restitutionary relief in a bona fide good faith

criminal prosecution, a situation which has absolutely no application to this particular case.

30. The professional prosecution of civil claims on behalf of clients is a trade, and attorney conduct is regulated by the South Carolina Unfair Trade Practices Act. E.g. S.C. Code § 39-5-39 (declaring deceptive attorney advertising conduct to be an unfair trade practice). It is indisputably illegal, and therefore unfair, for criminal prosecutors whose client is the Sovereign to simultaneously engage in the sort of “moonlighting” as civil prosecutors whose client is the alleged victim in a criminal prosecution that Howland engaged in in this case, conduct which was procured by Defendant Griffith and the Moore Taylor Defendants for the obvious reason that procuring such “moonlighting” from Howland was the only possible way Defendant Griffith and the Moore Taylor Defendants could secure possession of the disputed property in this matter, the pet animal. Defendant Griffith and the Moore Taylor Defendants knew that they would be unable to secure possession of the animal through legitimate civil process given the facts and circumstances of the case and therefore sought to illegitimately use criminal process in an effort to obtain an ill-gotten gain in the civil dispute.

31. Making a threat to commence or continue a criminal prosecution solely for advantage in a civil dispute—particularly a civil dispute that is entirely unrelated to the criminal matter—is an illegal, and therefore unfair, litigation practice expressly prohibited by Rule 4.5 of the South Carolina Rules of Professional Conduct (“A lawyer shall not present, participate in presenting, or threaten to present criminal or professional disciplinary charges solely to obtain an advantage in a civil matter.”) Enlisting a prosecutor to abuse his or her office by assisting in this illegal, and therefore unfair,

litigation practice is likewise an illegal, and therefore unfair, litigation practice expressly prohibited by South Carolina decisional law.

32. Defendants, a combination of a civil litigant, her civil litigation counsel, and a prosecutor unlawfully enlisted by them to assist in the civil litigation matter, made, and followed through, on a threat to continue a criminal prosecution solely for advantage in a civil dispute in this case. Defendants, by and through their co-conspirator and ally Howland, offered to drop a criminal domestic violence charge against Plaintiff if Plaintiff would surrender in an entirely unrelated civil dispute with Defendant Griffith that had nothing whatsoever to do with the criminal prosecution, a clear violation of Rule 4.5 of the South Carolina Rules of Professional Conduct and the common law of South Carolina governing the propriety of conduct incident to criminal and civil litigation. When Plaintiff refused the extortionate demand, Defendants unfairly continued the criminal prosecution against Plaintiff not because Defendants honestly thought Plaintiff deserved to be prosecuted for criminal domestic violence but because Plaintiff had declined to surrender an animal to Defendant Griffith and thereby cause the Moore Taylor Defendants to win that particular civil dispute on her behalf even though the dispute over the animal had absolutely no connection whatsoever to the criminal domestic violence matter.

33. The professional practice of civil litigation is a trade, and the disreputable and unlawful practice engaged in by certain civil litigators whereby a prosecutor is enlisted to unethically aid them in the prosecution of a civil claim is patently unfair because it is unlawful, and it is plainly subject to repetition as evidenced by the South Carolina Supreme Court's decision to expressly prohibit such conduct in Rule 4.5 of the South

Carolina Rules of Professional Conduct. Further, various South Carolina reported appellate decisions address and condemn such conduct in bright-line terms in cases where other civil litigators and prosecutors have engaged in the conduct at issue in this case. Accordingly, such conduct is a violation of the South Carolina Unfair Trade Practices Act and is civilly actionable under that Act when it causes harm to an actual or prospective criminal defendant, even if such conduct is also actionable under other causes of action. “The penalties and remedies provided in [the South Carolina Unfair Trade Practices Act] are cumulative of and in addition to other provisions of law” per 2004 Act No. 204, Section 2, informally codified as an editor’s note between S.C. Code § 39-5-38 and S.C. Code § 39-5-39 at www.scstatehouse.gov/code/t39c005.php.

34. Obviously, not every type of abuse of process necessarily constitutes an unfair trade practice that is actionable under the South Carolina Unfair Trade Practices Act. But the particular type of abuse of process at issue in this case—where a prosecutor agrees to serve as a de facto “outside” civil litigation counsel to aid private counsel representing an alleged victim in pressing civil claims against the criminal defendant that are entirely outside the proper ambit of criminal restitution—is an unfair litigation practice expressly prohibited by the Rules of Professional Conduct and clear South Carolina decisional law and is therefore an unfair trade practice as well.

35. Plaintiff asserts this statutory tort cause of action in addition to the common law causes of action pursuant to 2004 Act No. 204, Section 2, supra. To the extent the court may find that Plaintiff must elect between this statutory tort cause of action and one or more of the common law causes of action, Plaintiff will make such election at the proper time.

FOR THE FIFTH CAUSE OF ACTION
NEGLIGENT SUPERVISION

36. Plaintiff additionally asserts claims for negligent, grossly negligent, reckless, or willfully deficient supervision: (1) against Defendant Griffith for failing to adequately supervise her lawful private counsel, the Moore Taylor Defendants, and her unlawful private counsel, Howland, with respect to the civil dispute involving the animal; (2) against Defendant Moore Taylor Law Firm, P.A. for failing to adequately supervise the individual Moore Taylor lawyers involved in this matter and for failing to adequately supervise Howland once she was enlisted as “moonlighting” counsel to assist in the civil dispute involving the animal; (3) against the individual Moore Taylor lawyers for failing to adequately supervise Howland once she was enlisted as “moonlighting” counsel to assist in the civil dispute involving the animal; and (4) against Defendant Stricklin for failing to adequately supervise Defendant Fulmer to whatever extent Defendant Fulmer was primarily responsible for enlisting or subsequently supervising Howland’s conduct in this matter.

37. With the possible exception of Defendant Fulmer,² all Defendants had a duty to supervise Howland in this matter after securing an agreement from her to assist them in the civil dispute with Plaintiff involving the animal, and Defendants Griffith and Moore Taylor Law Firm, P.A. likewise had duties to supervise the individual Moore Taylor

² Plaintiff is informed and believes that Defendants Stricklin and Fulmer acted as joint supervisors of Howland’s involvement in the civil dispute that is the subject of this action, but Plaintiff was not privy to the communications between Defendants Stricklin and Fulmer with Howland and does not know with certainty who did what with respect to enlisting Howland to help with the prosecution of the civil claim against Plaintiff relating to the animal dispute or with respect to supervising Howland in that endeavor. Obviously Howland was under the supervision of one or both of the Moore Taylor lawyers but it is not clear exactly what the relationship was. Should discovery reveal that one of the Moore Taylor lawyers was not responsible for supervising Howland, Plaintiff will drop the negligent supervision claim against that particular Moore Taylor lawyer. Defendant assumes that the only possibility is that Defendant Fulmer might not have been responsible for supervising Howland given Defendant Fulmer’s status as a junior associate working under Defendant Stricklin, a senior partner.

lawyers and law firm staff who performed professional litigation services on behalf of Defendant Griffith, including but not limited to the enlistment and supervision of Howland as de facto outside associated counsel on the civil dispute involving the animal.

38. Every defendant owing a supervisory duty in this matter breached that duty by failing to ensure that Howland's efforts to assist Defendant Griffith and the Moore Taylor Defendants in pressing their civil claim against Plaintiff relating to the animal dispute stayed within the bounds of South Carolina law and did not result in an abuse of process or other tortious, illegal, unethical, or unfair conduct.³ Every defendant owing a supervisory duty in this matter further breached that duty by failing to direct Howland to engage in corrective action once Plaintiff objected to Howland's extortionate demand that he capitulate in the civil dispute involving the animal in exchange for Howland dropping the criminal domestic violence charge against him. Such corrective action would, as a matter of law, have been to direct Howland to drop the criminal domestic violence charge without conditioning such action on Plaintiff's capitulation in the unrelated civil dispute.

39. Obviously a typical victim in a typical criminal case has no authority to direct a prosecutor to drop the criminal charge, but this is not a typical criminal case and Defendant Griffith is not a typical victim. Defendant Griffith retained civil litigators to assist her in using the criminal case to her advantage in civil litigation, and those civil litigators were obviously able to "capture" the prosecutor in the matter and convince her to do their bidding. A civil litigant who "captures" a prosecutor in this fashion has the

³ Plaintiff cannot conceive of any assistance that Howland could have offered Defendant Griffith and the Moore Taylor Defendants without running afoul of South Carolina law other than quitting her job and going to work as Defendant Griffith's lawful civil counsel in the civil case involving the animal dispute, but even assuming there were less severe ways she could have assisted Defendant Griffith and the Moore Taylor Defendants that would have been within the bounds of South Carolina law, Howland elected not to stay within such boundaries and made this election at the direction and with the approval of Defendant Griffith and the Moore Taylor Defendants.

same duty to supervise the prosecutor that a solicitor would so long as the prosecutor stays captured. See In re Myers, 584 S.E.2d 375, 355 S.C. 1 (2003) (establishing personal duty of direct supervision on persons who supervise criminal prosecutions in the State of South Carolina). The fact that Defendant Griffith and the Moore Taylor Defendants have no legal right to supervise criminal prosecutions in the State of South Carolina is immaterial because in this case, as a factual matter, they endeavored to capture a prosecutor and were successful in doing so. Therefore they had the same supervisory duties as a solicitor, and a solicitor's duty of supervision in that situation would have required the solicitor to direct Howland drop the criminal domestic violence charge against Plaintiff without imposing the unlawful condition after Plaintiff objected to it, and since Howland was obviously willing to do whatever Defendant Griffith and the Moore Taylor Defendants told her to do—even including patently unlawful conduct—it is reasonable to conclude that if such a directive had been sent to her by her unlawful supervisors, Howland would have abided by it and would have dropped the criminal domestic violence charge without seeking to impose the unlawful and extortionate condition on Plaintiff that required him to capitulate to Defendant Griffith and the Moore Taylor Defendants in the unrelated civil dispute involving the animal.

40. Plaintiff contends this common law cause of action is entirely separate from the preceding causes of action and that no election of remedies is required, but should the court find otherwise, Plaintiff will make such election at the proper time.

FOR THE SIXTH CAUSE OF ACTION
SOUTH CAROLINA OMNIBUS ADULT PROTECTION ACT

41. Plaintiff contends that at all times relevant to this matter, Plaintiff qualified as a “vulnerable adult” as that term is used in the South Carolina Omnibus Adult Protection

Act codified at Title 43 Chapter 35 of the South Carolina Code of Laws and that Defendants had actual knowledge of Plaintiff's status in this regard at all times relevant to this matter.

42. Plaintiff contends that the conduct by Defendants complained of herein constitutes psychological abuse in violation of the South Carolina Omnibus Adult Protection Act.

43. Defendants' willful, intentional, reckless, grossly negligent, and negligent tortious conduct complained of herein has actually and proximately caused Plaintiff to suffer fear, humiliation, degradation, agitation, confusion, and other forms of serious emotional, mental, and psychological distress and therefore qualifies as psychological abuse per the definitions section of the South Carolina Omnibus Adult Protection Act codified at S.C. Code § 45-35-10(10).

44. The South Carolina Omnibus Adult Protection Act provides a private right of action sounding in tort for violations thereof and Plaintiff asserts this cause of action against all Defendants.

DAMAGES

45. Plaintiff seeks and is entitled nominal, compensatory, punitive, and treble damages for numerous harms and injuries actually and proximately caused by the tortious conduct of Defendants complained of herein.

46. Plaintiff's damages include but are not necessarily limited to emotional, psychological, reputational, financial, economic, wage loss, credit damage, liberty, and medical expense injuries suffered by Plaintiff proximately caused by Howland's unlawful refusal to drop the criminal domestic violence prosecution against Plaintiff on June 30,

2016 unless Plaintiff agreed to the unlawful condition which required him to surrender to Defendant Griffith and the Moore Taylor Defendants in the unrelated civil dispute regarding the pet animal. Accordingly, all injuries suffered as a result of the continuation of the misdemeanor criminal domestic violence prosecution past June 30, 2016 and the enhancement of charges to felony kidnapping and felony criminal domestic violence are actually and proximately caused by the tortious conduct complained of herein and are recoverable in this action.

47. The specific injuries suffered by Plaintiff are extreme and cannot be alleged with complete particularity because the harm is ongoing due to the ongoing nature of the criminal prosecution and the concomitant uncertainty as to its outcome, duration, or the adverse collateral effects it will continue to have on Plaintiff's life which may be continuations of harms already suffered or which may be entirely new harms Plaintiff cannot predict with certainty at this time. At a minimum Plaintiff is entitled to recover for:

- a. Loss of enjoyment of life associated with the continuation of the criminal prosecution and the enhancement of criminal charges from a minor misdemeanor to two major felonies.
- b. Reputational harm and embarrassment caused by the absence of a favorable resolution of the criminal prosecution and the enhancement of criminal charges from a minor misdemeanor to two major felonies.
- c. Severe psychiatric harm and resulting medical expenses including but not limited to a nervous breakdown in July of 2018 actually and proximately caused by the stress, anxiety, and depression associated with the ongoing criminal

prosecution and the enhancement of criminal charges from a minor misdemeanor to two major felonies.

d. Loss of employment opportunities which caused Plaintiff to lose his home in Columbia, South Carolina due to the inability to pay property taxes and which have caused Plaintiff to face foreclosure of his interest in a second parcel of real property in Colleton County.

e. Restrictions of liberty occasioned by the continuation of the criminal prosecution and the enhancement of criminal charges from a minor misdemeanor to two major felonies, including but not limited to incarceration in the Lexington County Detention Center after the criminal charges were enhanced, involuntary psychiatric hospitalization and a subsequent two-month incarceration in the Greenville County Detention Center after Plaintiff's nervous breakdown in July of 2018, and the various liberty restrictions imposed by the pre-trial release orders in the minor misdemeanor criminal domestic violence prosecution and the felony kidnapping and felony criminal domestic violence prosecution which include but are not limited to outright banishment from Lexington County, where Plaintiff's residence was located, and Richland County and which include terms essentially placing Plaintiff on house arrest and which as a practical matter entirely preclude Plaintiff from all sorts of activities that he previously enjoyed such as traveling to sporting events, going on vacations, and the like.

f. Numerous financial, economic, and credit injuries caused by the inability of Plaintiff to secure employment that would provide meaningful compensation commensurate with his skills in the legal and political industries, employment

which was off-limits to Plaintiff during the pendency of the criminal charges due to the nature of those industries and which is now forever off-limits to Plaintiff for all practical purposes due to the extreme public embarrassment and reputational harm caused by Plaintiff's nervous breakdown in July of 2018.

g. Mental anguish, frustration, and extreme emotional distress associated with Plaintiff's continued (and apparently unending) status as a criminal domestic violence defendant despite being provably innocent of the charges against him.

h. Loss of time and litigation expenses associated with Plaintiff's pro se defense of the criminal domestic violence prosecution coupled with exposure to potential imposition of an attorneys fee judgment against him arising from his decision to enlist the services of a public defender after his nervous breakdown in July of 2018.

i. Loss of his criminal defense attorney (who doubled as his divorce attorney) as a direct result of Defendants' abuse of process, which caused Plaintiff's counsel in those matters to seek to be relieved when Plaintiff made clear he had no intention of capitulating to Defendants' extortionate demands regarding the civil dispute over the animal, which forced Defendant to handle both matters pro se thereafter despite Plaintiff's complete lack of experience in family court litigation and complete lack of desire to represent himself in a criminal matter that had any probability of going to trial.

j. All future injuries, damages, and harms which manifest as a result of the continuation of the felony criminal domestic violence prosecution against Plaintiff, which may even include wrongful conviction and a thirty year prison

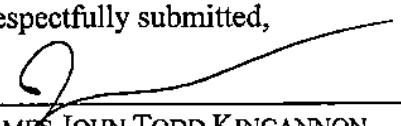
sentence imposed on Plaintiff solely because Plaintiff lawfully declined to submit to the extortionate demands of Howland and Defendant Griffith and the Moore Taylor Defendants in exchange for Howland dropping the minor misdemeanor criminal domestic violence charge on June 30, 2016.

PRAYER FOR RELIEF

48. Plaintiff prays for a jury trial and a judgment awarding all relief available under the causes of action asserted herein and such other and further relief as is equitable and proper, including but not limited to an award of the costs of this action.

Respectfully submitted,

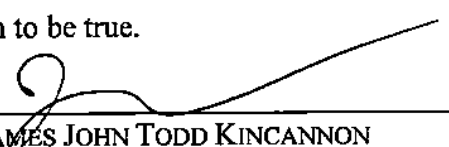
February 23, 2019

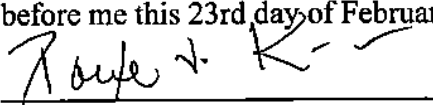

 JAMES JOHN TODD KINCANNON
 216 Jones Avenue
 Simpsonville, South Carolina 29681
 864-963-4374
 ToddKincannon@gmail.com
 Plaintiff Pro Se

VERIFICATION

The undersigned Plaintiff hereby verifies all factual allegations in the foregoing Complaint, having personal knowledge of each, except those expressly stated upon information and belief or implicitly represented as such given the context and as to those matters, Plaintiff is informed and believes them to be true.

Sworn to and subscribed
 before me this 23rd day of February, 2019


 JAMES JOHN TODD KINCANNON


 South Carolina Notary Public
 My Commission Expires: 6/2/25

ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

James John Todd Kincannon

Plaintiff(s)

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

Defendant(s)

Submitted By: James John Todd Kincannon

Address: 216 Jones Ave, Simpsonville SC 29681

IN THE COURT OF COMMON PLEAS

2019 CP 3201168

CIVIL ACTION COVERSHEET

-CP-

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FILED

SC Bar #:

Pro Se

Telephone #:

864-963-4374

Fax #:

Other:

E-mail:

toddkincannon@gmail.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. This form is NOT required to be filed in E-Filed Cases.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
- ☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- ☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
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| <p>Contracts</p> <p>☐ Constructions (100)</p> <p>☐ Debt Collection (110)</p> <p>☐ General (130)</p> <p>☐ Breach of Contract (140)</p> <p>☐ Fraud/Bad Faith (150)</p> <p>☐ Failure to Deliver/Warranty (160)</p> <p>☐ Employment Discrim (170)</p> <p>☐ Employment (180)</p> <p>☐ Other (199) _____</p> | <p>Torts - Professional Malpractice</p> <p>☐ Dental Malpractice (200)</p> <p>☐ Legal Malpractice (210)</p> <p>☐ Medical Malpractice (220)</p> <p>Previous Notice of Intent Case #
20____-NI-____</p> <p>☐ Notice/ File Med Mal (230)</p> <p>☐ Other (299) _____</p> | <p>Torts - Personal Injury</p> <p>☐ Conversion (310)</p> <p>☐ Motor Vehicle Accident (320)</p> <p>☐ Premises Liability (330)</p> <p>☐ Products Liability (340)</p> <p>☐ Personal Injury (350)</p> <p>☐ Wrongful Death (360)</p> <p>☐ Assault/Battery (370)</p> <p>☐ Slander/Libel (380)</p> <p>☒ Other (399) <u>Abuse of Process</u></p> | <p>Real Property</p> <p>☐ Claim & Delivery (400)</p> <p>☐ Condemnation (410)</p> <p>☐ Foreclosure (420)</p> <p>☐ Mechanic's Lien (430)</p> <p>☐ Partition (440)</p> <p>☐ Possession (450)</p> <p>☐ Building Code Violation (460)</p> <p>☐ Other (499) _____</p> |
| <p>Inmate Petitions</p> <p>☐ PCR (500)</p> <p>☐ Mandamus (520)</p> <p>☐ Habeas Corpus (530)</p> <p>☐ Other (599) _____</p> | <p>Administrative Law/Relief</p> <p>☐ Reinstate Drv. License (800)</p> <p>☐ Judicial Review (810)</p> <p>☐ Relief (820)</p> <p>☐ Permanent Injunction (830)</p> <p>☐ Forfeiture-Petition (840)</p> <p>☐ Forfeiture-Consent Order (850)</p> <p>☐ Other (899) _____</p> | <p>Judgments/Settlements</p> <p>☐ Death Settlement (700)</p> <p>☐ Foreign Judgment (710)</p> <p>☐ Magistrate's Judgment (720)</p> <p>☐ Minor Settlement (730)</p> <p>☐ Transcript Judgment (740)</p> <p>☐ Lis Pendens (750)</p> <p>☐ Transfer of Structured Settlement Payment Rights Application (760)</p> <p>☐ Confession of Judgment (770)</p> <p>☐ Petition for Workers Compensation Settlement Approval (780)</p> <p>☐ Incapacitated Adult Settlement (790)</p> <p>☐ Other (799) _____</p> | <p>Appeals</p> <p>☐ Arbitration (900)</p> <p>☐ Magistrate-Civil (910)</p> <p>☐ Magistrate-Criminal (920)</p> <p>☐ Municipal (930)</p> <p>☐ Probate Court (940)</p> <p>☐ SCDOT (950)</p> <p>☐ Worker's Comp (960)</p> <p>☐ Zoning Board (970)</p> <p>☐ Public Service Comm. (990)</p> <p>☐ Employment Security Comm (991)</p> <p>☐ Other (999) _____</p> |
| <p>Special/Complex /Other</p> <p>☐ Environmental (600)</p> <p>☐ Automobile Arb. (610)</p> <p>☐ Medical (620)</p> <p>☐ Other (699) _____</p> <p>☐ Sexual Predator (510)</p> <p>☐ Permanent Restraining Order (680)</p> <p>☐ Interpleader (690)</p> <p>☐ Pharmaceuticals (630)</p> <p>☐ Unfair Trade Practices (640)</p> <p>☐ Out-of State Depositions (650)</p> <p>☐ Motion to Quash Subpoena in an Out-of-County Action (660)</p> <p>☐ Pre-Suit Discovery (670)</p> | | | |

Submitting Party Signature: _____

Date: 2-23-19

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRPC, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.**

State of South Carolina
County of Lexington

Court of Common Pleas

James John Todd Kincannon,	)	
	)	
Plaintiff,	)	Transcript of Record
v.	)	2019-CP-32-1168
	)	
Ashley Suzanne Griffith,	)	
	)	
Defendant.	)	

May 29, 2019
Lexington, South Carolina

B E F O R E:

The Honorable Robin B. Stilwell, Judge.

A P P E A R A N C E S:

John James Todd Kincannon, pro se

James Edward Bradley, Esquire
Attorney for the Defendant

Bethanie K. Creppon
Circuit Court Reporter

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P R O C E E D I N G S

* * *

THE COURT: I'll be happy to hear from you, sir.

MR. BRADLEY: Thanks so much, Judge. Ward Bradley here with my law partner to my left, Vance Stricklin, who has been sitting in this matter; behind me is Amber Fulmer, who is one of the associates at our law firm; Sierra Carini, who is a new lawyer with us, is there. And, also, Ashley Griffith, who has been sued, who we are representing in this matter, is our client.

Finally, our whole law firm has been sued, the Moore Taylor Law Firm. And Stanley Myers is here as a representative of our firm because he's the managing partner in the law firm.

THE COURT: Yes, sir.

MR. BRADLEY: So this lawsuit came out of a divorce in which Mr. Stricklin and Ms. Fulmer represented Ashley Griffith, who is Mr. Kincannon's ex-wife.

In March of 2015, there was a domestic disturbance to which the police were called. Mr. Kincannon was charged with criminal domestic violence as a result of that. After that,

1 Ms. Griffith called our law firm to represent her,
2 which Mr. Stricklin agreed to do. He sent a letter
3 to Mr. Kincannon regarding the situation and the
4 divorce. In response, Mr. Kincannon sent several
5 threatening e-mails, as well as a picture of himself
6 with a gun pointed at his own head.

7 Charter Rivers -- he was -- this was reported
8 to the police. His law license, at some point, was
9 suspended, because he was a member of the Bar, and
10 he was checked into Charter Rivers Hospital for a
11 time. Eventually, he was released. And, at some
12 point, a settlement of the divorce was entered,
13 which was approved by the family court judge.

14 After that, Mr. Kincannon executed his parents'
15 dog with a kitchen knife and proclaimed himself the
16 second coming of Jesus Christ. He also threatened
17 various frivolous lawsuits against his ex-wife,
18 Ms. Griffith, as well as our law firm. In fact, a
19 couple of those were just cancelled yesterday.

20 I don't know if there are any more pending, but
21 this is one of the lawsuits he's filed either
22 against her or against -- I think this is the only
23 one he's filed against our law firm. So we move to
24 dismiss. And, as the Court is aware, for a motion
25 to dismiss, we take the facts alleged in the

1 complaint as true.

2 So here are, basically, the facts as alleged in
3 the complaint: Mr. Kincannon was charged with
4 criminal domestic violence; that he went to criminal
5 court and the prosecutor, Nicole Howland, offered to
6 dismiss those charges if he would return
7 Ms. Griffith's dog, Noodle, to her, and that, at
8 some level, Vance Stricklin told Ms. Howland that
9 Ms. Griffith would cooperate and agree to dismiss
10 the criminal domestic violence charge if the dog was
11 returned.

12 Mr. Kincannon refused to accept that agreement
13 and filed some sort of either complaint or lawsuit
14 against the prosecutor, Ms. Howland. The
15 Solicitor's Office in the 11th Circuit recused
16 itself and the matter was taken up by the Attorney
17 General's Office which elevated the charges to
18 kidnapping and felony criminal domestic violence,
19 where they sit today. That's, basically, the facts,
20 as he alleged them.

21 He's then sued on six claims: Abuse of
22 process, criminal conspiracy, trespass on the case,
23 negligent supervision, violation of the Adult
24 Omnibus Protection Act, and Unfair Trade Practices
25 Act.

1 I'm going to start at the beginning of his
2 complaint and address the abuse of process claims
3 that he's made. The case on abuse of process in
4 criminal proceedings is Johnson vs. Painter. And I
5 have a copy for the Court, if it will make it easier
6 as I go through the case. And I've tagged what I
7 believe are the relevant parts of this case. This
8 is from the Supreme Court.

9 In Mr. Johnson vs. Mr. Painter, Mr. Johnson and
10 Mr. Painter got in a fight and Mr. Johnson was
11 charged with assault and battery. Mr. Painter
12 offered to consent to the solicitor dismissing the
13 charges if Mr. Johnson would pay his medical bills
14 and his lost time of \$2,500. Mr. Johnson didn't
15 agree to do that. He was later found not guilty and
16 sued Mr. Painter for abuse of process for making
17 that offer.

18 He won in the trial court and it was appealed
19 at the Supreme Court which overturned the trial
20 court and said the case should have been thrown out
21 initially. And the reason for it was this: That it
22 is not abuse of process to offer to dismiss -- to
23 cooperate with the solicitor to dismiss a criminal
24 charge.

25 They set forth the elements there on the first

1 tabbed page on the opinion by Judge Gregory. It
2 says: The essential elements of abuse of process
3 are an ulterior purpose and a willful act in the use
4 of process not proper in the regular conduct of the
5 proceeding.

6 So the Supreme Court threw the case out. And,
7 essentially, what they found was, offering to agree
8 to dismiss the charges, if the solicitor would do
9 it, for restitution, essentially, is not a wrongful
10 act. So they even say: We've always looked with
11 favor upon restitution and reconciliation; we see
12 nothing wrong with the attorney calling or the
13 appellate telling him the amount of his
14 out-of-pocket expenses.

15 So, based on the Supreme Court's opinion,
16 offering to consent to dismiss a criminal charge for
17 restitution is not abuse of process, by definition,
18 because it's not a wrongful act.

19 Here, in taking everything Mr. Kincannon
20 alleges as true, the worst that happened here was
21 Ms. Griffith, through her lawyer, Mr. Stricklin,
22 agreed to consent to Ms. Howland dismissing the
23 criminal domestic violence charge if he would return
24 the dog, which he refused to do. So there's no
25 abuse of process because the Supreme Court has said

1 that's not an unlawful act.

2 THE COURT: Okay.

3 MR. BRADLEY: Moving to the second claim, which
4 is criminal -- well, not criminal. Civil
5 conspiracy. The case, really, that sets out the
6 requirements for civil conspiracy is McMillan vs.
7 Ocone Hospital, which I have a copy of here, Judge,
8 if I may approach.

9 THE COURT: Sure.

10 MR. BRADLEY: And what Mr. Kincannon has
11 alleged is that the law firm, its lawyers,
12 essentially -- he hasn't really alleged because he
13 hasn't sued Ms. Howland in his lawsuit. But he's
14 alleged that our law firm and our client conspired
15 against him with a wrongful purpose.

16 And in McMillan vs. Ocone Hospital -- I've got
17 it tagged there -- the Court sets out the elements
18 of civil conspiracy, which is a combination of two
19 or more persons joining for the purpose of injuring
20 or causing special damages to the plaintiff. All
21 right?

22 And then Justice Toal sets forth one of the
23 rules about civil conspiracy that's pretty
24 well-followed. But this case just sets it forth
25 pretty clearly: However, a civil conspiracy cannot

1 exist when the alleged acts arise in the context of
2 a principal-agent relationship because, by virtue of
3 the relationship, such acts do not involve separate
4 entities.

5 So what he's alleged is a conspiracy between
6 the law firm, the lawyers in the law firm, and the
7 client of the law firm, who are all -- the law firm,
8 obviously, is the agent of the client and the
9 lawyers are the agent of the law firm.

10 THE COURT: I got it. You can move on from
11 that now. I understand it.

12 MR. BRADLEY: All right. And --

13 THE COURT: If I hurry up a little bit and rush
14 you along, I hope you take no offense from that.

15 MR. BRADLEY: I've been chewed on by the best,
16 so you can't offend me. But I know there's a
17 courtroom full of people.

18 THE COURT: Yeah.

19 MR. BRADLEY: So -- and then I'll briefly hit
20 the rest of his claims.

21 The next one is trespass on the case, which
22 has, as far as I can tell, not been used in a
23 hundred years in South Carolina, is not recognized.
24 It's an old tort doctrine that was, essentially,
25 sort of a negligence-type doctrine that's not used.

1 And he hasn't even alleged any elements, because I
2 don't know what they are. And that's not a cause of
3 action in South Carolina.

4 The next one is the Unfair Trade Practices Act.
5 He hasn't alleged damage to the public for
6 possibility of repetition because there is none and
7 that's an element of a claim under the Unfair Trade
8 Practices Act. So he can't sue us for that.

9 The fifth claim that he's made is negligent
10 supervision, which is not a cause of action. It's
11 an agency doctrine where you hold one person liable
12 for what another person does. Negligent supervision
13 in itself doesn't create a cause of action, so he
14 can't sue us for negligent supervision; it would
15 just be a way to bring us in for the wrongful acts
16 of someone else we are supposed to supervise.

17 And, finally, the last claim is a violation of
18 the Adult Omnibus Criminal -- not criminal.
19 Vulnerable Adult Protection Act, which there's no
20 indication he was a vulnerable adult in this
21 situation or that we did anything that would violate
22 that act. The allegation is, just as I said to you,
23 which was the abuse of process by, essentially,
24 agreeing to consent to the solicitor dismissing the
25 case if he would return Ms. Griffith's dog, which he

1 never did. So that can't be a violation of the
2 Adult Omnibus Protection Act.

3 So that's the argument quickly. I know there's
4 a courtroom full of people. I'm happy to answer
5 questions. I do have an affidavit from
6 Mr. Stricklin that fills in the background facts
7 which I would like to present to the Court.

8 THE COURT: Mr. Kincannon, you have received a
9 copy of that as well?

10 MR. KINCANNON: I have, Your Honor. And I'll
11 object to it when it's my turn to talk.

12 THE COURT: All right. Good enough.

13 MR. BRADLEY: And that's our argument and why
14 we believe the lawsuit should be dismissed, Judge.

15 THE COURT: All right. Thank you.

16 Mr. Kincannon, I'll be happy to hear from you,
17 sir.

18 MR. KINCANNON: May it please the Court, Your
19 Honor? Good morning. May I hand up my amended
20 memorandum?

21 THE COURT: Yes, sir.

22 MR. KINCANNON: And that also has the Broadmoor
23 case with it.

24 Your Honor, first off, the -- a threshold
25 matter comes up -- and it's the affidavit. I've

1 objected to the affidavit being filed which
2 establishes matters outside the four corners of the
3 complaint. This is a motion to dismiss. It's a
4 vanilla Rule 12(b)(6) motion. Affidavits in support
5 of those are not typically proper. And this
6 affidavit was not served until less than two full
7 business days before this motion hearing today.

8 And the Rule (6)(d) says that there's a ten-day
9 rule and that affidavits have to be filed with the
10 motion. This was not, so I would object to the
11 affidavit being considered by the Court.

12 THE COURT: Okay.

13 MR. KINCANNON: I would also object to all of
14 Mr. Bradley's arguments beyond the prosecutorial
15 argument because they're not part of his motion.
16 His motion only advances one ground. It advances
17 the ground that because they aren't in control of
18 what the prosecutor does, they can't be held liable
19 for abuse of process. That's all the motion says.

20 On this other stuff about civil conspiracy,
21 Unfair Trade Practices Act and all that, that first
22 appeared in their memorandum in support of their
23 motion. It's not in their motion. And that
24 memorandum was first served the same time as that
25 affidavit, which was less than two days before the

1 hearing.

2 So I would object to any dismissal on the
3 grounds, anything apart from what's actually in
4 their motion. I have no problem whatsoever and they
5 have every right to make those motion -- make those
6 all as part of a Rule (12)(c) or 12 (h)(3) motion
7 later in the proceedings. But I haven't had an
8 opportunity to prepare a memorandum in response to
9 anything other than the two-one section of their
10 memorandum, which is the only thing in their motion.

11 So, that being said, I would ask the Court for
12 an opportunity -- and if the Court goes ahead and
13 grants anything beyond that, I would just ask for an
14 opportunity to amend my complaint rather than be
15 dismissed with prejudice at the get-go, because I
16 believe I can amend the complaint to cure a lot of
17 what they complain about in Sections 2, 3, 4, 5, and
18 6, everything beyond what was in their motion.

19 THE COURT: Okay.

20 MR. KINCANNON: As far as the abuse of process
21 argument, the case of Broadmoor Apartments vs. --
22 Charleston vs. Horwitz, which I've handed up --

23 THE COURT: Yes, sir.

24 MR. KINCANNON: -- says that -- their argument
25 in their motion is that because they don't control

1 what the prosecutor does, they can't be held liable
2 for a prosecutor's abuse of criminal process.
3 Broadmoor shoots that down.

4 In the Broadmoor case, the Supreme Court said,
5 quite plainly, that a private party can be held
6 liable for abuse of criminal process if the private
7 party -- and that lia- -- because liability of abuse
8 of process extends to all who knowingly participate,
9 aid, or abet in the abuse. That's what the case
10 says. It goes on to say: Those who advise or
11 consent to the unlawful acts or subsequently ratify
12 them are liable as joint tortfeasors.

13 So Mr. Bradley has already admitted in his
14 argument that the four corners of the complaint do
15 allege that Mr. Stricklin and Ms. Griffith and the
16 entire corps of defendants consented to what the
17 prosecutor did; that they went with the prosecutor,
18 the prosecutor -- I'm not sure who proposed what.

19 But there was this agreement between them that
20 this plea offer would be extended in a criminal
21 domestic violence matter and that the plea offer
22 would have connected to it an attached condition
23 that the plea offer would only be given if I would
24 surrender this dog, which was a completely unrelated
25 matter, completely unrelated civil matter.

1 So the offer that was made -- and this is how
2 we distinguish the Johnson case. The offer that was
3 made in the criminal case was, we'll dismiss this
4 criminal domestic violence matter if you surrender
5 in this totally unrelated civil matter. And that's
6 critical because the Johnson case talks about
7 restitution.

8 Another critically important distinguishing
9 factor with the Johnson case is that the lawyer for
10 the criminal defendant is who reached out to the
11 lawyer for the victim and proposed this deal.
12 That's the -- the uncontradicted testimony at trial
13 was that Respondent's attorney, who was the person
14 who got sued for abuse of process, who was counsel
15 for Mr. Johnson, a criminal, telephoned Appellant
16 while -- so the under- -- this is about restitution,
17 is what this case is about.

18 My case has absolutely nothing to do with
19 restitution. The civil dispute over the dog had
20 absolutely nothing to do with the criminal domestic
21 violence matter. They were two totally unrelated
22 matters. It would be no different from me offering
23 to drop a criminal charge against you for stealing
24 something of mine if you would invest \$10,000 in my
25 business. Totally separate; totally unrelated.

1 The policy in South Carolina looking with favor
2 upon restitution doesn't apply in a case where
3 there's no restitution. Surrender of the dog in a
4 civil proceeding was not restitutionary; it is,
5 therefore, completely outside Johnson vs. Painter.
6 And I can plead that with more specificity, if need
7 be, in an amended complaint, but I don't think
8 that's necessary.

9 The Broadmoor vs. Horwitz case couldn't be
10 clearer on the points with regard to -- that all a
11 private party has to do is consent, aid, abet. It,
12 essentially, creates a separate aiding and abetting
13 tort for abuse of process. That's what I've
14 pleaded.

15 I have pleaded that Mr. Stricklin,
16 Ms. Griffith, and Ms. Fulmer, and the firm, they
17 procured this abuse of process by the prosecutor.
18 And I think they've, basically, admitted that here
19 in oral argument.

20 So I would think that argue -- alleging that
21 they've procured an abuse of process is good enough
22 to constitute the aiding and abetting. So my
23 memorandum sets this all out in detail. And, again,
24 all I'd ask is that if you do decide that any of
25 their arguments have merit, give me an opportunity

1 to amend my pleadings before I get thrown out just
2 like one of the prior guys sitting -- I would ask
3 the same thing, Your Honor.

4 THE COURT: All right. This is what I'm going
5 to ask y'all to do, if you would, please: I want
6 y'all to send me, each, proposed orders setting
7 forth your respective positions and what you would
8 have the Court order pursuant to your positions.
9 And I'll ask each of you what you think is an
10 appropriate amount of time.

11 MR. BRADLEY: We can have it done within ten
12 days, Judge.

13 MR. KINCANNON: That's fine with me, too, if it
14 works for Ward.

15 THE COURT: All right. So send me proposed
16 orders within ten days. And send them to me, if you
17 will, please, in Word format --

18 MR. KINCANNON: Yes, sir.

19 THE COURT: -- and I'll review and sign it.
20 Thank you very much. Y'all have a great day.

21 MR. KINCANNON: Thank you, Your Honor.

22 MR. BRADLEY: Thank you for your time, Judge.

23 -- END OF TRANSCRIPT OF RECORD --

24

25

C E R T I F I C A T E

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

I, the undersigned, Bethanie K. Creppon, Circuit Court Reporter for the Eleventh Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete transcript of record of all the proceedings had and the evidence introduced in the hearing of the captioned cause, relative to appeal in the Circuit Court for Lexington County, South Carolina, on the 29th of May, 2019.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

December 13, 2019

s/ *Bethanie K. Creppon*

Bethanie K. Creppon
Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
James John Todd Kincannon,	)	C/A No. 2019-CP-32-01168
	)	
Plaintiff,	)	
vs.	)	DEFENDANTS' MOTION TO DISMISS
	)	
Ashely Suzanne Griffith,	)	
Moore Taylor Law Firm, P.A.,	)	
Vance Stricklin, and Amber Fulmer,	)	
	)	
Defendants.	)	
_____	)	

YOU WILL PLEASE TAKE NOTICE that the Defendants move to dismiss the allegations of this Complaint as they fail to state a claim upon which relief may be granted. In particular, the Complaint alleges claims for Abuse of Process, Civil Conspiracy, Trespass on the Case, South Carolina Unfair Trade Practices Act, Negligent Supervision, and the South Carolina Omnibus Adult Protection Act. All these claims center upon the factual allegations in the Complaint that the Plaintiff was charged with Criminal Domestic Violence by a Solicitor in the Lexington County Solicitors' Office. The Defendants are not in control of the actions of the Lexington County Solicitors' Office, and the Defendants cannot be held liable for actions of the Lexington County Solicitors' Office.

With this in mind, the Defendants move that this matter be dismissed with Prejudice.

[Signature Page Attached]

Respectfully submitted,

s/James Edward Bradley
James Edward Bradley, S.C. Bar # 66130
Moore Taylor Law Firm, P.A.
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160 (office)
(803) 791-8410 (fax)
ward@mttlaw.com
Attorney for the Defendants

West Columbia, South Carolina

April 23, 2019

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
James John Todd Kincannon,	)	C/A No. 2019-CP-32-01168
	)	
Plaintiff,	)	
vs.	)	MEMORANDUM IN SUPPORT OF
	)	DEFENDANTS' MOTION TO DISMISS
Ashely Suzanne Griffith,	)	
Moore Taylor Law Firm, P.A.,	)	
Vance Stricklin, and Amber Fulmer,	)	
	)	
Defendants.	)	
_____	)	

Defendants Ashely Suzanne Griffith (hereinafter “Griffith”), Moore Taylor Law Firm, P.A. (hereinafter “Moore Taylor”), Vance Stricklin (hereinafter “Attorney Stricklin”), and Amber Fulmer (hereinafter “Attorney Fulmer”) respectfully submit this Memorandum in Support of its Motion to Dismiss.

I. STATEMENT OF FACTS

On April 6, 2015, the Lexington County Solicitor’s Office charged Plaintiff with criminal domestic violence arising out of an assault that occurred on March 26, 2015. On September 1, 2015, Griffith filed for divorce from Plaintiff in Lexington County Family Court. The next day, the Honorable W. Greg Seigler granted Griffith an Ex Parte Restraining Order against Plaintiff. Griffith hired Attorney Stricklin and Attorney Fulmer to represent her in the divorce. Attorney Stricklin and Attorney Fulmer are employed as attorneys at Moore Taylor. Plaintiff has asserted multiple causes of action against Griffith, Moore Taylor, Attorney Stricklin, and Attorney Fulmer, which, for the reasons discussed herein, should be dismissed.

II. DISCUSSION

Defendants are entitled to dismissal of Plaintiff's Complaint because each of Plaintiff's individual causes of action fail to present a claim upon which relief can be granted, and, accordingly, should be dismissed pursuant to rule 12(b)(6), SCRCP.

A. Abuse of Process

To establish a claim for abuse of process, the plaintiff must assert (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the conduct of the proceeding. *Food Lion, Inc. v. United Food & Commercial Workers Int'l. Union*, 351 S.C. 65, 71, 567 S.E.2d 251, 253 (Ct. App. 2002). "The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Id.* "To sustain a claim for the tort, a party must allege facts sufficient to show not only that the lawsuit was brought for an ulterior purpose, i.e., for collateral reasons, but that willful acts were taken through which the process was misapplied. *Id.* "One who uses a legal process, whether criminal or civil against another *primarily* to accomplish a purpose for which it is not designed, is subject to liability to the other for harm caused by the abuse of process." *Id.* "The significance of ['primarily'] is that there is no action for abuse of process when the process is used for the purpose for which it is intended." *Id.*

Here, Plaintiff has failed to sufficiently allege that he was charged with criminal domestic violence for an ulterior purpose or that Defendants charged him. In fact, the 11th Circuit Solicitors Office charged Mr. Kincannon with criminal domestic violence after police were called to resolve a domestic dispute that arose between Kincannon and Griffith. (see Compl. ¶11). The Solicitor charged Kincannon with criminal domestic violence five months before Griffith sought a divorce and over a year before the civil dispute over Griffith's dog. Kincannon was later indicted for felony

kidnapping and felony criminal domestic violence of a high and aggravated nature. (Compl., ¶17). The charges are still pending. Thus, neither Ms. Griffith nor her lawyers had control or involved in the Solicitor's decision to pursue the criminal domestic violence charges. Thus, Plaintiff has failed to sufficiently allege an ulterior purpose to his criminal domestic violence charge or a willful act as required by South Carolina law.

B. Civil Conspiracy

To establish a claim for civil conspiracy, the plaintiff must prove three elements: (1) a combination of two or more persons, (2) for the purpose of injuring plaintiff, and (3) causing plaintiff special damage. *Hackworth v. Greywood at Hammett, LLC*, 335 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009). "In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim." *Id.* See *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981) (dismissing plaintiff's civil conspiracy claim because "the civil conspiracy action does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy. No additional acts in furtherance of the conspiracy [were] plead"). Similarly, "if a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed." *Id.* at 117.

In *Hackworth*, the Court held that the civil conspiracy counterclaim should be dismissed because Defendant repeated verbatim the same allegations and damages in its civil conspiracy claim as were alleged in its claim for breach of contract accompanied by a fraudulent act. *Id.*

Here, Kincannon has relied on the allegations contained in his cause of action for abuse of process. Specifically he alleges as follows: “Plaintiff alternatively pleads a cause of action for civil conspiracy as to such conduct” without informing Defendants of what acts have been committed in furtherance of the alleged conspiracy they are being accused of. (Compl. ¶27). Moreover, he “seeks all damages available under the tort of civil conspiracy” without identifying any special damages that have been caused as a result of the alleged civil conspiracy. (Compl. ¶27). In addition, Mr. Kincannon has sued his former wife and her lawyers for essentially being engaged in a domestic lawsuit. This is an attorney-client relationship required at law for the purpose of representing a client and not a wrongful conspiracy. Therefore, Mr. Kincannon’s claim of civil conspiracy should be dismissed.

C. Trespass on the Case

Trespass on the case is no longer recognize by the state of State of South Carolina. Trespass on the case has been abolished since 1895. *Michalson v. All*, 43 S.C. 459, 21 S.E. 323 (S.C. 1895).

D. Unfair Trade Practices

“To be actionable under the UTPA, the unfair or deceptive act or practice must have an impact upon the public interest.” *Wogan v. Kunze*, 366 S.C. 583, 607, 623 S.E.2d 107, 120 (Ct. App. 2005) citing *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 269, 536 S.E.2d 399, 407 (Ct. App. 2000). “An impact on the public interest may be shown if the acts or practices have the potential for repetition. *Id.* citing *Singleton v. Strokes Motors, Inc.*, 358 S.C. 369, 379, 595 S.E.2d 461, 466 (2004). “The potential for repetition may be shown by showing the same kind of actions occurred in the past, thus making it likely they will continue to occur absent deterrence.” *Id.*

The acts Mr. Kincannon alleges are appropriate within an attorney client relationship. Mr. Kincannon has not plead that the same kind of actions occurred in the past. Mr. Kincannon’s

pleadings show that he was charged with criminal domestic violence one year before the dispute over the dog began and he was later indicted for two felonies. Thus, there is no impact on the public interest, and this claim should be dismissed.

In addition, Mr. Kincannon has not alleged any actual damage as a result of the alleged unfair trade practice violation or any of the claims in the complaint. Because Mr. Kincannon has not alleged an impact on the public interest or any actual damage, the claim should be dismissed as a matter of law.

E. Negligent Supervision

In *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young*, 359 S.C. 635, 644-645, 598 S.E.2d 717, 722 (Ct. App. 2004), a claim of negligent supervision against a law firm hinges on whether or not the law firm owed a duty. Generally, the common law imposes no duty to act. *Id.* If the law firm owes no duty then any harm suffered would be irrelevant. *Id.*

Moore Taylor, Attorney Stricklin and Attorney Fulmer owed no duty to Plaintiff. In fact, they represented his wife in the divorce. Kincannon was not their client. As a result, Mr. Kincannon has no basis to sue Moore Taylor, Attorney Stricklin or Attorney Fulmer in negligence because they owe him not duty.

Further, Kincannon's own pleadings admit a victim in a criminal case has no authority to direct a prosecutor to dismiss a criminal charge. He alleges regardless of the lack of duty, Griffith can be liable for supervising the prosecutor when she was the victim. Kincannon also admits Moore Taylor, Attorney Stricklin and Attorney Fulmer have no legal duty or ability to supervise a solicitor's prosecution of a criminal case. Neither Moore Taylor, Attorney Stricklin, Attorney Fulmer, nor Griffith had a duty or the ability to supervise the solicitor in Kincannon's criminal domestic violence prosecution. Thus, his argument is wholly unsupported and should be dismissed.

F. South Carolina Omnibus Adult Protection Act

Pursuant to the South Carolina Omnibus Adult Protection Act, psychological abuse is defined as “deliberately subjecting a vulnerable adult to threats or harassment or other forms of intimidating behavior causing fear, humiliation, degradation, agitation, confusion, or other forms of serious emotional distress.” S.C. Code Ann. § 43-35-10(10).

Todd Kincannon is a law school graduate and was a lawyer until the Supreme Court suspended his license. He has not alleged facts to show he was a vulnerable adult. If he is in fact incompetent, then he does not have standing to bring claims without a guardian. Mr. Kincannon cannot claim to simultaneously be a vulnerable adult and be able to make legal claims on his own. Thus, his claim should be dismissed because he is not a vulnerable adult. If he is incompetent, the Court should appoint a guardian to decide on his behalf whether this lawsuit should go forward.

III. CONCLUSION

In his Complaint, Plaintiff has failed to set forth any cause of action upon which relief can be granted. Therefore, for the reasons discussed herein, in Defendants’ Motion to Dismiss, and through arguments put forth in the hearing of this matter, Defendants are entitled to a complete dismissal of Plaintiff’s Complaint.

MOORE TAYLOR LAW FIRM, P.A.

By: s/James Edward Bradley
 James Edward Bradley, SC Bar # 66130
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 ward@mttlaw.com

West Columbia, South Carolina
 May 24, 2019

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	
James John Todd Kincannon,	)	C/A No. 2019-CP-32-01168
	)	
Plaintiff,	)	
	)	
vs.	)	AFFIDAVIT OF
	)	C. VANCE STRICKLIN, JR.
Ashely Suzanne Griffith,	)	
Moore Taylor Law Firm, P.A., Vance	)	
Stricklin, and Amber Fulmer	)	
	)	
Defendants.	)	

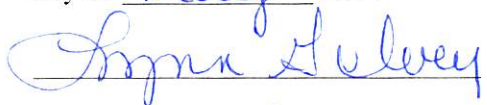
1. My name is C. Vance Stricklin, Jr. I am over the age of 18 and otherwise qualified to give sworn testimony in court.
2. I am a lawyer at the Moore Taylor Law Firm where I have practiced for over twenty years.
3. I focus my practice on domestic law in particular.
4. I was involved in the divorce between James John Todd Kincannon and Ashely Suzanne Griffith.
5. Mr. Kincannon has a history of acting in unpredictable, irrational, and malicious ways concerning his relationship with Ms. Griffith and his divorce.
6. Mr. Kincannon has been licensed as a lawyer in the past. It is my understanding that as a result of his behavior/conduct, his license has been suspended by the Bar.
7. Mr. Kincannon has repeatedly threatened both Ms. Griffith and me with malicious and repeated lawsuits. As an example, I enclose a copy of an email he sent to me at the time he filed this lawsuit threatening multiple abuse of process lawsuits and additional lawsuits. A copy of this email is attached as Exhibit A to this Affidavit.
8. In addition, on July 4, 2018, Mr. Kincannon sent another email threatening to file seventeen lawsuits against our client and our firm over the ensuing two years. A copy of this document is attached as Exhibit B to this Affidavit.
9. It is my understanding that Mr. Kincannon was arrested on criminal domestic violence charges on April 7, 2015. A copy of the Public Index reflecting this arrest is attached as Exhibit C to this Affidavit. It is my understanding that these charges are still pending against him. In fact, it is my understanding that they are now being prosecuted by the South Carolina Attorney General's office.

10. After Mr. Kincannon was charged with criminal domestic violence, his wife Ashely Griffith hired our law firm to represent her in a divorce. I sent a letter to Mr. Kincannon indicating that I was representing Ms. Griffith and desired to reach an amicable agreement regarding their impending divorce. In response to this letter I received an email attached as Exhibit D to this Affidavit. This email calls his wife a slut and indicates that he is planning to kill himself. It also accuses our law firm of unethical conduct. The email indicates that he hopes Ms. Griffith and I die a miserable, horrible death. The email had attached two photos of Mr. Kincannon with a pistol pointed at his own head. A copy of these photos are attached as Exhibit E to this Affidavit.
11. I am aware that Mr. Kincannon has been licensed to practice law in the past. I do not know the full details of his license suspension, but I am aware that the South Carolina Supreme Court suspended his license on August 28, 2015. I attach a copy of that order as Exhibit F to this Affidavit. Following Mr. Kincannon's suicide threats and emails, I made an ex parte motion for a restraining order on September 2, 2015. This order was issued by the Court on September 2, 2015. A copy of this restraining order is attached as Exhibit G to this Affidavit.
12. Mr. Kincannon was, at some point in September, institutionalized at Three Rivers Behavioral facility for some amount of time. It is my understanding that he was released at some point in September.
13. In May of 2016, Mr. Kincannon took Ms. Griffith's dog. Mr. Kincannon was ultimately ordered by the South Carolina Court of Appeals to return the dog. Mr. Kincannon never did return the dog. The parties eventually entered into a decree of divorce which allowed Mr. Kincannon to keep the dog. A copy of the divorce decree is attached as Exhibit H to this Affidavit.
14. Mr. Kincannon has continued to behave in irrational, violent and malicious ways. In fact, on July 26, 2018, I am informed and believe Mr. Kincannon executed his parent's dog with a kitchen knife. He stated to the arresting officer that he had to sacrifice the dog and that he was the second coming of Christ and received a command from God to do so. A copy of the incident report reflecting Mr. Kincannon's behavior is attached as Exhibit I to this Affidavit.
15. There is absolutely no merit to the claims made by Mr. Kincannon in this lawsuit and I believe this lawsuit is solely brought to harass his ex-wife, our law firm and me. I have never threatened criminal prosecution for a civil purpose. I have merely represented Ms. Griffith throughout these proceedings in the way that I believe were within the rules of ethics, within the law, and appropriate for my job as a family practice lawyer. We ultimately resolved the case with an agreement.

FURTHER AFFIANT SAYETH NAUGHT.


C. Vance Stricklin, Jr., Esquire

SWORN to before me this 24th
day of May 2019

 (SEAL)

LYNN G. IVEY

Printed name of Notary

Notary Public for the State of South Carolina

My Commission Expires: January 8, 2023

Kendra M. Vaughn

From: Todd K <toddkincannon@gmail.com>
Sent: Monday, February 25, 2019 4:08 PM
To: Jake Moore; Vance Stricklin; Amber C. Fulmer
Subject: Ashely S. Griffith vs. James John Kincannon RE: Family Law- Divorce: Filing of Kincannon v. Griffith, Moore Taylor, Stricklin & Fulmer
Attachments: Kincannon v. Griffith Moore Taylor Stricklin Fulmer Initial Filing.pdf

To the Moore Taylor Law Firm, P.A. c/o Jake Moore Sr., Vance Stricklin, and Amber Fulmer:

Please find attached a courtesy copy of a summons and complaint against you that has been submitted for filing to the Lexington County Clerk of Court. After I receive a date-stamped copy back in the mail, I will serve the same on each of you as you are defendants in the matter along with your former or perhaps current client Ashely S. Griffith.

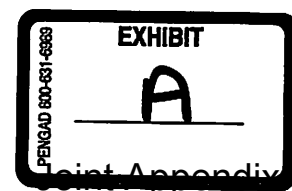
Please transmit a copy of the attached to all insurance carriers which may owe all or any of you a duty of defense or indemnification and please advise as to the most convenient way for my process server to make service upon you. Please also advise if you continue to represent Ms. Griffith and, if so, please advise as to the most convenient way for my process server to make service upon her as well.

Please let your carrier know that my initial demand is \$20 million but that I will make a demand within coverage limits if they are lower (provided, of course, that they are not unreasonably low). That may seem high but this is an open-and-shut abuse of process case and the damages are extraordinarily high given the circumstances, so I don't think that demand is out of bounds. Hard to say what a jury would value two+ years of dealing with a felony kidnapping and CDVHAN case that exists solely as a result of your abuse of process in the misdemeanor CDV case described in the lawsuit, but I'm betting it's not a low number.

Sincerely,
 J. Todd Kincannon

P.S. This is the first of multiple abuse of process/malicious prosecution actions I will file and prosecute arising out of Ms. Griffith's and your firm's conduct in and related to the divorce action and related matters. I will of course provide you with additional lawsuits as I finish preparing them and submit them for filing to the clerk's office.

P.P.S. Please forgive the absence of signatures on the attached copies. My scanner is presently on the fritz. These documents are identical to the signed documents submitted for filing.



Kendra M. Vaughn

From: Todd K <toddkincannon@gmail.com>
Sent: Wednesday, July 4, 2018 3:44 PM
To: Vance Stricklin; Amber C. Fulmer; Jake Moore
Subject: Ashely S. Griffith vs. James John Kincannon RE: Family Law- Divorce: Mercury Funding LLC v. Estate of Croft - Representation of Ashely Griffith

Vance, Amber, and Jake:

Do you represent Ashely Griffith in Mercury Funding LLC v. Estate of Croft? We are codefendants in that action, a quiet title case by the people who bought the marital residence at the tax deed sale. Has she been served yet?

I am going to assert cross claim against Ms. Griffith for willfully failing to pay the taxes and thereby causing the house to be lost to the tax man even though she knew I was indigent, unemployed, and unemployable due to her conduct incident to the initiation of the divorce.

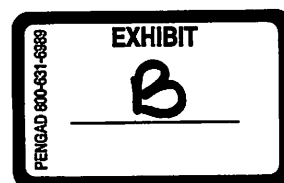
I intend to sue for negligence and various other things, and seek punitives too. The total value of the claim against the ever-suable Ms. Griffith is probably \$150,000. Of course Moore Taylor is actually liable for that due to malpractice but you all will lie to her and tell her that you didn't commit malpractice, which is hilarious but I don't care because I'll get a receiver appointed once I win and get him to sue you if she won't.

Let me know if you guys are still representing her. This is the first action of what will be 17 cases as I presently have it charted over the next two and half years in a string of litigation I like to call "The Kincannon Strikes Back." Although I don't intend to lose at the end like Darth Vader did because I'm not going to suddenly feel pangs of love where your client is concerned and let her beat me. This litigation Death Star is fully armed and operational and by the time we get to court on any of this I'll be "Judge Kincannon," which is hilarious.

You guys might want to cut down on the tortious conduct incident to litigation or else we will literally be litigating Kincannon v. Griffith cases for the rest of our lives. That's fine with me because I find all of this incredibly entertaining but I get the feeling your client doesn't enjoy it as much as I do. But that's what she gets for hiring divorce lawyers who thought it was a good idea to play hardball with a lawyer in a divorce case and apparently have no idea that a tort called "abuse of process" exists or how the elections of remedies doctrine in breach-of-settlement-agreement cases works. I look forward to teaching Litigation Misconduct Claims 501 to Vance and Amber over the next few years, because God knows somebody needs to before they end up getting disbarred. Be thankful that all I want is your carrier's money and your client to experience homelessness and don't care to nail your law licenses up on my wall as trophies because that would keep you from earning money that I could take in my lawsuits against you, some of which will be way outside your coverages and which I won't settle as part of any insurance defense settlement because an insurance carrier shouldn't have to pay me for your intentional tortious conduct until you're judgment proof.

So, to sum up, do I mail the cross claim to you people or to Ms. Griffith directly or to some other sucker she's found to represent her?

Sincerely,
 J. Todd Kincannon



P.S. Ms. Griffith should sue the bejesus out of Moore Taylor for malpractice committed by Vance and Amber, but Jake has snowed her into thinking they didn't screw anything up. I strongly recommend for your sakes you get your carrier involved right now and let the carrier talk to me about how to settle all this. It will make your lives a lot easier. Your client is a pathological liar and she will turn on you the second she realizes that Vance and Amber actually did royally screw up the divorce case and commit all kinds of torts against me that I can sue her for but not you, but that she can sue you for for indemnification. I don't know why you people think that's not going to happen. I have nothing better to do while I'm sitting around waiting for my coronation as Greenville County Probate Judge than to sue your client for things you people did (and in some cases, that she did) because you gave her horrendously bad advice that caused her to be far worse off than she would have been with no lawyers at all. I got a far better deal for your client as her divorce lawyer than you did, and you set her up for a decade of litigation misery and destitution when she could have had a third of a million dollars just to leave me and my dog in peace. It will cost more for her to defend all the lawsuits I'm going to file against her than she has, and all of them are perfectly legitimate and I don't care if I ever get a dime. All I care about is denying her her ill gotten gains and ruining her credit and getting judgments against her that tell the true story of what happened in all these cases so that when a fellow I'm on good terms with named Mike Pence nominates me for the Fourth Circuit in ten years I can explain to the Senate Judiciary Committee why I'm not actually a dognapping kidnapping wifebeater, I just married a pathological liar who had shitty lawyers who thought committing litigation-misconduct torts against a lawyer who wrote the book on suing people for bad things their lawyers do was a good idea.

P.P.S. You people should know that I sue people for bad things their lawyers do. That's why David Thomas wanted me to help him with all his foreclosure defense cases. This isn't exactly news to the Moore Taylor Law Firm, and yet having actual knowledge of precisely the type of litigation skill set I bring to the table, you nonetheless represented my estranged wife in a divorce and did all the things to me that David Thomas regularly associated me to assist him in suing bank plaintiffs for after their lawyers did the same kinds of things. And I mean the EXACT same kinds of things--denial of the existence of settlement agreements reached on a pro se basis party to party prior to the initiation of litigation, an unfair trade practice that I am probably the only lawyer in South Carolina that knows how to sue people for. Your carrier is going to love that. Your divorce action was a wrongful foreclosure action dressed up as a divorce action and you did all the same things that bank lawyers do that end up regretting when I show up. You and your client will regret them too soon enough--I suspect it'll be sometime around lawsuit #4 of 17 that she turns on you, probably October or so. You get the October surprise even though I'm the candidate for public office.



Lexington County Eleventh Judicial Circuit Public Index



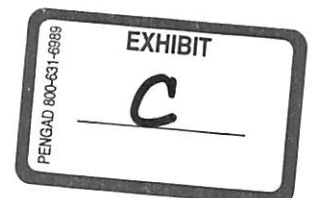
[Lexington County Home Page](#) [South Carolina Judicial Department Home Page](#) [SC.GOV Home Page](#)

Switch View

The State of South Carolina VS James John Todd Kincannon					
Case Number:	2015A3210200544	Court Agency:	Irmo Magistrate Court	Filed Date:	07/24/2015
Case Type:	Criminal	Case Sub Type:			
Status:	Pre-Trial Conference	Assigned Judge:	Adams, Rebecca L.	Disposition Judge:	
Disposition:					
Disposition Date:		Date Received:		Arrest Date:	04/07/2015
Law Enf. Case:	15005471	True Bill Date:		No Bill Date:	
Prosecutor Case:		Indictment Number:		Waiver Date:	
Probation Case:					

Case Parties	Charges	Sentencing	Associated Cases	Actions	Financials	Bonds
Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date			
Kincannon, James John Todd	2671-Domestic / Criminal Domestic Violence	2671-Domestic / Criminal Domestic Violence				

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Kendra M. Vaughn

From: Todd Kincannon <todd@thekincannonfirm.com>
Sent: Thursday, August 27, 2015 3:09 PM
To: Vance Stricklin
Cc: Ashely
Subject: Ashely S. Griffith vs. James John Kincannon RE: Family Law- Divorce: Divorce Matters

Vance,

I am in receipt of the letter you had "hand delivered" to me (illegally) on August 25, 2015. You and my slut of a soon-to-be-ex-wife are welcome to make whatever demands you wish. I have no intention of giving my wife an easy out for what all she has done. She has ruined my life intentionally and all I care about at this point is killing myself in a way that will cause her the most pain possible.

By the way, I failed to explain that your law firm is filled with unethical conduct and that I once had a legal malpractice case against Moore & Taylor that I decided not to pursue because you all once retained me as associated counsel on case retained by David Thomas.

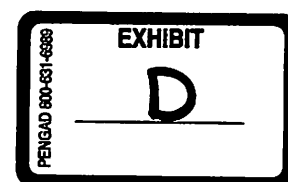
I no longer care about all that. I hope you all are happy with causing my suicide. I hope my wife is especially happy with it. All I want to do is die. And you are the reason why.

Do not contact me about this. Do not call emergency services about it. If I see someone pull up in my yard with sirens on, I will blow my brains out. Be aware of this as you proceed.

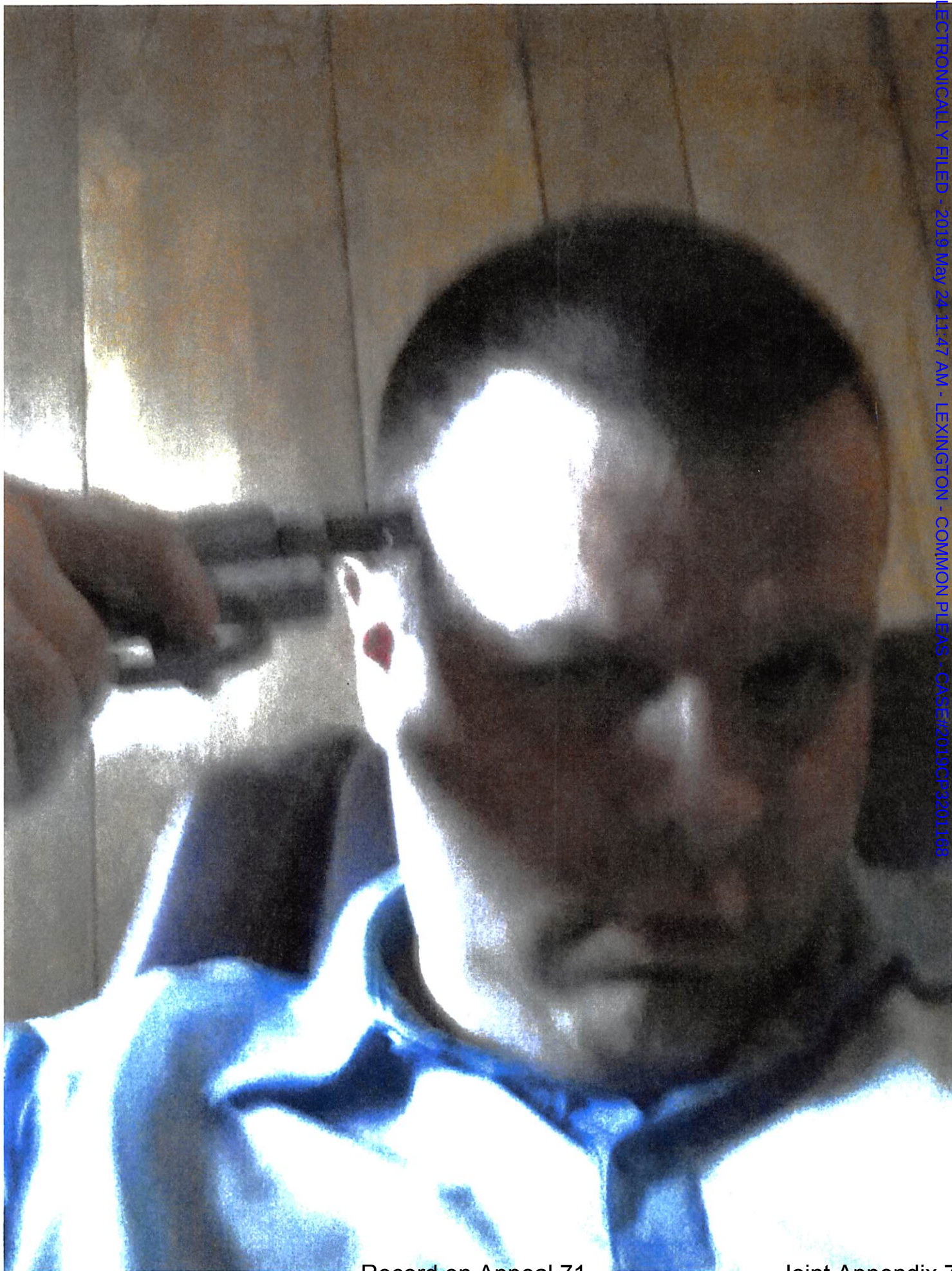
I hope my client Andy Rice sues the hell out of you for committing malpractice that injured him. And I honestly hope that every single one of you burns in eternal hellfire. Including my wife.

Should I someone survive my imminent suicide attempt, this is a directive to you not to contact me under any circumstances. I hope you and my wife die miserable, horrible deaths, but in the event you do not, I want nothing more than for both of you to leave me alone.

Sincerely,
Todd Kincannon







2015-08-28-01

The Supreme Court of South Carolina

In the Matter of J. Todd Kincannon, Respondent.

Appellate Case No. 2015-001824

ORDER

The Office of Disciplinary Counsel asks this Court to issue an order transferring respondent to Incapacity inactive status pursuant to Rule 28, RLDE, Rule 413, SCACR, or in the alternative, placing respondent on interim suspension pursuant to Rule 17, RLDE, Rule 413, SCACR. The petition also seeks appointment of the Receiver pursuant to Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients.

IT IS ORDERED that respondent's license to practice law in this state is suspended and respondent is transferred to incapacity inactive status until further order of this Court.

IT IS FURTHER ORDERED that Peyre Thomas Lumpkin, Esquire, Receiver, is hereby appointed to assume responsibility for respondent's client files, trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain. Mr. Lumpkin shall take action as required by Rule 31, RLDE, Rule 413, SCACR, to protect the interests of respondent's clients. Mr. Lumpkin may make disbursements from respondent's trust account(s), escrow account(s), operating account(s), and any other law office accounts respondent may maintain that are necessary to effectuate this appointment.

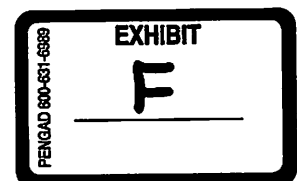
This Order, when served on any bank or other financial institution maintaining trust, escrow and/or operating account(s) of respondent, shall serve as an injunction to prevent respondent from making withdrawals from the account(s) and shall further serve as notice to the bank or other financial institution that the Receiver, Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court.

Finally, this Order, when served on any office of the United States Postal Service, shall serve as notice that the Receiver, Peyre Thomas Lumpkin, Esquire, has been duly appointed by this Court and has the authority to receive respondent's mail and the authority to direct that respondent's mail be delivered to Mr. Lumpkin's office.

Mr. Lumpkin's appointment shall be for a period of no longer than nine months unless an extension of the period of appointment is requested.

s/Jean H. Toal C.J.

Columbia, South Carolina
August 28, 2015



COPY

STATE OF SOUTH CAROLINA

FILED

IN THE FAMILY COURT

COUNTY OF LEXINGTON

2015 SEP -2

FOR THE ELEVENTH JUDICIAL CIRCUIT

Ashely S. Griffith,

ETHA A. CARRIGG
CLERK OF COURT
LEXINGTON SC

Plaintiff,

vs.

James John Kincannon,

Defendant,

EX PARTE RESTRAINING ORDER**2015DR3202268**

Case No.: 15-DR-32-_____

This matter is before the Court on motion of the Plaintiff seeking an Ex Parte Order a Restraining Order from the Defendant. Based on the motion and Affidavit of the Plaintiff presented to the Court, the Court finds that it is appropriate that the Plaintiff be granted an Ex Parte Restraining Order against the Defendant.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:

- A. The Defendant is hereby prohibiting from directly or indirectly contacting, harassing, threatening, bothering, intimidating, molesting, or otherwise interfering with the Plaintiff at any time and in any manner;
- B. The Defendant is prohibited from coming on to the premises of the Plaintiff's residence and place of employment;
- C. The Defendant is prohibited from possessing a firearm; and
- D. The Defendant is strictly instructed to only contact the Plaintiff's attorney regarding issues related to this matter and that all communications must be in a civil and non-threatening manner. The Defendant is further instructed all communications with the Plaintiff's attorney must be done by United States Mail First Class.

(signature block on the following page)



FILED

2015 SEP -2 AM 8:01

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

S/ W. GREG SEIGLER
PRESIDING JUDGE
FAMILY COURT - ELEVENTH CIRCUIT

IT IS SO ORDERED.

Lexington, South Carolina
September 1st, 2015

15-DL-32-2268

COPY

STATE OF SOUTH CAROLINA)

COUNTY OF LEXINGTON)

Ashely S. Griffith,)

Plaintiff,)

vs.)

James John Todd Kincannon,)

Defendant)

IN THE FAMILY COURT
FOR THE ELEVENTH JUDICIAL CIRCUITDECREE OF DIVORCE AND ORDER
APPROVING AGREEMENT

C.A. No. 2015-DR-32-2268

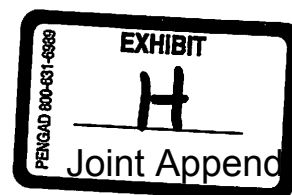
Date of Hearing:
Presiding Judge:
Plaintiff's Attorneys:January 24, 2017
Peter R. Nuessle
C. Vance Stricklin, Jr.
Amber C. Fulmer
Pro Se
Carole ShealyDefendant's Attorney:
Court Reporter:FILED
CLERK OF COURT
JULY 11, 2017
LEXINGTON, SC

2017 MAR -1 PM 4:22

FILED

This action was filed by Plaintiff (hereinafter also referred to as "Wife") on September 1, 2015. An Ex Parte Restraining Order was issued on September 2, 2015. The affidavit of service that was filed indicates Defendant (hereinafter also referred to as "Husband") was served personally with the pleadings and the Restraining Order on September 4, 2015. Husband did not serve an Answer.

This matter is currently before this Court for a final merits hearing. Notice of the hearing was properly served upon Husband. Wife was present at the hearing along with her attorneys C. Vance Stricklin, Jr. and Amber C. Fulmer. Husband was also present, but was not represented by counsel. Husband indicated he did not desire counsel and wished to proceed with the hearing *pro se*. Upon inquiring into Husband's education, life skills, and his desire to proceed without counsel, I find and conclude the Husband is capable of representing himself and should be

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allowed to proceed *pro se*.

The Court then proceeded with the hearing. After the direct and cross examination of two of the Plaintiff's witnesses, the Court recessed to allow the parties the opportunity to discuss a potential settlement. The parties then advised the Court they had reached a full agreement as to all issues present before the Court, except the issue of divorce, which rests within the sole discretion of the Family Court, and desired to orally recite the terms of the agreement on the record. Thereafter, the Court reconvened and the terms of the parties' agreement were placed on the record.

I find the parties agreement as placed on the record and reduced herein below to writing is as follows:

AGREEMENT

A. The parties' agree the Court has personal and subject matter jurisdiction over this action and of the parties. Venue is proper in the Lexington County Family Court.

B. The parties' agree each shall waive alimony and spousal support from the other. The parties' agree this is a permanent and irrevocable waiver of alimony and spousal support.

C. Husband agrees the residence where Wife resides at 306 Springwalk Lane, West Columbia, South Carolina 29169 is Wife's separate non-marital property. Husband agrees Wife has legal title to this residence.

D. Wife agrees Husband is entitled to whatever interest he may have in the residence located at 200 Townes Road, Columbia, South Carolina 29210. The parties are not acknowledging there is an interest in the residence, but are acknowledging that should such interest exist, Husband is entitled to the interest in this residence.

E. The parties' agree each shall keep the personal property currently in his or her

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possession and control. The parties' agree the dog Noodle is non-marital property and this Court has no jurisdiction to award the dog to either party. The parties' are not agreeing as to the ownership of Noodle; however, Husband agrees that if he is incapacitated unable to care for Noodle for an extended period of time, Wife shall have the first right to care for Noodle.

F. The parties' agree each shall have the ownership and possession of the vehicle currently in his or her possession. Husband's vehicle is a Nissan Pathfinder, and Wife previously owned a BMW but has since traded that vehicle in for a GMC Terrain. Each party shall be responsible for any liabilities and expenses related to his or her vehicle such as the payments, taxes, repairs, maintenance, and the like, and shall hold the other harmless and indemnify the other from the same.

G. The parties agree that each shall retain the ownership of his or her own checking, savings, investment, retirement, or other account titled in his or her name, free and clear of any claim or interest by the other. Each party waives any interest he or she may have in the other party's checking, savings, investment, retirement, or other account titled in the name of the other party.

H. Each party shall be responsible for the debt in his or her name. Each party agrees they shall indemnify and hold the other harmless of any liability related to the debts retained by him or her. The parties acknowledge they have no joint debts.

I. The parties agree each shall be responsible for his or her own health, dental, and vision insurance. Each party shall be responsible for his or her own non-covered and non-reimbursed medical, dental, vision, and other healthcare related expenses incurred during this litigation and in the future.

J. Husband agrees he shall be placed under a permanent injunction prohibiting

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Husband from directly contacting, threatening, harassing, molesting, bothering, intimidating, or otherwise interfering with Wife at any time or place. This prohibition does not preclude Husband from legal process service on Wife.

K. Husband agrees he shall be responsible for \$23,000.00 toward Wife's attorney's fees and costs incurred in this matter. Husband agrees this \$23,000.00 shall be reduced to a judgment against him.

L. Wife agrees to dismiss her pending Rule to Show Cause and Complaint for Contempt. Husband acknowledges he has filed a number of items with this Court and the South Carolina Court of Appeals. Husband acknowledges that whatever items he filed with the Family Court and South Carolina Court of Appeals shall be dismissed.

M. The parties agree that if the Court approved the parties' agreement, Wife would amend her Complaint to seek a divorce based on one year's continuous separation, and Husband would consent and waive his statutory response time.

Based upon the agreement of the parties as recited above and the record before me, I make the following Findings of Fact and Conclusions of Law and Order:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Wife is a citizen and resident of Lexington County, South Carolina, and has been so in excess of three (3) months prior to the commencement of this action.
2. Husband was a citizen and resident of Lexington County, South Carolina, and had been so in excess of three (3) months prior to the commencement of this action. Husband currently resides in Greenville County.
3. The parties last resided together as wife and husband in Lexington County, South Carolina.

PK

4. The parties are currently wife and husband, having been married to each other on February 6, 2013. The parties had a formal wedding ceremony in a church on April 6, 2013. There are no children of the marriage and none are expected.

5. As agreed upon by the parties and recited above, this Court has jurisdiction of the parties and subject matter herein. Venue is proper in Lexington County, South Carolina.

6. I find and conclude Wife made a motion to supplement her pleadings to request a divorce on the grounds of one year's continuous separation without cohabitation. Husband waived his response time and joined in the Wife's requested relief. Wife testified the parties' separated on or about August 26, 2015. Wife testified the parties had remained separate and apart since that time without intervening cohabitation. I find Wife's testimony was fully corroborated by her corroborating witness. Based upon the testimony and the record before me, I find and conclude Wife is entitled to a divorce, a vinculo matrimonii from the Husband based upon one year's continuous separation without intervening cohabitation.

7. I find and conclude there has been no collusion between the parties for the purpose of obtaining a divorce.

8. I find that all other matters arising between the parties as a result of the marriage, except the issues of divorce, have been resolved by the parties' agreement as recited on the record and reduced to writing herein above. Both parties were separately examined under oath as to the terms of the agreement and circumstances surrounding its negotiation. It was clearly established that:

- (a) They had been successful in reaching an agreement resolving all of the issues of their marriage;
- (b) The agreement recited on the record and reduced to writing herein above was their agreement;

- (c) Each party entered into the agreement freely and voluntarily;
- (d) Each party stated neither was threatened, forced, or coerced into entering in this agreement;
- (e) Each party understood all terms of the agreement;
- (f) The agreement as recited on the record and reduced to writing herein above reflects the entire agreement between them;
- (g) Each party participated in the negotiation of the agreement;
- (h) Neither party had any questions about the agreement they desired to ask the Court or counsel;
- (i) Each party had sufficient information regarding the other's finances, income, assets, and debts at the time they entered into this agreement;
- (j) Each party provided truthful information regarding his or her own finances, income, assets and debts to the other party;
- (k) Neither party was under the influence of any drugs, intoxicants, or medications that would affect their judgment at the time they entered into this agreement;
- (l) Wife testified she was satisfied with the services provided by her attorneys, her attorneys had done everything she had asked them to do, and her attorneys had discussed all aspects of the agreement with her;
- (m) Husband testified he understood he was not represented by Mr. Stricklin, Ms. Fulmer, or the Moore Taylor Law Firm, P.A. Husband testified he did not have any complaints against Wife's attorneys or their firm;
- (n) Each party had ample time to speak with a CPA or financial advisor regarding the tax consequences or financial implications of the agreement, had they so desired;
- (o) Each party understood that the agreement regarding the division of property and debts was permanent, and if approved by the Court, cannot be changed in the future;
- (p) Each party understood a waiver of alimony is permanent and neither could come back before the Court at any time in the future to request alimony;
- (q) Each party understood they were giving up their right to a trial where they could have been allowed to present witnesses and other information to support

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their requests, and each party affirmatively stated they were waiving their right to trial;

- (r) Each party believes the agreement was in their his or her best interests and the best interests of their spouse;
- (s) Based on all the circumstances surrounding the negotiation of the agreement, they believed it to be fair and equitable to themselves and the other party;
- (t) Each party testified they would be able to comply with all terms of the agreement;
- (u) Each party understood once the agreement is approved, it would be enforceable through the Court's contempt powers which means that either party could be fined, sentenced to a jail term and/or ordered to perform community service if found in contempt of the agreement; and
- (v) Each party desired to have the Court approve the agreement and make it an Order of the Court.

9. The record reflects that the parties have had the opportunity to exchange financial information, and have otherwise satisfied themselves that they know enough of each other's financial situation including earnings, needs, obligations, and assets to make intelligent decisions regarding the financial aspects of this case. Accordingly, I find each party was familiar with the income, expenses, debts and assets of the other.

10. After having conducted examinations of both parties, I find and conclude that both Husband and Wife appeared sincere, honest and truthful in the representations made under oath and that neither party was under the influence of alcohol nor was either's judgment impaired by drugs or other substances. Each entered into this Agreement freely, knowingly, voluntarily, and without threats or coercion. This Court thereafter independently reviewed the details of this Agreement which I specifically find to be fair, equitable, reasonable and in the best interests of the parties. Forsythe v. Forsythe, 290 S.C. 253, 349 S.E.2d 405, (Ct. App. 1986). Accordingly, I find that I should approve, adopt, merge and incorporate this Agreement as part of

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the Order of this Court.

ORDER

Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that:

A. Wife is awarded a divorce, a vinculo matrimonii, from Husband on the ground of one year's continuous separation without cohabitation;

B. the parties' agreement as recited on the record and reduced to writing above, is hereby approved, confirmed, merged and incorporated into this Order by this Court, thereby rendering it the Order of the Court, and either party violating the terms and conditions of this Order shall be subject to the contempt sanctions of this Court; and

IT IS SO ORDERED.

PK

Aiken, South Carolina

February 13, 2017



PETER R. NUESSLE, PRESIDING JUDGE
FAMILY COURT - ELEVENTH CIRCUIT

AGENCY I.D.
SCO230500SIMPSONVILLE POLICE DEPARTMENT
INCIDENT REPORT

CASE NUMBER

05-18-015031

NCIC

INQ. ENTD.

E V E N T	INCIDENT TYPE		COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM						
	1. 990 - DISTURBANCE/ COMPLAINT CALL		☒ YES ☐ NO	☐ YES ☐ NO	20		☒ Individual ☐ Business ☐ Financial Inst. ☐ Government ☐ Relig. Orgn. ☒ Soc./Public ☐ Other ☐ Unknown ☐ Police Off.						
	2. 90M - MENTAL PERSON / EPC		☒ YES ☐ NO	☐ YES ☐ NO	20								
	3. OR - ILL TREATMENT OF ANIMALS		☒ YES ☐ NO	☐ YES ☐ NO	20								
I N C I D E N T	INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER)					ZIP CODE	WEAPON TYPE						
	216 JONES AVE, SIMPSONVILLE SC					29881							
	INCIDENT DATE	24 HR. CLOCK	TO	DATE	24 HR. CLOCK	DISPATCH DATE/TIME 24 HR. CLOCK		LOCATION NO.					
	07/26/2018	0100		07/26/2018	0132	DISPATCH DATE/TIME 24 HR. CLOCK DISPATCH DATE 07/26/2018 DISPATCH TIME 0134 TIME ARRIVED 0137 DEPART TIME 0430		A					
C O M P L A I N A N T	COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX	AGE	ETH	DAYTIME PHONE	EVENING PHONE		
	KINCANNON, JAMES CHARLES		PA		☒ SOU	W	M	62	N				
	ADDRESS		CITY		STATE	ZIP CODE	LOCATION NO.						
	216 JONES AVE		SIMPSONVILLE		SC	29681-2339	A						
V I C T I M	VICTIM'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX	AGE	ETH	DAYTIME PHONE	EVENING PHONE		
	KINCANNON, ROXIE TODD				☒ SOU	W	F	65	N				
	HEIGHT		WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.							
	5-0		100	BRO	BRO								
# 1	ADDRESS		CITY		STATE	ZIP CODE	LOCATION NO.						
	216 JONES AVE		SIMPSONVILLE		SC	29681-2339	A						
	VISIBLE INJURY (VICT. 1) ☐ YES ☒ NO EXPLAIN --												
	VICTIM (NO. 1) USING: ALCOHOL: ☐ YES ☒ NO ☐ UNK. DRUGS: ☐ YES ☒ NO ☐ UNK.												
S U B J E C T	☐ TWO-MAN VEH. ☐ ONE-MAN VEH. ☐ DETECTIVE/SPLASMT. ☐ OTHER ☐ ALONE ☐ ASSISTED J - This Jurisdiction S - State O - Out of State U - Unknown												
	☒ SUSPECT		SUBJECT NAME (LAST, FIRST, MIDDLE)		RACE	SEX	AGE	ETH	DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES
	☐ RUNAWAY		KINCANNON, JAMES JOHN TODD		W	M	37	N		5-10	220	BRO	
	☐ WANTED		FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.										
# 1	☐ WARRANT		ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.					
	☐ ARREST		216 JONES AVE		SIMPSONVILLE	SC	29681	A					
	☐ JAIL		SUBJECT (NO. 1) USING: ALCOHOL: ☐ YES ☐ NO ☒ UNK.		ARRESTED NEAR OFFENSE SCENE ☐ YES ☒ NO		DATE/TIME OF OFFENSE		DATE/TIME OF ARREST				
	☐ SUMMONS		DRUGS: ☐ YES ☐ NO ☒ UNK. TYPE:		TOTAL # ARRESTED 0		07/26/2018 0100						
N A R R A T I V E	Offenses:												
	DISTURBANCE/ COMPLAINT CALL												
	MENTAL PERSON / EPC												
	ILL TREATMENT OF ANIMALS												
On July 26, 2018 at approximately 0134, I, Inv. Weibel was dispatched to 216 Jones Ave. In reference to a disturbance.													

Date Entered: 07/26/2018 03:59:21 AM		Last Modified: 07/27/2018 04:05:42 PM		JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY		JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY	
Print Date:							
P R O P E R T Y	TYPE (GROUP)					TOTAL VALUE	
	Burned						
	Count/Forged						
	Dest./Damaged						
	Recovered						
	Seized						
A D M I N I S T	SUBJECT IDENTIFIED	☒ YES ☐ NO	SUBJECT LOCATED	☒ YES ☐ NO	☒ ACTIVE ☐ ADM. CLOSED	☐ ARRESTED UNDER 18	☐ EX-CLEAR UNDER 18
	REASON FOR EXCEPTIONAL CLEARANCE:	1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ JUVENILE - NO CUSTODY					
REPORTING OFFICER(S)		DATE	UNIT NUMBER	APPROVING OFFICER		DATE	UNIT NUMBER
INV J WEIBEL		07/26/2018	406	CPL N DOWNING		07/26/2018	B2
				FOLLOW-UP INVESTIGATION OFFICER			
				☐ YES ☐ NO INV J WEIBEL		07/26/2018	

EXHIBIT

H

PENAD 800-831-6311-6969

AGENCY I.D.
SC0230500

SIMPSONVILLE POLICE DEPARTMENT
SUPPLEMENTAL INCIDENT REPORT

CASE NUMBER
0,5,-1,8-0,1,5,0,3,1

NOIC
INC. ENTD.

☐ ORIGINAL REPORT	☐ SUPPLEMENTAL REPORT	☒ ADDITIONAL VICTIMS	☐ ADDITIONAL STOLEN PROPERTY
☐ MODIFIES ORIGINAL	☐ CASE STATUS CHANGE	☐ ADDITIONAL OFFENDERS	☐ ADDITIONAL RECOVERED PROPERTY

PAGE 1

V I C T I M S S U B J E C T O V E R F L O W I N G N A R R A T I V E	☐ COMPLAINT	NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT			RESIDENT	RACE	SEX	AGE	D.O.B.	ETH	
	☒ VICTIM # 002	SOCIETY/PUBLIC		#1	#2	#3	J	S	O	U			
	☐ SUBJECT #	HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.							
	☐ RUNAWAY	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	DAY PHONE	EVENING PHONE				
	☐ WANTED						A	H	B				
	☐ WARRANT												
	☐ ARREST	☒ VICTIM NO. 002 VISIBLE INJURY: ☒ NO ☐ YES		VICTIM USING ALCOHOL: ☒ NO ☐ YES ☐ UNK.		☐ TWO-MAN VEH. ☐ DETECTIVE/SPLASHIT ☐ ALONE							
	☐ JAIL	EXPLAIN:		DRUGS: ☒ NO ☐ YES TYPE:		☐ UNK. ☐ ONE-MAN VEH. ☐ OTHER		☐ ASSISTED					
	☐ SUMMONS	☐ SUBJECT NO. _____ USING ALCOHOL: ☐ NO ☐ YES											
	☐	USING DRUGS: ☐ NO ☐ YES TYPE:						☐ UNKNOWN					
NARRATIVE													
						JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY			JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY				

A D M I N I S T	SUBJECT IDENTIFIED ☒ YES ☐ NO		SUBJECT LOCATED ☒ YES ☐ NO		☒ ACTIVE ☐ ADM. CLOSED		☐ ARRESTED UNDER 18 ☐ ARRESTED 18 AND OVER		☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER	
	REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ JUVENILE - NO CUSTODY									
	REPORTING OFFICER(S)		DATE	UNIT NUMBER	APPROVING OFFICER		DATE	UNIT NUMBER		
	INV J WEIBEL		07/26/2018	406	CPL N DOWNING		07/26/2018	B2		
					FOLLOW-UP INVESTIGATION OFFICER ☐ YES ☐ NO INV J WEIBEL		07/26/2018			

INCIDENT REPORT SUPPLEMENTAL

Page #: 1

Case Number: 05-18-015031

Officer: 00387 DOWNING, N

Date Entered/Changed: 07/26/2018

Reviewer: 00255

Review Date: 07/26/2018

DETAILED STATEMENT OF INVESTIGATION: On the above listed date, I responded to 216 Jones Ave in reference to assisting Inv. Weibel (Unit 406). I arrived on scene and was directed to obtain digital still images of the inside of the residence.

I then obtained digital still images of the residence.

Inside of the residence I observed a deceased medium sized brown and black in color dog lying on its left side in a large amount of suspect blood. I observed the left side of the dog, the side facing upward, to have several suspect puncture marks with dried suspect blood around the punctures. I observed suspect blood on a kitchen cabinet as well as suspected blood on two kitchen drawers above the kitchen cabinet. I observed what appeared to be fecal matter behind the deceased dog.

I observed two knives located in the kitchen sink. I observed one knife to have a black in color handle and one knife to have a brown in color handle.

I then secured and took possession of, at Inv. Weibel's request, both the knife with the black handle and the knife with the brown handle, located in the kitchen sink. Upon arrival both knives were placed into a secured temporary storage locker in property and evidence. The digital still images were placed onto two separate CD's. One copy of the CD was placed with the original copy of the report and the other CD was also placed into a secured locker in property and evidence.

No further action was taken.

INCIDENT REPORT SUPPLEMENTAL

Page #: 1

Case Number: 05-18-015031

Officer: 00294 WEIBEL, J

Date Entered/Changed: 07/26/2018

Reviewer: 00387

Review Date: 07/26/2018

DETAILED STATEMENT OF INVESTIGATION: On July 26, 2018 at approximately 0134, I, Inv. Weibel was dispatched to 216 Jones Ave. in reference to a disturbance.

Simpsonville Dispatch explained that Jim Kincannon had contacted the Simpsonville Police Department because his wife, Roxie Kincannon, was in fear for her safety and locked herself in the bathroom. While en route, I did contact Roxie Kincannon, who advised that she was absolutely terrified of Todd because he had killed one of their dogs with his bare hands.

When I arrived on scene, I pulled up toward the house with my bright lights on and spotlight on the house. At that time, I did contact Todd Kincannon utilizing a house line [REDACTED]. When I advised him that I was outside, he began to explain that he had to "sacrifice the dog" on the phone. At that time, I asked him to exit the residence. He explained that he would and shortly after, exited the residence. Once he was outside, I observed Mr. Kincannon to be covered in blood and what appeared to be dog hair. At that time, he told me that he killed a dog. When I asked him why he killed the dog, he stated "I told you I think, I mean I know I'm the second coming of Christ and I got a command from God to do it".

Once other units arrived on scene, I did leave Mr. Kincannon in their observation. I did enter the residence in the attempt to secure the safety of Roxie Kincannon. Once inside, I did call Ms. Kincannon via cell phone and advised her that it was safe for her to come out. Once I entered the residence, I did locate a deceased dog in the kitchen that appeared to have suffered numerous stab wounds and was laying in a large pool of blood. The dog appeared to have defecated during the fight.

At that time, as Ms. Kincannon was exiting her bedroom, I did advise her that a dog was in fact deceased. At that time, she did walk right past me and into the kitchen. As I made entry, I did enter the kitchen to evaluate the extent of the carnage. Ms. Kincannon did ask to go outside, at which time I asked her if we could secure the remaining three (3) dogs in her room so that we could take pictures of the scene. Before she came outside, I advised Ms. Kincannon to calm down and not enflame the situation.

At that time, she was speaking with her husband, Jim Kincannon on the phone and I exited the residence. At that time, Mr. Kincannon held up his hands and proclaimed "this is a sign man". He explained that he wanted to speak with me. While we were talking, he stated "the last time you saw me, you didn't recognize me, I'm Jesus, I'm not making it up. I have a sign. I'm about to get crucified in the media. The reason I killed the dog is this, it's real simple, ... I'm sorry, I think y'all are going to have to take me to the Psych Institution, I get that. But I'll tell you from a legal stand point you know, it's in the State Constitution that God is a sovereign and I honestly think he told me to do it". Mr. Kincannon stated that he wanted to show us the sign and held up his hands to show his wrists. At that time, I was advised that Jim Kincannon wanted to speak with me directly. I did stop away and speak with him via cell phone.

When I returned, he was talking about going to a Psychological Institution but didn't want to go to Spring Brook. At that time, I did advise him that we would be going to Greenville Memorial Hospital to get a psychological evaluation. Numerous times he advised that he wanted to pray. After praying, he advised that he was supposed to go to the place in Lexington, Three Rivers. He stated that Spring Brook was hell and Three Rivers was heaven. At that time, I did request Simpsonville Dispatch to call for an ambulance. As I returned, Mr. Kincannon and I began talking about going to Greenville Memorial Hospital (GMH). When Mr. Kincannon found out that he was going to GMH, he began to argue about a law stating that I had to take him to Three Rivers. I advised him that I was not going to take him to Three Rivers and that I was taking him to GMH. At that time, while he was protesting, I did tell him that if I had to, I was going to take him into my Emergency Protective Custody. He advised, while protesting, please do it. He advised that he wasn't going to fight me, at which time he advised that he prayed about it and was told to tell me to take him to Heaven. When I asked Mr. Kincannon if he wanted an ambulance to take him or for me to take him, he requested that I do. Shortly after, due to my past experiences with Mr. Kincannon, the rapport I have with him, and the fact that he was calm, I did opt to cancel Greenville County Emergency Medical Services (GCEMS). At that time, I felt it was clear and understood that Mr. Kincannon was now in my Emergency Protective Custody. I did request that he be taken inside and be cleaned up a bit and then dressed.

Before he was escorted inside, Mr. Kincannon became upset and then requested that we, the Simpsonville Police Department, take possession of his dog, Noodle. He was then escorted inside by Pfc. Davis (Bravo 3) to change. At that time, I began to speak with Ms. Kincannon about the fact that Mr. Kincannon needed psychological help.

At that time, Cpl. Downing (Bravo 2) arrived on scene to take photographs on the scene. Once Mr. Kincannon and Pfc. Davis exited the residence, I confirmed that he had his wallet on his person with his ID. Once that was confirmed, I did have Pfc. Davis search Mr. Kincannon for any weapons, to which there were none. I did place him in two (2) sets of handcuffs behind his back. We then walked into the residence and I pointed him to the room that the dogs were in. He then opened the door and Noodle exited the room and we placed him on a leash. At that time, I did secure the dog. He asked me to make sure the dog went to his preacher. I did remind him that we would take his dog into our custody

ELECTRONICALLY FILED - 2019 May 24 11:47 AM - LEXINGTON - COMMON PLEAS - CASE#2019CP3201168

INCIDENT REPORT SUPPLEMENTAL

Page #: 2

Case Number: 05-18-015031

Officer: 00294 WEIBEL, J

Date Entered/Changed: 07/26/2018

Reviewer: 00387

Review Date: 07/26/2018

and release him to his father, Jim Kincannon. I did then escort Mr. Kincannon out to my vehicle. When I opened the door, he asked if he could ride up front with me. I advised him that he had to ride in back, but that I would move the handcuffs from the rear to the front. He was then placed into the rear of my patrol car, with the seatbelt on. Once Mr. Kincannon was in the rear of my patrol car, Pfc. Davis advised me that both Roxie and Jim Kincannon explained that they didn't want the dog to go to the kennel and that they would hold the dog as the dog as been in their custody. I did agree that the dog could stay at the Kincannon residence.

While on the way to GMH, my in-car camera was activated and my body camera was activated to record what Mr. Kincannon was saying.

While en route to GMH, I did request Simpsonville Dispatch to contact GMH and request that we be allowed to enter the Emergency Room for the psychological evaluation.

Once at GMH, I was met by Security Officer Booker, who escorted us to C-Pod Emergency Room. Once in the ER, we were escorted to a room. I did speak with Intake nurse Khadijah T. After a short time, we met with Dr. Aubry Bryant, who began the evaluation process. After he was evaluated, Mr. Kincannon was transferred to their custody after some time. I asked for a copy of the "white sheet" and was advised that the hospital didn't provide copies of such. Once custody was transferred, I did exit the hospital.

I have not secured a warrant for Mr. Kincannon's arrest yet, due to wanting to confer with the Greenville County Solicitor's Office, based on Mr. Kincannon's mental state.

This case is active. Nothing follows.

ELECTRONICALLY FILED - 2019 May 24 11:47 AM - LEXINGTON - COMMON PLEAS - CASE#2019CP3201168

INCIDENT REPORT SUPPLEMENTAL

Page #: 1

Case Number: 05-18-015031

Officer: 00294 WEIBEL, J

Date Entered/Changed: 07/26/2018

Reviewer: 00387

Review Date: 07/26/2018

DETAILED STATEMENT OF INVESTIGATION: On July 26, 2018 I, Inv. Weibel did contact the Greenville County Solicitors Office in reference to this case. I spoke with Law Enforcement Liaison Brian Moroney, and explained that situation to him. I did explain what Mr. Kincannon had done with his hands, the knives, and that he proclaimed himself to be the second coming of Jesus Christ.

At that time, Mr. Moroney did advise me that South Carolina Statute 47-01-0040B (Ill Treatment of Animals) would be an appropriate charge and that the Greenville County Solicitor's Office would be willing to prosecute the case. At that time, I did contact Judge Feld and advised her of the case, as well as the criminal charge I was seeking. She advised me that she would be willing to sign the warrant into service on Friday (July 26, 2018). A copy of the report will be attached to the warrant and left in the judges box in the squad room.

I did make contact with Jim Kincannon. While speaking with him, he did advise me that Greenville Memorial Hospital did commit Todd for a mental health evaluation for an unknown amount of time. I did advise Mr. Kincannon that I did speak with the Greenville County Solicitors Office and a Judge and advised him that I would be seeking a warrant for his son's arrest upon his release from the mental health clinic. He stated that he understood.

When I asked Mr. Kincannon how his wife, Roxie, was doing, he advised me that she is still very upset. I did explain to Mr. Kincannon that due to the fact that they owned Bailey, a brown and black Beagle/Cattle dog mix, who was approximately ten (10) years old, they were to be considered victims. I did explain that I completed a Victim Notification Information (VNI) Form and advised that I would need Ms. Kincannon to sign it. Mr. Kincannon advised that due to a lack of sleep, as well as the trauma she endured, to not bother Ms. Kincannon this evening. I advised Mr. Kincannon that the VNI was complete and that it was currently at the Simpsonville Police Department and would need to be picked up. He stated that he understood.

Mr. Kincannon advised he would call me to set up a time to pick up the VNI.

Nothing follows.

ELECTRONICALLY FILED - 2019 May 24 11:47 AM - LEXINGTON - COMMON PLEAS - CASE#2019CP3201168

INCIDENT REPORT SUPPLEMENTAL

Page #: 1

Case Number: 05-18-015031

Officer: 00392 CARSON, J

Date Entered/Changed: 07/27/2018

Reviewer: 00387

Review Date: 07/27/2018

DETAILED STATEMENT OF INVESTIGATION: On July 26, 2018, I, PTL Carson, responded to 216 Jones Ave as a backup unit for INV. Weibel (Unit # 406), in reference to a disturbance in the City of Simpsonville, Greenville County, South Carolina.

Upon arrival, I observed a white male sitting on the porch steps, shirtless, and blood resonating on his hands, legs, and torso. There was also a cut on the suspects hand, which was also covered in hair. INV. Weibel identified the individual as Todd Kincannon, as INV. Weibel has dealt with the individual in the past. I, PTL Carson, heard Mr. Kincannon state that he had heard from God that an animal needed to be sacrificed for the good of mankind. Mr. Kincannon stated that every 1,000 years Jesus needs a sacrifice and blood must be spilt. Mr. Kincannon also advised that to his knowledge, only once has the sacrifice ever been a human. Mr. Kincannon stated that God told him to sacrifice the dog belonging to his mother, Roxie Kincannon. Ms. Kincannon did advise that Mr. Kincannon's dog, a large golden retriever, was in her bedroom with the door shut, as she was afraid that Mr. Kincannon might try to hurt that dog as well. Mr. Kincannon stated that he would never hurt his personal dog and he was afraid that Mr. Kincannon would hurt his dog in retaliation for him killing hers. Mr. Kincannon was adamant about getting his personal dog to his pastor as he feared for its safety.

INV. Weibel advised Mr. Kincannon that he was going to be taken to Greenville Memorial Hospital for a psychological evaluation. At first, Mr. Kincannon was hesitant, and only wanted to be transported to Three Rivers Behavioral Health, located in Lexington, South Carolina. However, INV. Weibel stated that at this time, that was not an option. PFC. Davis took Mr. Kincannon back into the residence to wash the blood off of his body and to have him properly dressed. INV. Weibel advised me to make sure there were photographs taken of the entire interior of the residence and that CPL. Downing (Unit # Bravo 2) was on his way to the scene.

I entered the premises of the residence with CPL. Downing, where we observed a brown in color medium sized dog lying on the kitchen floor in a puddle of blood with various entry wounds. There were two medium sized knives placed into the kitchen sink. I observed blood stains and dog hair on both knives. PFC. Davis and Mr. Kincannon emerged from Mr. Kincannon's room inside the residence. Mr. Kincannon continued to advise responding officers that he wanted one of us to take his dog for safe keeping. Mr. Kincannon's golden retriever was placed onto a leash and Mr. Kincannon was advised that responding officers would take care of the dog.

At this time, Mr. Kincannon was placed into Emergency Protective Custody by INV. Weibel, handcuffed behind the back, double locked, and checked for proper fit. Mr. Kincannon was then placed into the backseat of INV. Weibel's patrol vehicle, to await being transported to GME. PFC. Davis informed INV. Weibel that the city kennel could not accommodate the large dog, as there was not enough room. PFC. Davis also stated that Ms. Kincannon would allow the dog to stay at 216 Jones Ave and no harm would come to it. INV. Weibel cleared the scene and transported Mr. Kincannon to GME, and the dog was placed into the custody of Ms. Kincannon.

Ms. Kincannon did advise responding officers that her husband, Jim, and a family friend were on the way back to the residence and that they would take care of moving the deceased animal. Units cleared and returned to service. Nothing follows.

This incident was recorded via Body Worn Camera.

INCIDENT REPORT SUPPLEMENTAL

Page #: 1

Case Number: 05-18-015031

Officer: 00363 BYRD, S

Date Entered/Changed: 07/27/2018

Reviewer:

Review Date:

DETAILED STATEMENT OF INVESTIGATION: On 07/27/2018, I received a phone call from Inv. Weibel. Weibel stated that the Attorney General stated that they were going to set no bond on KinCannon and asked if I could do a Notification of Patient Release form. I contacted GMH to see what room KinCannon was in, to which they stated E-55. Judge Feld arrived to sign the form. I then faxed the form to GMH [REDACTED].

Nothing further.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	
JAMES JOHN TODD KINCANNON,	Case No. 2019-CP-32-1168
Plaintiff,	
v.	PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS
ASHELY SUZANNE GRIFFITH, MOORE TAYLOR LAW FIRM, P.A., VANCE STRICKLIN, and AMBER FULMER,	
Defendants.	

Plaintiff respectfully submits the following memorandum in opposition to Defendants' Motion to Dismiss filed April 23, 2019.

EXECUTIVE SUMMARY

Defendants' Motion to Dismiss must be denied pursuant to the holding in Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991), in which the Supreme Court held that "liability for an abuse of process extends to all who knowingly participate, aid, or abet in the abuse." Id. at 486. "Those who advise or consent to the unlawful acts, or subsequently ratify them, are liable as joint tortfeasors [in an abuse of process action]. Id.

Plaintiff's Verified Complaint plainly alleges that each Defendant knowingly participated in, aided, and abetted the abuse of the plea bargain process by the prosecutor employed by the Lexington County Sheriff's Department. The fact that none of the Defendants had any legal right to exercise "control" over criminal prosecution decisions made by the prosecutor is irrelevant per the Broadmoor holding. All that is necessary to qualify Defendants as joint tortfeasors with respect to the abuse of criminal process

alleged in the Verified Complaint is knowingly participating in, aiding, abetting, advising, consenting, or subsequently ratifying an abuse of process, regardless of who actually performs the act or has the legal right to perform the act. Plaintiff has alleged in the Verified Complaint that each Defendant knowingly participated in, aided, abetted, advised, consented, and/or subsequently ratified an act constituting abuse of process. Defendants' Motion to Dismiss must therefore be denied per the holding in Broadmoor.

If at the conclusion of discovery there exists no direct or circumstantial evidence that Defendants knowingly participated in, aided, abetted, advised, consented to, or subsequently ratified an act constituting abuse of process, whether performed by the Lexington County Sheriff's Department prosecutor or by some other person, then Defendants will be entitled to summary judgment on the abuse of process cause of action and perhaps the remaining causes of action. But Defendants cannot prevail on a Rule 12(b)(6) motion or other type of demurrer because Plaintiff's Verified Complaint adequately sets out factual allegations in support of Plaintiff's position that each Defendant knowingly participated in, aided, abetted, advised, consented to, or subsequently ratified an act constituting abuse of process. The Broadmoor case is crystal clear on these matters.

RULE 12(b)(6) STANDARD

Defendants' Motion to Dismiss is based exclusively on the contention that the Complaint "fail[s] to state a claim upon which relief may be granted." See Motion to Dismiss at 1. This motion therefore falls entirely under Rule 12(b)(6), SCRCP. When considering a Rule 12(b)(6) motion, the Court must assume as true all well-pleaded factual allegations in the Complaint. Defendants' Motion to Dismiss does not allege that

any of the factual allegations in the Complaint are *not* well-pleaded, therefore all factual allegations in the Complaint must be assumed true for the purpose of the Court's consideration of Defendants' motion. The Court must "construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431 (2009).

ANALYSIS AS TO ABUSE OF PROCESS CAUSE OF ACTION

Defendants' Motion to Dismiss Plaintiff's abuse of process cause of action must be denied pursuant to the holding in Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991). Defendants contend that the abuse of process claim must be dismissed because the particular abuse of process principally at issue in this case involved a prosecutor employed by the Lexington County Sheriff's Department¹ refusing to dismiss a criminal domestic violence charge against Plaintiff unless Plaintiff agreed to surrender to Defendants in a civil dispute regarding the possession of a pet animal that had no relationship whatsoever to the criminal domestic violence matter. Defendants' position is that because they "are not in control of the actions" of the Lexington County Sheriff's Department prosecutor, they are immune from liability for abuses of process the prosecutor committed at their behest, with their consent and approval, and for their benefit. This is not the law of South Carolina, as the Supreme Court held in the Broadmoor case.

¹ Defendants' motion incorrectly refers to the Lexington County Sheriff's Department prosecutor as a Lexington County Solicitor's Office solicitor. The Eleventh Circuit Solicitor's Office has had no involvement in the criminal domestic violence matter. As of June 30, 2016, the CDV matter was being prosecuted by a lawyer employed as a prosecutor by the Lexington County Sheriff's Department and has thereafter been prosecuted by the South Carolina Attorney General's Office after the LCSD prosecutor consented to disqualification due to the misconduct referenced in the Verified Complaint in August 2016.

Addressing the issue of aiding-and-abetting liability in abuse of process cases, the Supreme Court held as follows in Broadmoor:

There are two essential elements required for an abuse of process action: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings. Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E. (2d) 693 (1967). As a general rule, liability for an abuse of process extends to all who knowingly participate, aid, or abet in the abuse. See generally 1 Am. Jur. (2d), Abuse of Process § 17; 72 C.J.S. Process § 112. Those who advise or consent to the unlawful acts, or subsequently ratify them, are liable as joint tortfeasors. See, e.g. Woodring v. Jennings State Bank, 603 F. Supp. 1060 (D. Neb. 1985); Alexander v. Unification Church, 634 F. (2d) 673 (2d Cir.1980); Ingo v. Koch, 127 F. (2d) 667 (2d Cir.1942). Where there is any evidence of aiding or abetting, the question is one for the jury. McGann v. Allen, 105 Conn. 177, 134 A. 810 (1926); See also Ingo v. Koch, *supra*; Lambert v. Bruton, 127 Me. 510, 144 A. 864 (1929). 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 united with him in inflicting the injury.

Wood v. Bailey, 144 Mass. 365, 11 N.E. 567, 576 (1887).

South Carolina law is clear: a private party who knowingly participates in, aids, abets, advises, consents to, or subsequently ratifies an act constituting abuse of process is liable for abuse of process even if he did not personally commit the act. “The hand of one is the hand of all” is fully applicable to abuse of process cases per Broadmoor, and Plaintiff’s Verified Complaint is replete with well-pleaded factual allegations asserting that Defendants and the prosecutorial officer who committed the principal abuse of process (and later prosecutorial officers who ratified it) all acted in concert with one another and would all be proper defendants in an abuse of process action, including each and every one of the named Defendants.

Plaintiff's Complaint alleges with specificity that the instant Defendants procured the prosecutorial officer's abuse of criminal process and related tortious conduct directed at Plaintiff in connection with the prosecutorial officer's attempt to dismiss the criminal domestic violence charge (so long as Plaintiff agreed to the extortionate condition regarding the unrelated civil dispute) and are therefore liable for it as joint tortfeasors, which is plainly proper under Broadmoor. The Complaint could not be clearer with respect to these factual allegations. Paragraph 9 of the Complaint is directed at this matter and states, in no uncertain terms:

All Defendants are jointly and severally liable, both directly as joint tortfeasors and vicariously, for the actionable conduct of one Nicole Howland of the Lexington County Sheriff's Department described herein, as Defendants and Howland willfully acted in concert with respect to these matters. All actionable conduct engaged in by Howland and other agents of the State of South Carolina, including all tortious acts and omissions, was procured by Defendants and engaged in by Howland and/or other agents of the State of South Carolina at the direction of Defendants and with their express approval.

Verified Complaint at 2, ¶ 9.

Paragraph 15 of the Complaint also plainly alleges, as a matter of fact, that Defendants propositioned the prosecutorial officer to attach the improperly extortionate demand relating to the civil dispute to her offer to discontinue the criminal domestic violence prosecution:

Howland [the prosecutorial officer] made this unlawful demand after being propositioned by Defendant Griffith and her legal counsel in the civil dispute involving Plaintiff's animal, the Moore Taylor Defendants, in connection with a court appearance in the criminal domestic violence case on June 30, 2016. Howland willingly agreed to attach that unlawful condition relating to an unrelated civil dispute to the offer to drop the criminal domestic violence charge and did so.

Verified Complaint at 3-4, ¶ 15.

The Complaint further contains a well-pleaded factual allegation in Paragraph 18 that Defendants' act in procuring the prosecutorial officer's misconduct is the sole and proximate cause of the continuation of the criminal domestic violence prosecution beyond June 30, 2016 (an allegation which is plainly correct given the indisputable facts of the case) and, therefore, is the sole and proximate cause of the injuries Plaintiff seeks to recover damages for in this action:

[T]he sole and proximate cause of the continuation of the criminal domestic violence prosecution after June 30, 2016 and the elevation of charges from the minor misdemeanor charge to the two major felony charges was the unlawful conduct of Howland, procured by Defendant Griffith and the Moore Taylor Defendants, which resulted in Howland's lawful and proper offer to drop the bogus criminal domestic violence charge against Plaintiff being unlawfully conditioned on Plaintiff surrendering his animal to Defendant Griffith to enable her to prevail in the wholly unrelated civil dispute between Plaintiff and Defendant Griffith.

Verified Complaint at 4-5, ¶ 18.

In light of Broadmoor, Plaintiff's Verified Complaint plainly states facts sufficient to constitute a cause of action for abuse of process against each Defendant. Plaintiff's allegations clearly meet any conceivable standard for alleging liability for abuse of process based on a "hand of one, hand of all" theory pursuant to Broadmoor.

ANALYSIS AS TO REMAINING CAUSES OF ACTION

Defendants also contend, in their motion to dismiss, that their "lack of prosecutorial control" theory should doom the remaining causes of action in Plaintiff's Verified Complaint but cite no authority in support of the proposition (nor did they cite any authority in support of the proposition with respect to the abuse of process claim). Plaintiff contends that because the remaining causes of action, are either related to, derivative of, or functionally similar to the abuse of process cause of action, the

Broadmoor rule of “hand of one, hand of all” liability necessarily ought to apply to them as well as a basic matter of legal logic, and that is certainly in keeping with basic principles of tort law and joint tortfeasor liability. Accordingly, Plaintiff respectfully request the Court deny Defendants’ Motion to Dismiss with respect to the remaining causes of action in the Verified Complaint.

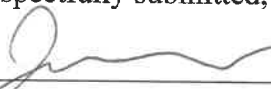
OPPORTUNITY TO AMEND COMPLAINT

Plaintiff was served with the Answer and Counterclaim and Motion to Dismiss on May 9, 2019, meaning Plaintiff has until June 10, 2019 to amend the Verified Complaint as a matter of right pursuant to Rule 15, SCRCP. Should the Court conclude that Plaintiff has not adequately pleaded Broadmoor-style “hand of one, hand of all” liability with respect to the abuse of process claim or find some other defect with regard to the remaining causes of action, Plaintiff respectfully requests the Court issue its ruling on the matter prior to June 10, 2019 to afford Plaintiff the opportunity to amend the Verified Complaint as a matter of right to cure any pleading defects the Court identifies.

CONCLUSION

Defendants’ Motion to Dismiss must be denied because Plaintiff has pleaded all that is necessary to state facts sufficient to constitute a cause of action for abuse of process under Broadmoor, supra. The remaining causes of action, being functionally similar to the abuse of process claim, ought to be governed by Broadmoor as well. Defendants’ contention that a private party cannot be sued for abuse of process committed by a prosecutor in league with the private party is plainly wrong per the clear holding of the Broadmoor case, a copy of which is attached to this memorandum for the Court’s review and consideration.

Respectfully submitted,



JAMES JOHN TODD KINCANNON
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Simpsonville, South Carolina 29681
864-963-4374
ToddKincannon@gmail.com
Plaintiff Pro Se

May 21, 2019

CERTIFICATE OF SERVICE

The undersigned Plaintiff hereby certifies service by first class mail on the date below indicated in accordance with Rule 5, SCRPC on all Defendants by and through their counsel of record, Ward Bradley of the Moore Taylor Law Firm, P.A., at the correct mailing address listed for Mr. Bradley and his firm.



JAMES JOHN TODD KINCANNON

May 21, 2019

306 S.C. 482 (1991)

413 S.E.2d 9

**BROADMOOR APARTMENTS OF CHARLESTON, a South Carolina Limited Partnership,
and Town and Campus International, Inc., Respondents/Appellants**

v.

**Lanny HORWITZ, Max Schlopy and Berkeley Square Associates, Inc.,
Appellants/Respondents.**

23529

Supreme Court of South Carolina.

Heard April 23, 1991.

Decided December 16, 1991.

Rehearing Denied February 4, 1992.

483 *483 *William R. Phipps, Bethea, Jordan and Griffin, P.A., Hilton Head, for appellants-respondents Horwitz and Berkeley Square Associates, Inc.*

T. Reeve Sams, Levin, Sams & Grimsley, Beaufort, for appellant-respondent Schlopy.

Richard S. Rosen and Karen E. McCormick, Rosen, Rosen & Hagood, Charleston, and Joab Dowling, Jr., Dowling, Sanders, Dukes, Svalina & Williams, P.A., Beaufort, for respondents-appellants.

Heard April 23, 1991;

Decided December 16, 1991.

Rehearing Denied February 4, 1992.

CHANDLER, Justice:

Respondents-Appellants, Broadmoor Apartments and Town and Campus International (Broadmoor), instituted suit against Appellants-Respondents, Lanny Horwitz, Berkeley Square Associates, and Max Schlopy, alleging (1) slander of title and (2) abuse of process. The trial court, by directed verdict, dismissed the slander of title action; on abuse of process, Broadmoor was awarded \$750,000. All parties appeal.

We affirm.

484 *484 **FACTUAL BACKGROUND**

Town and Campus, as General Partner of Broadmoor, entered into negotiations with Max Schlopy for the purchase of Broadmoor's 305-unit apartment complex in Charleston, South Carolina. On July 2, 1983, Schlopy executed a contract to purchase the complex for \$7,400,000. The required \$75,000 deposit was subsequently reduced to \$50,000 by agreement. Thereafter, Schlopy was contacted on two occasions by Broadmoor's agent, Richard Zitzman, requesting the \$50,000 down payment. When it was not received,

Zitzman wrote Schlopy on October 18, 1983, advising that Broadmoor would no longer entertain the offer to purchase. Meanwhile, and unbeknownst to Zitzman, Schlopy had written a letter on October 17, 1983, requesting the deposit be reduced to \$25,000. Upon receipt of this letter, Zitzman replied on October 25, 1983, advising that \$25,000 was unacceptable.

Schlopy *never* made the required \$50,000 deposit. Nevertheless, on October 28, 1983, he purported to assign his "Contract of Sale" to Berkeley Square Realty Associates, Lanny Horwitz, President.^[1] The assignment included the following:

... the Contract of Sale is valid and binding and that the Assignor and Seller have agreed that the deposit to be paid under the contract has been reduced to ... \$25,000 ... [to] be paid by Assignee promptly upon consummation of the within assignment.

It also reserved a 10% interest to Schlopy. A "consent" provision contained in the assignment was never signed by Broadmoor.

Thereafter, Horwitz wrote to Broadmoor, advising of the assignment from Schlopy. Prior to this letter, Broadmoor had had no dealings with Horwitz or Berkeley Square.

Under the terms of the original contract, Schlopy had the right to assign his interest, without Broadmoor's consent, *only* if a corporation known as Marc Equity^[2] was a partner of the assignee.

485 *485 When Schlopy and Horwitz learned that Broadmoor refused to consent to the assignment, they, belatedly, on November 2, 1983, purported to comply with the terms of the original contract by naming Marc Equity a corporate partner.

Thereafter, on November 6, 1983, Horwitz brought three potential investors to inspect the apartment complex, and was "thrown off" the premises by the on-site manager. On November 7, 1983, Horwitz issued a \$50,000 draft to cover the deposit; however, the bank account on which the draft was drawn had a balance of \$10. On November 9, 1983, Horwitz wrote to a limited partner of Broadmoor, Cameron Todd, advising of Berkeley's intent to file a lis pendens to enjoin sale of the property.

On November 10, the lis pendens was filed, followed by a summons and complaint seeking specific performance.

In April, 1985, the lis pendens and specific performance actions were resolved in Broadmoor's favor. The trial court held (1) that Schlopy had no enforceable contract to assign and (2) that neither Schlopy nor Berkeley had made the required \$50,000 deposit.

Thereafter, Broadmoor sued Schlopy, Horwitz and Berkeley, for slander of title and abuse of process. The slander of title action, by directed verdict, was dismissed; the abuse of process action resulted in a jury verdict of \$750,000.

ISSUE

Were Schlopy, Horwitz and Berkeley entitled to a directed verdict on the abuse of process claim?^[3]

DISCUSSION

In reviewing the denial of a motion for directed verdict, this Court must consider the evidence and all reasonable inferences in the light most favorable to the opposing party. We may not pass upon the veracity of witnesses or determine the case according to what we believe is the weight of the evidence. Graham v. Whitaker, 282 S.C. 393, 321 S.E. (2d) 40 (1984); Godfrey v. Little River Fishing Fleet, 302 S.C. 426, 396 S.E. (2d) 828 (1990). If there is any evidence tending to prove *486 the allegations of the complaint, the motion must be denied. Godfrey, supra.

There are two essential elements required for an abuse of process action: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings. Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E. (2d) 693 (1967). As a general rule, liability for an abuse of process extends to all who knowingly participate, aid, or abet in the abuse. See generally 1 Am. Jur. (2d), *Abuse of Process* § 17; 72 C.J.S. *Process* § 112. Those who advise or consent to the unlawful acts, or subsequently ratify them, are liable as joint tortfeasors. See, e.g. Woodring v. Jennings State Bank, 603 F. Supp. 1060 (D. Neb. 1985); Alexander v. Unification Church, 634 F. (2d) 673 (2d Cir.1980); Ingo v. Koch, 127 F. (2d) 667 (2d Cir.1942). Where there is any evidence of aiding or abetting, the question is one for the jury. McGann v. Allen, 105 Conn. 177, 134 A. 810 (1926); See also Ingo v. Koch, supra; Lambert v. Bruton, 127 Me. 510, 144 A. 864 (1929). 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.

Wood v. Bailey, 144 Mass. 365, 11 N.E. 567, 576 (1887).

Adverting to the record before us, we hold that the trial court properly submitted abuse of process to the jury.

In addition to the factual background previously set forth, Horwitz testified that he never had a loan commitment from a bank to purchase the property. Additionally, he admitted that, prior to the assignment, he was aware of Broadmoor's October 18 letter to Schlopy rejecting the offer of purchase. Moreover, despite Horwitz's "unwilling[ness] to put the deposit with the brokers as called for under the contract," (Tr. p. 738), Berkeley moved in July, 1984, to enforce a purported settlement agreement.^[4] Lastly, *487 bank records revealed that Berkeley at no time had sufficient funds in its bank account to pay the \$50,000 downpayment.

We find ample evidence from which the jury could infer that Berkeley and its president, Horwitz, willfully abused the process, with the ulterior purpose of preventing a sale to third parties in hopes of obtaining financial backing with which to purchase the property at an advantageous price.

Regarding Schlopy, he "assigned" the contract to Berkeley, notwithstanding Broadmoor's rejection of his offer. He then advised Horwitz that he "thought [filing a lis pendens] was a good idea." Further, during the pendency of the lawsuit, he filed an affidavit on Berkeley's behalf, erroneously listing Marc Equity as the assignor and stating "as soon as Mr. Zitzman received my October 17 letter [suggesting a \$25,000 deposit] he told me by telephone that the information was satisfactory and the parties would proceed to fulfill the terms of the contract..." Nothing in the record supports this affidavit. To the contrary, Mr. Zitzman had explicitly rejected Schlopy's request that the required deposit be reduced from \$50,000 to \$25,000.

Finally, Schlopy's participation is demonstrated by his retention of a 10% interest under the assignment, and his statement to a Broadmoor agent that, although not a party, he was involved in the lawsuit by virtue of his entitlement to commissions.

Under these facts, the issue of whether Schlopy aided, abetted or consented to the abuse of process was for the jury. Accordingly, the court correctly denied the directed verdict motion.

The remaining exceptions are affirmed pursuant to Rule 23: Kolb v. Nash, 245 S.C. 25, 138 S.E. (2d) 417 (1964) (Schlopy's exceptions 8, 13, 17 through 20 and 28); Jones v. Hamm, 253 S.C. 283, 170 S.E. (2d) 206 (1969) (Schlopy's exceptions 1 through 3); Hofer v. St. Clair, 298 S.C. 503, 381 S.E. (2d) 736 (1989), Joyner v. St. Matthews Builders, 263 S.C. 136, 208 S.E. (2d) 48 (1974), Winburn v. Minnesota Mutual Life Ins. Co., 261 S.C. 568, 201 S.E. (2d) 372 (1973) (Berkeley/Horwitz' exceptions 2 and 3, Schlopy's exceptions 4, 5, 6, 7, 9 through 12, and 14 through 16); Godfrey v. Little River Fishing Fleet, 302 S.C. 426, 396 S.E. (2d) 828 (1990), King v. Daniel International *488 Crop., 278 S.C. 350, 296 S.E. (2d) 335 (1982) (Schlopy's exceptions 26, 29; Berkeley/Horwitz' exceptions 4, 5).

Affirmed.

GREGORY, C.J., and HARWELL, FINNEY and TOAL, JJ., concur.

[1] The assignment was drafted by Horwitz, an attorney, with knowledge of Zitzman's letter to Schlopy advising that Broadmoor would "no longer entertain his offer to purchase" as no deposit had been received. Schlopy is also an attorney, engaged primarily in real estate practice.

[2] Marc Equity was a corporation with which Schlopy was engaged in numerous joint ventures. It was dissolved in 1984.

[3] In its brief, Broadmoor urges affirmance of the verdict in the abuse of process action, or, *alternatively*, it requests the award be upheld on the ground that directed verdict was improper in the slander action. In light of our affirmance, we do not address Broadmoor's exceptions.

[4] The trial court ruled that no settlement had been reached.

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STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

JAMES JOHN TODD KINCANNON,

Plaintiff,

v.

ASHELY SUZANNE GRIFFITH, MOORE
TAYLOR LAW FIRM, P.A., VANCE
STRICKLIN, and AMBER FULMER,

Defendants.

Case No. 2019-CP-32-1168

**PLAINTIFF'S AMENDED
MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS
AND MEMORANDUM IN SUPPORT OF
ORAL MOTION TO STRIKE UNTIMELY
AFFIDAVIT AND MATERIAL IN
DEFENDANTS' MEMORANDUM IN
SUPPORT ARGUING GROUNDS
OUTSIDE THE MOTION TO DISMISS**

Plaintiff respectfully submits the following amended memorandum in opposition to Defendants' Motion to Dismiss filed April 23, 2019 which supersedes the memorandum in opposition served May 21, 2019 and responds to Defendants' memorandum in support and an affidavit served May 24, 2019. This memorandum also contains argument in support of an oral motion Plaintiff intends to make at the threshold of the hearing on Defendants' Motion to Dismiss to strike and exclude an untimely, improper affidavit of Defendant Stricklin and material in Defendants' memorandum in support of their Motion to Dismiss arguing grounds outside the motion to dismiss and raised for the first time in the supporting memorandum, which was served less than two full business days prior to the hearing on the Motion to Dismiss.

EXECUTIVE SUMMARY

Defendants' Motion to Dismiss must be denied pursuant to the holding in Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991), in which the Supreme Court held that "liability for an abuse of process extends to all who knowingly participate, aid, or abet in the abuse." Id. at 486. "Those who advise or

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consent to the unlawful acts, or subsequently ratify them, are liable as joint tortfeasors [in an abuse of process action]. Id.

Plaintiff's Verified Complaint plainly alleges that each Defendant knowingly participated in, aided, and abetted the abuse of the plea bargain process by the prosecutor employed by the Lexington County Sheriff's Department. The fact that none of the Defendants had any legal right to exercise "control" over criminal prosecution decisions made by the prosecutor is irrelevant per the Broadmoor holding. All that is necessary to qualify Defendants as joint tortfeasors with respect to the abuse of criminal process alleged in the Verified Complaint is knowingly participating in, aiding, abetting, advising, consenting, or subsequently ratifying an abuse of process, regardless of who actually performs the act or has the legal right to perform the act. Plaintiff has alleged in the Verified Complaint that each Defendant knowingly participated in, aided, abetted, advised, consented, and/or subsequently ratified an act constituting abuse of process. Defendants' Motion to Dismiss must therefore be denied per the holding in Broadmoor.

If at the conclusion of discovery there exists no direct or circumstantial evidence that Defendants knowingly participated in, aided, abetted, advised, consented to, or subsequently ratified an act constituting abuse of process, whether performed by the Lexington County Sheriff's Department prosecutor or by some other person, then Defendants will be entitled to summary judgment on the abuse of process cause of action and perhaps the remaining causes of action. But Defendants cannot prevail on a Rule 12(b)(6) motion or other type of demurrer because Plaintiff's Verified Complaint adequately sets out factual allegations in support of Plaintiff's position that each Defendant knowingly participated in, aided, abetted, advised, consented to, or

subsequently ratified an act constituting abuse of process. The Broadmoor case is crystal clear on these matters.

Defendants' remaining grounds for dismissal, asserted for the first time in its memorandum in support and not included in the Motion to Dismiss itself, cannot be heard by the Court at this time because Defendants failed to give Plaintiff proper notice of the grounds upon which the Motion to Dismiss was based in violation of Rules 6(d) and 7(b)(1), SCRPC, which are mandatory in motions practice per Dedes v. Strickland, 414 S.E.2d 134, 307 S.C. 155 (1992) and the notice requirements of the due process clauses of the United States and South Carolina Constitutions.

RULE 12(b)(6) STANDARD

Defendants' Motion to Dismiss is based exclusively on the contention that the Complaint "fail[s] to state a claim upon which relief may be granted." See Motion to Dismiss at 1. This motion therefore falls entirely under Rule 12(b)(6), SCRPC. When considering a Rule 12(b)(6) motion, the Court must assume as true all well-pleaded factual allegations in the Complaint. Defendants' Motion to Dismiss does not allege that any of the factual allegations in the Complaint are *not* well-pleaded, therefore all factual allegations in the Complaint must be assumed true for the purpose of the Court's consideration of Defendants' motion. The Court must "construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431 (2009).

**ANALYSIS AS TO THE SINGLE GROUND ASSERTED IN DEFENDANTS'
MOTION TO DISMISS REGARDING LACK OF CONTROL OF PROSECUTOR**

Defendants' Motion to Dismiss Plaintiff's abuse of process cause of action must be denied pursuant to the holding in Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991). Defendants contend that the abuse of process claim must be dismissed because the particular abuse of process principally at issue in this case involved a prosecutor employed by the Lexington County Sheriff's Department¹ refusing to dismiss a criminal domestic violence charge against Plaintiff unless Plaintiff agreed to surrender to Defendants in a civil dispute regarding the possession of a pet animal that had no relationship whatsoever to the criminal domestic violence matter. Defendants' position is that because they "are not in control of the actions" of the Lexington County Sheriff's Department prosecutor, they are immune from liability for abuses of process the prosecutor committed at their behest, with their consent and approval, and for their benefit. This is not the law of South Carolina, as the Supreme Court held in the Broadmoor case.

Addressing the issue of aiding-and-abetting liability in abuse of process cases, the Supreme Court held as follows in Broadmoor:

There are two essential elements required for an abuse of process action: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings. Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E. (2d) 693 (1967). As a general rule, liability for an abuse of process extends to all who knowingly participate, aid, or abet in the abuse. See generally 1 Am. Jur. (2d), Abuse of Process § 17; 72 C.J.S. Process § 112. Those who advise or consent to

¹ Defendants' motion incorrectly refers to the Lexington County Sheriff's Department prosecutor as a Lexington County Solicitor's Office solicitor. The Eleventh Circuit Solicitor's Office has had no involvement in the criminal domestic violence matter. As of June 30, 2016, the CDV matter was being prosecuted by a lawyer employed as a prosecutor by the Lexington County Sheriff's Department and has thereafter been prosecuted by the South Carolina Attorney General's Office after the LCSD prosecutor consented to disqualification due to the misconduct referenced in the Verified Complaint in August 2016.

the unlawful acts, or subsequently ratify them, are liable as joint tortfeasors. See, e.g. Woodring v. Jennings State Bank, 603 F. Supp. 1060 (D. Neb. 1985); Alexander v. Unification Church, 634 F. (2d) 673 (2d Cir.1980); Ingo v. Koch, 127 F. (2d) 667 (2d Cir.1942). Where there is any evidence of aiding or abetting, the question is one for the jury. McGann v. Allen, 105 Conn. 177, 134 A. 810 (1926); See also Ingo v. Koch, *supra*; Lambert v. Bruton, 127 Me. 510, 144 A. 864 (1929). 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 united with him in inflicting the injury.

Wood v. Bailey, 144 Mass. 365, 11 N.E. 567, 576 (1887).

South Carolina law is clear: a private party who knowingly participates in, aids, abets, advises, consents to, or subsequently ratifies an act constituting abuse of process is liable for abuse of process even if he did not personally commit the act. “The hand of one is the hand of all” is fully applicable to abuse of process cases per Broadmoor, and Plaintiff’s Verified Complaint is replete with well-pleaded factual allegations asserting that Defendants and the prosecutorial officer who committed the principal abuse of process (and later prosecutorial officers who ratified it) all acted in concert with one another and would all be proper defendants in an abuse of process action, including each and every one of the named Defendants.

Plaintiff’s Complaint alleges with specificity that the instant Defendants procured the prosecutorial officer’s abuse of criminal process and related tortious conduct directed at Plaintiff in connection with the prosecutorial officer’s attempt to dismiss the criminal domestic violence charge (so long as Plaintiff agreed to the extortionate condition regarding the unrelated civil dispute) and are therefore liable for it as joint tortfeasors,

which is plainly proper under Broadmoor. The Complaint could not be clearer with respect to these factual allegations. Paragraph 9 of the Complaint is directed at this matter and states, in no uncertain terms:

All Defendants are jointly and severally liable, both directly as joint tortfeasors and vicariously, for the actionable conduct of one Nicole Howland of the Lexington County Sheriff's Department described herein, as Defendants and Howland willfully acted in concert with respect to these matters. All actionable conduct engaged in by Howland and other agents of the State of South Carolina, including all tortious acts and omissions, was procured by Defendants and engaged in by Howland and/or other agents of the State of South Carolina at the direction of Defendants and with their express approval.

Verified Complaint at 2, ¶ 9.

Paragraph 15 of the Complaint also plainly alleges, as a matter of fact, that Defendants propositioned the prosecutorial officer to attach the improperly extortionate demand relating to the civil dispute to her offer to discontinue the criminal domestic violence prosecution:

Howland [the prosecutorial officer] made this unlawful demand after being propositioned by Defendant Griffith and her legal counsel in the civil dispute involving Plaintiff's animal, the Moore Taylor Defendants, in connection with a court appearance in the criminal domestic violence case on June 30, 2016. Howland willingly agreed to attach that unlawful condition relating to an unrelated civil dispute to the offer to drop the criminal domestic violence charge and did so.

Verified Complaint at 3-4, ¶ 15.

The Complaint further contains a well-pleaded factual allegation in Paragraph 18 that Defendants' act in procuring the prosecutorial officer's misconduct is the sole and proximate cause of the continuation of the criminal domestic violence prosecution beyond June 30, 2016 (an allegation which is plainly correct given the indisputable facts

of the case) and, therefore, is the sole and proximate cause of the injuries Plaintiff seeks to recover damages for in this action:

[T]he sole and proximate cause of the continuation of the criminal domestic violence prosecution after June 30, 2016 and the elevation of charges from the minor misdemeanor charge to the two major felony charges was the unlawful conduct of Howland, procured by Defendant Griffith and the Moore Taylor Defendants, which resulted in Howland's lawful and proper offer to drop the bogus criminal domestic violence charge against Plaintiff being unlawfully conditioned on Plaintiff surrendering his animal to Defendant Griffith to enable her to prevail in the wholly unrelated civil dispute between Plaintiff and Defendant Griffith.

Verified Complaint at 4-5, ¶ 18.

In light of Broadmoor, Plaintiff's Verified Complaint plainly states facts sufficient to constitute a cause of action for abuse of process against each Defendant. Plaintiff's allegations clearly meet any conceivable standard for alleging liability for abuse of process based on a "hand of one, hand of all" theory pursuant to Broadmoor.

Defendants also contend, in their motion to dismiss, that their "lack of prosecutorial control" theory should doom the remaining causes of action in Plaintiff's Verified Complaint but cite no authority in support of the proposition (nor did they cite any authority in support of the proposition with respect to the abuse of process claim). Plaintiff contends that because the remaining causes of action are either related to, derivative of, or functionally similar to the abuse of process cause of action, the Broadmoor rule of "hand of one, hand of all" liability necessarily ought to apply to them as well as a basic matter of legal logic, and that is certainly in keeping with basic principles of tort law and joint tortfeasor liability. Accordingly, Plaintiff respectfully request the Court deny Defendants' Motion to Dismiss with respect to the remaining causes of action in the Verified Complaint.

NOTE REGARDING “PROCESS” AS USED IN THE COMPLAINT

Defendants’ Motion to Dismiss and supporting memorandum appear to reflect an erroneous belief by Defendants that the “process” Plaintiff claims they abused was the initiation of a misdemeanor criminal domestic violence prosecution against Plaintiff on April 6, 2015. The initiation of that criminal prosecution is not the “process” that Plaintiff claims was abused. The process that Defendants abused was the plea bargaining process which occurred on June 30, 2016. Plaintiff does not seek to recover any damages in this action for the initiation of the misdemeanor criminal domestic violence action against him in 2015. The damages Plaintiff seeks to recover are those occasioned by the *continuation* of the criminal domestic violence prosecution *after* June 30, 2016 after the plea bargaining process failed due to Defendants’ tortious abuse of that plea bargaining process, which consisted of persuading the Lexington County Sheriff’s Department criminal domestic violence prosecutor, Nicole Howland, to attach an illegal condition to her offer to drop the criminal domestic violence charge in exchange for Plaintiff surrendering to Defendants in the unrelated civil dispute over the animal that arose in early 2016, a civil dispute that did not even exist in April of 2015 when the misdemeanor criminal domestic violence prosecution was commenced.

OBJECTION TO ADDITIONAL GROUNDS FOR DISMISSAL FIRST RAISED IN DEFENDANTS’ MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND ARGUMENT IN SUPPORT OF MOTION TO STRIKE ALL ADDITIONAL GROUNDS

On May 24, 2019, less than two full business days before the hearing on the Motion to Dismiss, Defendants filed and served a memorandum in support of their motion that asserts, for the very first time, numerous grounds for dismissal not raised in the Motion to Dismiss itself. Sections II.B., II.C., II.D., II.E., and II.F. of Defendants’

memorandum in support of their Motion to Dismiss raise and argue grounds for dismissal that are not raised by the Motion to Dismiss itself, and therefore violate Rules 6(d) and 7(b)(1), SCRCP because Plaintiff has not had ten days to prepare a response to the grounds for dismissal raised for the first time in these sections of Defendants' memorandum in support. Allowing Defendants to proceed on grounds outside their Motion to Dismiss, raised for the first time in their supporting memorandum filed and served less than two full business days before the hearing on the Motion to Dismiss, would violate the rules of civil procedure and deny Plaintiff his due process right to adequate notice of the grounds for motions in advance of motion hearings secured by the United States and South Carolina Constitutions.

Rule 7(b)(1), SCRCP, requires that a party making a pre-trial motion like Defendants' make the motion in writing and requires that such writing "shall state with particularity the grounds therefor[.] Rule 7(b)(1), SCRCP. Defendants' Motion to Dismiss states with particularity a single ground: that because Defendants had no legal control over the prosecutor's decision-making in the criminal domestic violence prosecution, they cannot be held liable for abuses of process committed by the prosecutor or for any of the other causes of action asserted in Plaintiff's Verified Complaint and the Complaint must be dismissed in its entirety based solely on the lack-of-prosecutorial--control ground. Defendants' Motion to Dismiss contains no other grounds for dismissal whatsoever.

Defendants' Memorandum in Support, however, contains argument in support of numerous grounds for dismissal of Plaintiff's causes of action other than the abuse of process cause_of action. These additional arguments, entirely unrelated to the

prosecutorial-control ground, appear in Sections II.B., II.C., II.D., II.E., and II.F. of Defendants' memorandum in support of the Motion to Dismiss. Plaintiff had no notice whatsoever that Defendants intended to present these additional grounds for dismissal at the hearing on the Motion to Dismiss until the memorandum was emailed to Plaintiff the afternoon of May 24, 2019, less than two full business days prior to the hearing on the Motion to Dismiss. Plaintiff objects to Defendants' attempt to ambush him with additional grounds for dismissal not included in the Motion to Dismiss itself, which is a violation of Rule 7(b)(1), SCRPC's requirement that all written motions "shall state with particularity the grounds therefor." The only ground stated with particularity in Defendants' written motion is the lack-of-prosecutorial-control ground, and that is the only ground that Plaintiff has had ten days to prepare opposition to as required by Rule 6(d), SCRPC. Therefore, the lack-of-prosecutorial-control ground is the only ground that Defendants can argue at the hearing on their Motion to Dismiss, and the Court must strike the remaining grounds raised for the first time in the memorandum pursuant to Rules 6(d) and 7(b)(1) per Dedes v. Strickland, 414 S.E.2d 134, 307 S.C. 155 (1992) and the notice requirements of the due process clauses of the United States and South Carolina Constitutions.

Defendants will not be prejudiced by the Court's refusal to entertain their additional grounds for 12(b)(6) dismissal at this time because Defendants can raise those grounds later by way of a properly drafted and noticed Rule 12(c) or 12(h) motion. But the Court cannot hear Defendants on these additional grounds at this time because doing so would cause unconstitutional and improper prejudice to Plaintiff's ability to prepare for the hearing on the Motion to Dismiss. The record indicates that Plaintiff fully

prepared a written memorandum regarding the only ground raised in Defendants' Motion to Dismiss and served it on Defendants and transmitted a copy to the Court on May 21, 2019, and Plaintiff has not had time to prepare an additional memorandum or even complete the legal research necessary to the preparation of an additional memorandum in opposition to the numerous additional grounds for dismissal raised for the first time in Defendants' memorandum in support of their Motion to Dismiss first transmitted to Plaintiff on May 24, 2019, less than two full business days prior to the hearing.

The Supreme Court of South Carolina made clear in Dedes v. Strickland, supra, that non-movants are entitled to ten full days to prepare their opposition to written pre-trial dispositive motions, and there are no exceptions to the rule established in Dedes that could possibly apply to the circumstances of this case. Defendants have every right to pursue their additional grounds for dismissal by way of a Rule 12(c) or 12(h) motion but cannot do so by way of the pending Motion to Dismiss because they failed to give Plaintiff due notice of the grounds for dismissal they intended to argue at the hearing until it was far too late to do so. Plaintiff would waive this objection if he had had time to fully research and prepare an opposition to the numerous additional grounds for dismissal simply to avoid causing extra work for the Court and for himself at a future hearing on a Rule 12(c) or 12(h) motion and resolve all issues regarding the sufficiency of his pleading as early as possible in the litigation, but Plaintiff has been entirely unable to fully research and fully prepare a memorandum in opposition to the additional grounds in the less-than-two-full-business-days time period allotted to him by Defendants given their eve-of-hearing service and filing of their memorandum in support of the Motion to Dismiss.

Any favorable ruling for Defendants on the grounds for dismissal appearing for the first time in their memorandum in support would be reversible error per Dedes v. Strickland, *supra*. Therefore the Court must strike these additional grounds without prejudice to Defendants' right to present them at a later time in the context of a Rule 12(c) or Rule 12(h) pre-trial motion.

**OBJECTION TO DEFENDANTS' UNTIMELY AND IMPROPER
AFFIDAVIT FILED IN SUPPORT OF MOTION TO DISMISS AND
ARGUMENT IN SUPPORT OF MOTION TO STRIKE AFFIDAVIT**

On May 24, 2019, less than two full business days before the hearing on the Motion to Dismiss, Defendants filed and served an affidavit of Defendant Vance Stricklin with the apparent intention to rely on the affidavit as a supporting affidavit for Defendants' Motion to Dismiss. Plaintiff objects to the affidavit as untimely because it was not served with the Motion to Dismiss as required by Rule 6(d), SCRCP, leaving Plaintiff with no opportunity to prepare, serve, and file opposing affidavits, and improper because supporting affidavits are generally improper with respect to motions to dismiss arising under Rule 12(b)(6), SCRCP and the affidavit of Defendant Stricklin does not fall within any presently recognized exception to the general rule that 12(b)(6) motions cannot be supported by affidavits because it addresses matters outside the pleadings and, apparently, asks the Court to rule on a disputed issue of material fact: whether Defendant Stricklin engaged in any conduct that would render him liable for abuse of process.

The affidavit is improper because Defendants' Motion to Dismiss is a pure demurrer and asks the Court to rule only that Plaintiff's Verified Complaint fails to allege facts sufficient to constitute the causes of action asserted therein. Defendants' Motion to Dismiss does not include or argue any grounds for summary judgment pursuant to Rule

56, SCRCP, and therefore cannot be converted into a motion for summary judgment without violating Plaintiff's due process rights and the rules of civil procedure applicable to motions for summary judgment.

If the affidavit of Defendant Stricklin had been filed and served at the same time as the Motion to Dismiss, rather than on the eve of the hearing, conversion to a motion for summary judgment would be proper so long as the Court gave Plaintiff notice of its intention to treat Defendants' Motion to Dismiss as a motion for summary judgment and gave Plaintiff at least ten additional days to respond to a motion for summary judgment per Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987). That has not happened—Plaintiff has received no notice from either Defendants or the Court of any intention to treat Defendants' Motion to Dismiss as a motion for summary judgment, and Plaintiff has not had time to prepare an opposition to a motion for summary judgment and has, instead, only had an opportunity to prepare an opposition to a motion to dismiss for failure to state facts sufficient to constitute a cause of action pursuant to Rule 12(b)(6).

Plaintiff has not sought to present any material outside the pleadings to the Court with respect to Defendants' Motion to Dismiss, and Plaintiff objects to Defendants' attempt to do so by way of the untimely affidavit of Defendant Stricklin. Accordingly, Plaintiff respectfully requests the Court strike the affidavit of Defendant Vance Stricklin and exclude it from consideration with respect to Defendants' Motion to Dismiss without prejudice to Defendants' right to resubmit the affidavit in support of a motion for summary judgment that Defendants may choose to make at some future time with proper notice to Plaintiff as required by Rules 6(d), 7(b)(1), and 56 of the South Carolina Rules of Civil Procedure, Dedes v. Strickland, supra, and Brown v. Leverette, supra.

Defendants have invited the Court to commit reversible error by considering the affidavit of Defendant Stricklin in connection with the Motion to Dismiss, and Plaintiff respectfully requests the Court decline that invitation and strike the affidavit without prejudice.

OPPORTUNITY TO AMEND COMPLAINT

Plaintiff was served with the Answer and Counterclaim and Motion to Dismiss on May 9, 2019, meaning Plaintiff has until June 10, 2019 to amend the Verified Complaint as a matter of right pursuant to Rule 15, SCRPC. Should the Court conclude that Plaintiff has not adequately pleaded Broadmoor-style “hand of one, hand of all” liability with respect to the abuse of process claim or find some other defect with regard to the remaining causes of action, Plaintiff respectfully requests the Court issue its ruling on the matter prior to June 10, 2019 to afford Plaintiff the opportunity to amend the Verified Complaint as a matter of right to cure any pleading defects the Court identifies.

CONCLUSION

Defendants’ Motion to Dismiss must be denied because Plaintiff has pleaded all that is necessary to state facts sufficient to constitute a cause of action for abuse of process under Broadmoor, *supra*. The remaining causes of action, being functionally similar to the abuse of process claim, ought to be governed by Broadmoor as well. Defendants’ contention that a private party cannot be sued for abuse of process committed by a prosecutor in league with the private party is plainly wrong per the clear holding of the Broadmoor case, a copy of which is attached to this memorandum for the Court’s review and consideration. The remaining grounds for dismissal asserted for the first time in Defendants’ supporting memorandum filed on the eve of the hearing, and not

asserted in Defendants' motion itself, cannot serve as the basis for dismissal at this time because they were not included in the motion itself and therefore violate the applicable provisions of Rules 6(d) and 7(b)(1), SCRPC, which require that motions state with specificity all grounds upon which they are based and which require that the opposing party have ten days to prepare for the motion hearing as explained in the Dedes case, supra.

Respectfully submitted,

May 29, 2019



JAMES JOHN TODD KINCANNON
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ToddKincannon@gmail.com
Plaintiff Pro Se

CERTIFICATE OF SERVICE

The undersigned Plaintiff hereby certifies service by hand delivery on all Defendants by and through their counsel of record, Ward Bradley of the Moore Taylor Law Firm, P.A., prior to the hearing on Defendants' Motion to Dismiss together with service by email the morning of May 29, 2019.

May 29, 2019



JAMES JOHN TODD KINCANNON

ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

JAMES JOHN TODD KINCANNON,

Plaintiff,

v.

ASHELY SUZANNE GRIFFITH, MOORE
TAYLOR LAW FIRM, P.A., VANCE
STRICKLIN, and AMBER FULMER,

Defendants.

Case No. 2019-CP-32-1168

**PLAINTIFF'S MOTION FOR
RECONSIDERATION OF ORDER
GRANTING DEFENDANTS'
MOTION TO DISMISS AND FOR
ADDITIONAL RELIEF**

2019 JUL 25 PM 3:05

FILED

RECONSIDERATION

Plaintiff respectfully submits the following motion for reconsideration of the Courts' Order of Dismissal entered July 2, 2019. Plaintiff received written notice of the entry of the Order of Dismissal on July 10, 2019.¹ This motion is made pursuant to Rules 59(e), 52(b), 60(a), and 60(b), SCRCF and the inherent power of trial courts to reconsider, alter, and amend erroneous prior rulings is based on the following grounds:

1. The Court did not rule on Plaintiff's unopposed objections to grounds for dismissal first appearing in Defendants' memorandum in support of their motion to dismiss, served and filed less than two full business days prior to the hearing, that did not appear in the Motion to Dismiss itself. The Court should have sustained Plaintiff's objections because Plaintiff did not have adequate notice of the additional grounds for dismissal and should have further sustained Plaintiff's objections because Defendants offered no argument in response to Plaintiff's objections. The portions of the Court's order granting Defendants' Motion to Dismiss on these particular grounds violate the

¹ This motion is being served and submitted for filing on July 22, 2019, ten days after July 10, 2019. July 20th was a Saturday and July 21st was a Sunday.

South Carolina Rules of Civil Procedure and unfairly surprised Plaintiff and further violated Plaintiff's federal and state constitutional due process rights.

2. The Court did not rule on Plaintiff's unopposed objection to the Affidavit of Defendant Vance Stricklin yet evidently relied upon portions of it in the dismissal order. The Court should have sustained Plaintiff's objections because the Affidavit in question did not fit within the very narrow grounds for which affidavits may be filed in support of Rule 12(b)(6) motions, because the affidavit was untimely and should have been filed with the Motion to Dismiss itself per the South Carolina Rules of Civil Procedure. Plaintiff was unfairly surprised and had no opportunity to file a counteraffidavit. The Court should have further sustained Plaintiff's objections because Defendants offered no argument in response to Plaintiff's objections. Because the Court improperly relied on this untimely and improper affidavit, the dismissal order must be vacated, the affidavit ruled improper, and the Motion to Dismiss should be reheard without consideration of the untimely and improper affidavit.

3. The dismissal order improperly relies on void temporary orders and appellate proceedings that were later determined to be void for lack of subject matter jurisdiction by the Lexington County Family Court's final order in the divorce proceeding between Plaintiff and Defendant Griffith.

4. The dismissal order improperly relies on Plaintiff's alleged failure to plead that the criminal proceedings against him, referenced in the Complaint, were not instituted without probable cause. The absence of probable cause is not an element of abuse of process nor of any of the other causes of action asserted by Plaintiff and it was error for the Court to consider Plaintiff's "failure" to plead a non-element of his causes of action in

the dismissal order. Further, Plaintiff would plead the absence of probable cause by amendment of the Complaint if the Court would allow amendment of the pleadings, as it must at this stage of the proceedings per Rule 15, SCRPC—the only reason Plaintiff did not include that particular allegation is that it is not an element of any causes of action Plaintiff has asserted and is instead an element of the unpleaded cause of action for malicious prosecution, a claim Plaintiff cannot bring until the conclusion of the criminal case in his favor.

5. The dismissal order improperly relies on public policy in ruling that Plaintiff's Complaint must be dismissed. No South Carolina public policy exists which supports Defendants' conduct in this matter, nor does any South Carolina public policy exist which supports the actions of the criminal prosecution which were procured, aided, abetted, and ratified by Defendants. South Carolina public policy is actually to the contrary: the South Carolina Rules of Professional Conduct and South Carolina criminal and civil law prohibiting blackmail and extortion barred Defendants and their affiliated criminal prosecutor from demanding that Plaintiff surrender to Defendants in an unrelated civil proceeding in exchange for the abandonment of the criminal domestic violence prosecution.

6. The dismissal order is apparently based, in part, on the Court's independent research into the procedural history of Plaintiff's divorce litigation and other civil and criminal litigation, although the order fails to identify which parts of these other cases were relied on by the Court with the exception of the aforementioned void orders in the divorce case which are not and never have been part of the record in the case at bar. This is error, and the conclusions that the Court drew from this apparent review are also error.

The Court concluded, gratuitously, that Plaintiff is an “obsessive” litigant, a conclusion which is improper in a Rule 12(b)(6) dismissal proceeding—which must be based only on the pleading standards of the causes of action asserted—and is also erroneous. 100% of the prior litigation involving Plaintiff and Defendants was instituted by, or at the instance of, Defendants, or reflected a defensive filing by Plaintiff because Defendants had instituted a proceeding in a court without subject matter jurisdiction and Plaintiff responded by instituting a proceeding in the proper court.

7. The Court erred by refusing to grant or even rule on Plaintiff’s request for an opportunity to amend the Complaint to cure any defects the Court might find in its order on Defendants’ Motion to Dismiss. Per Rule 15, SCRC, Plaintiff should have been given an opportunity to amend the Complaint because none of the pleading defects found by the Court in its dismissal order are incurable.

8. The Court erred by considering the void orders from Plaintiff’s divorce case with Defendant Griffith, submitted by email to the Court without permission after the hearing on Defendants’ Motion to Dismiss, without giving Plaintiff an opportunity to respond to that submission by submitting additional information regarding those proceedings and argument which would conclusively demonstrate that the orders submitted by Defendants after the hearing are void for lack of subject matter jurisdiction and entirely irrelevant to the question of whether Plaintiff properly pleaded, or could properly plead after amendment, the abuse of criminal process and other causes of action asserted in the Complaint.

9. The Court erred in its identification of the “process” that Plaintiff alleges Defendants abused. Plaintiff specifically alleges that the “process” abused by Defendants

was the plea bargain process incident to the criminal domestic violence prosecution itself, not the entirety of the criminal domestic violence prosecution. The order incorrectly indicates that Plaintiff alleged the entire criminal domestic violence prosecution was infected by Defendants' alleged abuse of process, an error. The only allegation Plaintiff made in the Complaint, and clarified by way of his amended memorandum in opposition to Defendants' Motion to Dismiss, was that the plea bargain process was abused by Defendants because they convinced the criminal prosecutor in the CDV matter to attach an unlawful condition to the offer to discontinue the CDV prosecution: the condition that Plaintiff surrender to Defendants in a civil matter entirely unrelated to the criminal prosecution in exchange for the offer to drop the CDV prosecution.

10. The Court's factual conclusion that the Eleventh Circuit Solicitor's Office was involved in the prosecution of the criminal domestic violence case is erroneous, as explained in Plaintiff's memoranda.

11. The Court's conclusion that Plaintiff's Complaint fails to state a cause of action for abuse of process is erroneous as explained in the argument and analysis portions of Plaintiff's memoranda, Plaintiff's presentation at the hearing, and Plaintiff's proposed order, all of which are incorporated herein by reference.

12. Because a review of the dismissal order indicates the Presiding Judge evidently had or sua sponte gained personal knowledge of matters relating to the case that are not part of the record and intended to rely on such knowledge in the ruling, the Presiding Judge had a duty to recuse. The Presiding Judge should also recuse at this juncture due to multiple, apparently intentional, violations of Plaintiff's due process rights incident to the consideration of the Rule 12(b)(6) motion filed by Defendants. The record of proceedings

in this matter and the dismissal order itself indicate that the Presiding Judge's ruling was based, in whole or in part, on personal prejudice against the Plaintiff entirely unrelated to the sole issue before the Court, i.e. whether or not Plaintiff's Complaint adequately stated facts sufficient to constitute a cause of action for abuse of process and the other causes of action asserted in the Complaint. The dismissal order in particular indicates that the Presiding Judge considered numerous matters that were entirely improper in the context of the one-issue Rule 12(b)(6), SCRCF motion made by Defendants and the Presiding Judge should vacate the dismissal order and recuse from further proceedings in this matter due to the realistic possibility that future rulings in this case by the Presiding Judge will be tainted by matters outside the record that the Presiding Judge became personally familiar with and, in whole or in part, animated his decision-making process at the Rule 12(b)(6) stage. Plaintiff respectfully submits that non-recusal at this point would violate Plaintiff's rights to a judge whose rulings are untainted by outside-the-record personal research secured by South Carolina common law, the South Carolina Constitution, and the United States Constitution.

13. The Court erred by sua sponte ruling on public policy grounds that Plaintiff's Complaint failed to state a cause of action. Defendants' Motion to Dismiss does not raise public policy grounds as a basis for dismissal and by engrafting a public policy rationale onto the dismissal order, the Court erroneously violated Plaintiff's due process rights to notice and an opportunity to be heard and, unfortunately, became an actual partisan in the case creating and advancing arguments for dismissal not even contemplated by Defendants and not included in their motion. Even if public policy did support dismissal of Plaintiff's Complaint (it does not), it was error for the Court to dismiss on that basis

without even being asked to do so by way of defense motion, and this additionally supports Plaintiff's position that the Presiding Judge lacked impartiality and should have recused.

14. Despite concluding that none of the named causes of action included in Plaintiff's Complaint stated facts sufficient to constitute a cause of action, the dismissal order contains no analysis as to whether or not Defendants' conduct is independently actionable under an unnamed tort theory or heretofore unrecognized theory of actionability under South Carolina law. Defendants' alleged conduct in this matter was plainly unlawful in that Defendants persuaded a criminal prosecutor to violate the South Carolina Rules of Professional Conduct and criminal and civil laws prohibiting blackmail and extortion by the manner in which she conducted a plea bargain negotiation in the criminal prosecution against Plaintiff referenced in the Complaint. A general principle of South Carolina law and equity is that law, equity, and basic principles of due process and equal protection generally do not permit a wrong to exist without a remedy, and the Court's dismissal order in this matter must not only analyze whether the allegations of Plaintiff's Complaint successfully set forth the named causes of action in Plaintiff's Complaint but also whether Defendants' conduct is actionable under South Carolina law despite not falling within any particular heretofore named cause of action. In this regard, Plaintiff notes that the dismissal order appears to express finds that Plaintiff has been harmed by Defendants' conduct yet denies him any opportunity for relief.

ADDITIONAL RELIEF

1. As stated above in part, the Court erroneously granted Defendants' Motion to Dismiss *with prejudice* and failed to rule on Plaintiff's request for an opportunity to

amend the Complaint to cure any pleading defects the Court identified at the Rule 12(b)(6) stage, which is not proper in this case. Rule 15, SCRCP permits pleading amendments whenever the opposing party will not be prejudiced, and it is axiomatic that Defendants will not be prejudiced by the Court giving Plaintiff a single opportunity to prepare, file, and serve an amended the Complaint in this action in an effort to cure the pleading defects found by the Court in the dismissal order.

2. As stated above in part, the Court erred by not offering to recuse, or sua sponte recusing, upon doing outside-the-record research into other litigation involving these parties that was not part of the record in this case and, therefore, not properly before the Court. Certain of the Court's other errors also mandate recusal, such as the apparent intentional denial of Plaintiff's due process rights with respect to the manner in which Defendants' Motion to Dismiss was heard and adjudicated. The Court improperly permitted Defendants to surprise Plaintiff with an untimely and substantively improper memorandum in support, an untimely and substantively improper supporting affidavit, and untimely and improper post-hearing submissions of void interlocutory orders, contradicted by the final order, in the divorce action involving Plaintiff and Defendant Griffith without providing any opportunity for Plaintiff to respond with any countersubmission of record material in the divorce action or argument as to why the void interlocutory orders in the divorce action are entirely irrelevant to the Court's consideration of Defendants' Rule 12(b)(6) motion in this action, which has no substantive connection to the divorce case whatsoever. The Presiding Judge's recusal should also be required by personal prejudice given the various improper findings in the dismissal order which indicate the Presiding Judge's ruling was based in whole or in part

on findings that Plaintiff is an “obsessive” litigant, a finding which is entirely improper in the context of a Rule 12(b)(6) Motion to Dismiss.

3. To whatever extent the Court finds that the South Carolina Rules of Civil Procedure permit the various procedural hijinks by Defendants complained of above, and the Court’s post-hearing research into other cases involving the parties which Plaintiff was given no opportunity to respond to prior to the Court issuing ruling, Plaintiff asks the Court to declare the South Carolina Rules of Civil Procedure unconstitutional under both the state and federal constitutions as applied to these particular matters. Plaintiff asks that this ruling include, but not necessarily be limited to, a finding that it is unconstitutional to permit a civil movant to file a “supporting” memorandum on the eve of a motion hearing that includes grounds for the motion not included in the timely-filed motion itself. If parties can include additional grounds for motions in eve-of-hearing memoranda then the notice-of-motion provisions of the South Carolina Rules of Civil Procedure are dead letters and their application to this particular case unconstitutional under the due process clauses and other provisions of the state and federal constitutions. Plaintiff makes the parallel argument with respect to Defendants’ unauthorized and wholly improper post-hearing submission of void and irrelevant interlocutory orders from the substantively unrelated divorce action involving Plaintiff and Defendant Griffith.

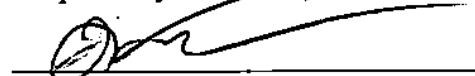
4. To whatever extent there are additional errors in the dismissal order, including but not limited to errors in the findings of fact and conclusions of law supporting dismissal grounds outside Defendants’ one-substantive-sentence Motion to Dismiss, Plaintiff requests additional time to identify such errors and present them to the Court by way of independent motion based on unfair surprise pursuant to Rule 60(b), SCRPC or an

amendment of this motion pursuant to Rule 59(e) and other authority. Rule 60(b), SCRCF establishes a one year time limit for reconsideration motions based on unfair surprise, and Plaintiff asks the Court to conclude that the ten day time limit established by Rule 59(e) and similar rules is unconstitutional under the state and federal constitution as applied to Plaintiff in this case and the Americans with Disabilities Act because of the manner in which the proceedings in this case were held, the numerous and extensive errors in the dismissal order, and Plaintiff's need for additional time over and above the standard rules-based time limits caused by his untreatable attention deficit disorder, which cannot be controlled by prescription medications due to a conflict with Plaintiff's comorbid bipolar disorder which is treated by prescription medications. Plaintiff is perfectly capable of handling all litigation tasks incident to this litigation but not necessarily within the time limitations established by state court rules due to his disability status, and due process and equal protection clauses of the state and federal constitution and the Americans with Disability Act require the Court to grant Plaintiff reasonably brief extensions of time as needed to complete litigation tasks. Plaintiff will be happy to submit verifying documentation of his disability status and medical conditions, with an appropriate protective order, as the Court may require in order to rule on this particular matter.

5. Plaintiff had no meaningful opportunity to be heard on many of the foregoing matters at the hearing on Defendants' Motion to Dismiss. Many of the Court's errors were entirely unforeseeable by Plaintiff at the hearing, and on many others Plaintiff had no meaningful opportunity to be heard because of Defendants' litigation-by-surprise tactics with respect to the untimely and improper memorandum in support and supporting

affidavit. Plaintiff respectfully demands the Court hold a hearing on this Motion for Reconsideration and for Other Relief and not decide the matter solely on written submissions. If the Court does, however, elect to rule based solely on written submissions, Plaintiff demands notice and an opportunity to prepare and file a supporting memorandum, a reply memorandum in response to whatever is submitted by Defendants, and such other material as is appropriate to support this motion prior to the Court's issuance of a ruling without a hearing. This request for hearing and a request for a full and fair opportunity to present Plaintiff's position on this matter is based on the South Carolina Rules of Civil Procedure, South Carolina common and statutory law applicable to these matters, and the state and federal constitutional provisions applicable to these matters, including but not limited to the due process clauses of both constitutions.

Respectfully submitted,



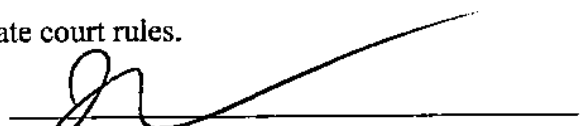
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Plaintiff Pro Se

July 22, 2019

CERTIFICATE OF SERVICE

The undersigned Plaintiff hereby certifies service by first class mail on the date below indicated in accordance with Rule 5, SCRPC on all Defendants by and through their counsel of record, Ward Bradley of the Moore Taylor Law Firm, P.A., at the correct mailing address listed for Mr. Bradley and his firm. Plaintiff has also sent a copy to the Presiding Judge as required by applicable state court rules.

July 22, 2019



JAMES JOHN TODD KINCANNON

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

ORIGINAL

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 2019-CP-32-1168

James John Todd Kincannon,
Plaintiff,

vs.

Ashely Suzanne Griffith et al.,
Defendant.

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

FILED
JUL 25 PM 3:05
CLERK OF COURT
ELEVENTH JUDICIAL CIRCUIT
SOUTH CAROLINA

Plaintiff's Attorney: James John Todd Kincannon, Bar No. Pro Se Address: 216 Jones Avenue, Simpsonville SC 29681 Phone: 864-963-4374 Fax _____ E-mail: toddkincannon@gmail.com Other: _____		Defendant's Attorney: James "Ward" Bradley, Bar No. _____ Address: Phone: _____ Fax _____ E-mail: _____ Other: _____	
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information Nature of Motion: Motion for Reconsideration of Dismissal Order Estimated Time Needed: 30 mins Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type ☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for ☒ Plaintiff / ☐ Defendant 7-22-2019 Date submitted			
SECTION III: Motion Fee ☐ PAID - AMOUNT: \$ _____ ☒ EXEMPT: (check reason) ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☒ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCP) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____		JUDGE CODE _____ Date: _____	
CLERK'S VERIFICATION Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001501

James John Todd Kincannon,

Appellant,

v.

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

Respondents.

RECEIVED
Sep 14 2020
SC Court of Appeals

**APPELLANT’S RULE 210(g) CERTIFICATION RE
PRODUCTION OF THE RECORD ON APPEAL**

Pursuant to Rule 210(g), SCACR, Appellant hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

NOTE REGARDING “EXHIBITS” CITED BY THE ORDER OF DISMISSAL

Appellant has faithfully reproduced the Order of Dismissal in this Record on Appeal exactly as it was filed with the Lexington County Clerk of Court by the Hon. Robin B. Stilwell. As discussed in the briefs, this Order of Dismissal strangely cites three “exhibits”¹ that are *not*

¹ These “exhibits” are first cited on Page 4 of the Order of Dismissal (which is also Page 4 of the Record on Appeal) and consist of three interlocutory orders from a different case—divorce litigation—involving the parties to this civil Record on Appeal 130

included as attachments to the Order of Dismissal that Judge Stilwell filed with the Lexington County Clerk of Court. Further, these three “exhibits” do not appear anywhere else in the record below in this case. Neither party sought to include them in the record below in this case and Judge Stilwell did not enter them into the record below sua sponte. Accordingly, Appellant has omitted these three “exhibits” from the Record on Appeal since they were never made a part of the record below by any party or by the lower court judge and were not attached to the Order of Dismissal as prepared and filed by the lower court judge.

Appellant raised this issue with the lower court in his Motion for Reconsideration, but the lower court summarily denied the Motion for Reconsideration and took no action to add the “exhibits” to the record below. See Motion for Reconsideration at 8 (Record on Appeal at 125); see also Order Denying Reconsideration at 1 (Record on Appeal at 11). Accordingly, Appellant has included the Order of Dismissal *exactly* as it was filed by the lower court, leading to the strange result that the Order cites three “exhibits” that were never part of the record below and therefore cannot be part of this Record on Appeal per Rule 210(h), SCACR.

September 14, 2020

s/James John Todd Kincannon

Other Counsel of Record:
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Appellant Pro Se

action: (1) an interim temporary order in the divorce action dated July 1, 2016; (2) an order on a motion for temporary relief in the divorce action dated July 26, 2016; and (3) an order regarding an interlocutory appeal from the South Carolina Court of Appeals in the divorce action dated September 30, 2016. See Order of Dismissal at 4, *supra*, which appears on Page 4 of the foregoing Record on Appeal. Even though the Order of Dismissal cites these interlocutory orders from divorce litigation as “exhibits,” the Lexington County Court of Common Pleas judge who issued the Order of Dismissal on appeal did not attach them to the Order of Dismissal as exhibits, and no party to this civil action moved to include them in the record below either as exhibits to the Order of Dismissal or in support of any motion or other filing.

Record on Appeal 131

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001501

James John Todd Kincannon,

Appellant,

v.

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

Respondents.

RECEIVED
Sep 14 2020
SC Court of Appeals

CERTIFICATE OF SERVICE

The undersigned Appellant hereby certifies that he has, on the date below, properly served the foregoing Record on Appeal on opposing counsel.

September 14, 2020

s/James John Todd Kincannon

James John Todd Kincannon
ToddKincannon@gmail.com

Record on Appeal 132

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001501

RECEIVED

Oct 30 2020

SC Court of Appeals

James John Todd Kincannon,

Appellant,

v.

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

Respondents.

APPELLANT'S FINAL BRIEF

Other Counsel of Record:
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STATUTES

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err by allowing Respondents—despite Appellant’s timely objection—to support their Rule 12(b)(6) motion with two improper filings submitted less than two days before the hearing: a memorandum of law that presented numerous arguments entirely unrelated to Respondents’ two-paragraph, single-issue motion to dismiss and a supporting affidavit that was both improper and untimely, both of which the circuit court relied on extensively in fashioning its order dismissing Appellant’s complaint with prejudice pursuant to Rule 12(b)(6)?
2. Did the circuit court err by relying on materials outside the record in the order dismissing Appellant’s complaint pursuant to Rule 12(b)(6) and failing to provide Appellant with an opportunity to respond to “judicially noticed” materials as required by Rule 201, SCORE?
3. Did the circuit court err by dismissing Appellant’s complaint due to alleged pleading errors *with prejudice* and concomitantly refusing to grant Appellant leave to submit an amended complaint seeking to cure the alleged pleading defects cited in the circuit court’s order of dismissal, an amendment that would not have prejudiced Respondents and therefore should have been allowed pursuant to Rule 15 and common law?
4. Did the circuit court err by failing to rule on Appellant’s timely motion for recusal and, accordingly, continuing to issue rulings on substantive matters in the case during the pendency of Appellant’s motion for recusal?
5. Did the circuit court make additional errors of varying severity including completely misapprehending the nature of several of Appellant’s causes of action and the facts actually alleged in the complaint itself, which led to the circuit court erroneously dismissing several of Appellant’s causes of actions for reasons which have nothing to do with what Appellant actually pleaded in the complaint?

STATEMENT OF THE CASE

On March 21, 2019, Appellant filed a complaint against Respondents in the Lexington County Court of Common Pleas alleging abuse of process and related causes of action. The complaint was promptly served on all Respondents by the Lexington County Sheriff's Department. Respondents filed a Rule 12(b)(6) motion to dismiss on April 23, 2019. Both parties filed memoranda of law shortly before the hearing and Respondents additionally submitted an affidavit in support of their Rule 12(b)(6) motion, which Appellant objected to as untimely and improper. Appellant also objected to the memorandum of law filed by Respondents on the grounds that it included numerous arguments that had no relationship to the single-issue motion to dismiss Respondents had filed. The circuit court heard arguments on the motion to dismiss on May 29, 2019 and granted the motion by order filed July 2, 2019. Appellant timely moved for reconsideration. The circuit court summarily denied Appellant's motion for reconsideration by order filed July 30, 2019.

STANDARD OF REVIEW

This case involves an appeal from an order dismissing a complaint with prejudice pursuant to Rule 12(b)(6), SCRCP and an order denying a motion for reconsideration of the dismissal order. All issues before the court on appeal appear to be questions of law. The standard of review applicable to questions of law is de novo. Town of Summerville v. City of North Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

ARGUMENTS

I.

The circuit court erred by improperly allowing Respondents—despite Appellant’s timely objection—to support their Rule 12(b)(6) motion with two improper filings submitted less than two days before the hearing: a memorandum of law that presented numerous arguments entirely unrelated to Respondents’ two-paragraph, single-issue motion to dismiss and a supporting affidavit that was both improper and untimely, both of which the circuit court relied on extensively in fashioning its order dismissing Appellant’s complaint with prejudice pursuant to Rule 12(b)(6).

A. Respondents’ Improper Memorandum of Law

Less than two business days before the hearing on Respondents’ Rule 12(b)(6) motion, Respondents submitted a memorandum of law to the circuit court in support of their two-paragraph, single-issue Rule 12(b)(6) motion to dismiss. See generally Respondents’ Memorandum in Support (R. 56-61). The memorandum argues numerous points of law entirely unrelated to Respondents’ simple and straightforward motion to dismiss, which is reproduced in its entirety as follows:

YOU WILL PLEASE TAKE NOTICE that the Defendants move to dismiss the allegations of this Complaint as they fail to state a claim upon which relief may be granted. In particular, the Complaint alleges claims for Abuse of Process, Civil Conspiracy, Trespass on the Case, South Carolina Unfair Trade Practices Act, Negligent Supervision, and the South Carolina Omnibus Adult Protection Act. All these claims center upon the factual allegations in the Complaint [sic] that the Plaintiff was charged Criminal Domestic Violence by a Solicitor in the Lexington County Solicitors’ Office.[sic¹] The Defendants are not in control of the actions of the Lexington County Solicitors’ Office, and the

¹ There is no such thing as the “Lexington County Solicitors’ Office.” There is an Eleventh Circuit Solicitors’ Office which has jurisdiction over Lexington County, but Appellant’s complaint makes no reference to it. The criminal prosecution at issue in this case was handled entirely by the Lexington County Sheriff’s Office, which is referenced in Appellant’s complaint.

Defendants cannot be held liable for actions of the Lexington County Solicitors' Office.

With this in mind, the Defendants move that this matter be dismissed with Prejudice.

See Respondents' Motion to Dismiss at 1 (R. 54).

Despite the simplicity of Respondents' single-issue motion to dismiss, the memorandum of law submitted by Respondents less than two days before the hearing contains all sorts of arguments on points of law entirely unrelated to the single "prosecutorial control" ground advanced in the motion to dismiss itself. See generally Respondents' Memorandum in Support (R. 56-61). Respondents' memorandum in support is a "kitchen sink" filing that makes every argument to dismiss Appellant's complaint that Respondents' could think of, practically all of which are entirely unrelated to the motion to dismiss itself. For example, Respondents' memorandum of law contains arguments about pleading insufficiency with respect to Appellant's causes of action that have *absolutely nothing to do* with the "prosecutorial control" ground in the motion to dismiss itself. See Respondents' Memorandum in Support at 3-6 (R. 58-61).² These arguments are entirely unrelated to the motion to dismiss itself and therefore cannot be properly included in a supporting memorandum of law filed less than two days before the hearing consistent with constitutional due process and the

² By way of example, Respondents' memorandum contains an argument related to the Omnibus Adult Protection Adult Act to the effect that Appellant has "not alleged facts to show he was a vulnerable adult." See Respondents' Memorandum in Support at 6 (R. 61). That plainly has nothing whatsoever to do with the "prosecutorial control" argument advanced in Respondents' motion to dismiss and could not properly be included in a supporting memorandum. Practically all of Respondents' memorandum in support is like this—the arguments submitted in support of the motion to dismiss have absolutely no relationship whatsoever to the single ground raised in the motion to dismiss.

South Carolina Rules of Civil Procedure, which require that motions “state with particularity the grounds therefor.” Rule 7(b)(1), SCRPC.

Courts plainly cannot allow parties to evade the requirements of Rule 7(b)(1) and the ten-day motion filing requirement of Rule 6(d), SCRPC by filing simple motions arguing a single point of law, then radically expanding their arguments with a memorandum of law submitted on the eve of the hearing. Permitting parties to act in this manner not only subverts Rules 6(d) and 7(b)(1) of the South Carolina Rules of Civil Procedure—it also violates the constitutional due process rights of parties responding to such arguments by denying them a full and fair opportunity to respond to motions filed by their opponents. This is particularly true where a memorandum is filed less than two days before a hearing—in that situation, the opposing party is not only denied the ten days to respond to the motion guaranteed by Rule 6(d), but the party is also placed in the situation of preparing and filing something on a de facto emergency basis despite the absence of any emergency. That is problematic for all litigants but especially problematic for a disabled pro se litigant like Appellant, and it cannot be permitted by South Carolina courts without violating the due process protections of both the state and federal constitutions.

Appellant timely objected and moved to strike the portions of Respondents’ memorandum of law that argue points unrelated to Respondents’ motion to dismiss. See Transcript at p. 13 l. 13 to p. 14 l. 10 (R. 47-48) and Appellant’s Amended Memorandum in Opposition at 8-12 (R. 110-114). The circuit court did not rule on Appellant’s objection and motion to strike (see

generally Order of Dismissal (R. 1-10)) and Appellant properly preserved these issues by timely moving for reconsideration of that particular issue. See Appellant's Motion for Reconsideration at 1-2 (R. 118-119). The circuit court denied Appellant's Motion for Reconsideration by way of a summary order that did not specifically address Appellant's arguments relating to the impropriety of Respondents' memorandum of law. See generally Order Denying Reconsideration (R. 11-12).

The circuit court's error was plainly harmful to Appellant. Every legally meaningful part of the order dismissing Appellant's complaint includes arguments and other material gleaned from the improper portions of Respondents' memorandum of law that have absolutely no relationship to Respondents' motion to dismiss itself. Compare Respondents' Memorandum in Support (R. 56-61) with Order of Dismissal (R. 1-10). There is no way to separate the untainted parts of the circuit court's dismissal order from the unaffected parts. The only solution is for the Court of Appeals to vacate the order of dismissal and remand the case to the Lexington County Circuit Court with instructions to sustain Appellant's objection to the improper portions of Respondents' memorandum of law, hear Respondents' motion to dismiss anew, and consider only the motion to dismiss itself and any new supporting memorandum Respondents might file that contains no improper argument outside the scope of their motion.³

³ As also explained in this brief, the Court of Appeals should also direct the Lexington County Circuit Court to sustain Appellant's objection to the improper and untimely supporting affidavit filed by Respondents in support of their motion to dismiss.

B. Respondents' Improper and Untimely Supporting Affidavit

Along with their improper memorandum of law served and filed on the eve of the hearing, Respondents also submitted an improper and indisputably untimely affidavit in support of their motion to dismiss. See generally Respondents' Supporting Affidavit (R. 62-90). Appellant raised a timely objection to Respondents' supporting affidavit orally at the hearing (see Transcript at p. 12 l. 24 to p. 13 l. 11 (R. 46-47)) and by way of a written objection and motion to strike submitted to the Court at the hearing. See Plaintiff's Amended Memorandum in Opposition at 12-14 (R. 114-116). Appellant's objection was based on two points of black letter South Carolina law: Rule 12(b)(6) motions cannot be supported by affidavits except in rare situations inapplicable to this case (see Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987) and, further, Respondents' affidavit was untimely because it was not served along with the motion at least ten days prior to the hearing. In fact, it was served and filed less than two days before the hearing in clear violation of Rules 6(d) and 7(b)(1), SCRCF.

Just as the circuit court failed to rule on Appellant's timely objections to Respondents' memorandum of law, the circuit court also did not rule on Appellant's objection to the affidavit at the hearing or in the order granting Respondents' motion to dismiss. See generally Transcript (R. 35-53) and Order of Dismissal (R. 1-10). Appellant properly preserved the issue for appellate consideration by timely moving for reconsideration of the Order of Dismissal and again objecting to, and moving to strike, Respondent's improper and untimely

affidavit supporting their Rule 12(b)(6) motion. See Appellant's Motion for Reconsideration and Additional Relief at 2 (119). Appellant timely moved for reconsideration (see generally Appellant's Motion for Reconsideration (R. 118-129)), and the circuit court summarily denied Appellant's Motion for Reconsideration without a hearing. See Order Denying Reconsideration at 1 (R. 11). The circuit court did not address the affidavit issue in the one-paragraph order summarily denying reconsideration. Id.

The circuit court plainly erred by failing to rule on Appellant's objection and motion to strike Respondents' untimely affidavit supporting their Rule 12(b)(6) motion. The circuit court obviously had a fundamental duty to rule on the objection, and crystal clear South Carolina law required the circuit court to sustain Appellant's objection and strike the affidavit for two independent reasons: (1) Rule 12(b)(6) motions, which necessarily allege only pleading defects, cannot be supported by affidavits per Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987)⁴ and (2) Respondents' supporting affidavit was untimely because it was served and filed less than two days before the hearing in direct violation of Rules 6(d) and 7(b)(1), SCRPC.

The circuit court's error was not harmless. The circuit court plainly relied on the improper and untimely affidavit submitted by Respondents in its order dismissing Appellant's complaint. For example, the order expressly states:

⁴ Courts may consider such affidavits *only* if the court converts the Rule 12(b)(6) motion to a motion for summary judgment *and* grants the opposing party sufficient notice and time to submit counteraffidavits. Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698-99 (1987). None of that happened in this case. The circuit court did not convert Respondents' Rule 12(b)(6) motion to a motion for summary judgment and did not give Appellant any time to submit counteraffidavits.

As an additional determining factor, it is instructive for this Court to state what is obvious to any person who reviews the relevant history of Plaintiff's litigation, claims, and prosecutions. The Plaintiff is no doubt aggrieved by the circumstances of the dissolution of his marriage. The Court is sensitive to the inexorable effect of obsessive interpersonal passion. However, lawsuits against third parties who may have had some connection to the marital fallout [sic⁵] are not the responsible or legally appropriate method of redressing interpersonal grievances. . . . The Plaintiff is flailing about wildly through misplaced litigation to recover something which has been lost. Sadly, the Courts are not the venue for recovering this type of loss or for exacting personal retribution.

Order of Dismissal at 8 (R. 8).

The only possible source of this improper conclusion by the circuit court is the untimely affidavit (R. 62-90) submitted by Respondents in support of their motion to dismiss (R. 54-55). Nothing in Appellant's complaint (R. 14-34) suggests that Appellant is an "obsessive" litigant improperly using the judicial system as a "method of redressing interpersonal grievances," as the order concludes (R. 8). Appellant's complaint contains nothing that would even begin to suggest such a thing. The gravamen of Appellant's complaint is that Respondents improperly hijacked a plea bargain negotiation between Appellant and the Lexington County Sheriff's Office by persuading the prosecutor to demand Appellant make concessions to Respondents in civil litigation entirely unrelated to the criminal matter in exchange for dismissal of the criminal charge against Appellant. That is not "obsessive" or "improper" litigation—it is a perfectly legitimate effort by Appellant to vindicate his fundamental right not to have plea bargain negotiations in a criminal matter extortionately hijacked by

⁵ The circuit court bizarrely concluded that Appellant's ex-wife—Respondent Griffith—is a "third part[y] who may have had some connection to the marital fallout." Obviously this is an error.

Respondents.

The fact that the circuit court included this material in the dismissal order is proof that the circuit court improperly relied on the untimely and improper affidavit submitted by Respondents and requires this court to vacate the dismissal and remand the matter to the Lexington County Circuit Court with instructions to strike the affidavit and rehear the motion to dismiss without consideration of any material within it, none of which is in any way relevant to a Rule 12(b)(6) motion in any event and was submitted to the circuit court by Respondents as part of a naked (and, unfortunately, successful) attempt to improperly prejudice the court against Appellant with respect to this litigation.

II.

The circuit court erred by improperly relying on materials outside the record in the order dismissing Appellant’s complaint pursuant to Rule 12(b)(6) and failing to provide Appellant with an opportunity to respond to “judicially noticed” materials as required by Rule 201, SCRE.

In addition to improperly relying on a memorandum of law containing argument entirely unrelated to the motion to dismiss and improperly relying on an untimely and improper affidavit, the circuit court also erred by improperly relying on three documents cited as “exhibits” in the order of dismissal that are not, and never have been, part of the record below and—despite being identified as “exhibits” in the order of dismissal—were never filed with the clerk by either Respondents or the circuit court judge who issued the order of dismissal. The three “exhibits” are referenced on page 4 (R. 4) of the order of dismissal⁶ but were

⁶ The exhibits are preliminary rulings in Appellant’s divorce litigation which involved
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not attached to the order and, again, are not part of the record below. These documents were not referenced in any of the filings of Respondents or Appellant—they merely appear by reference for the very first time in the circuit court’s Order of Dismissal, never having been referenced in the record by any party or the court, with the circuit court taking “judicial notice” of them without following the proper procedure for taking judicial notice, and despite doing so did not actually attach them to the dismissal order or enter them into the record of the case. See Order of Dismissal at 4 (R. 4). Appellant objected that the circuit court had done this without giving Appellant an opportunity to respond, as required by Rule 201, SCRE, but the circuit court ignored Appellant’s objection and did not allow Appellant an opportunity to respond to the judicial notice. See Appellant’s Motion for Reconsideration at 4 (R. 121); see generally Order Denying Reconsideration (R. 11-12).

Appellant timely raised an objection to the circuit court’s reliance on material outside the record in the dismissal order in Appellant’s motion for reconsideration. See Appellant’s Motion for Reconsideration at 2; 4 (R. 119; 121). The circuit court summarily denied Appellant’s motion for reconsideration. See generally Order Denying Reconsideration (R. 11-12). Appellant therefore properly preserved this issue for appeal.

Obviously, the circuit court erred by considering and referencing materials outside the record in an order granting a Rule 12(b)(6) motion. It is fundamental

Respondents that were voided by the final order in Appellant’s divorce case and have no relevance whatsoever to Respondents’ Rule 12(b)(6) motion to dismiss.

that a court may only consider materials properly in the record when issuing rulings of any kind. That is the purpose of the record. If Respondents wanted the circuit court to consider the three “exhibits” at issue, they should have properly made them a part of the record before or at the hearing on their Rule 12(b)(6) motion. The circuit court’s error in relying on these outside-the-record materials is obviously not harmless—they are cited as “exhibits” to the dismissal order despite not actually being part of the dismissal order as filed. See generally Order of Dismissal (R. 1-10). If a judge cites exhibits in an order, it means he or she obviously considered them and relied on them in fashioning the order. Because judges cannot rely on materials outside the record when issuing rulings, the circuit court erred by including references to these “exhibits” and the order which relies on them must be vacated.

Even so, if the circuit court had given Appellant an opportunity to respond as required by Rule 201, SCRE and as sought by Appellant in his motion for reconsideration, the circuit court would have learned that these orders were voided by further proceedings in the divorce action and civil litigation in Greenville County that collectively resolved in Appellant’s favor regarding the non-marital property issue at stake in this case. Finally, despite Rule 201, SCRE’s allowance of discretionary judicial notice, basic constitutional due process does not permit a judge to take judicial notice of some matter on his own initiative without giving all parties an opportunity to respond and submit whatever materials they reasonably believe the court should also, in fairness, consider along with the matters that judicial notice was taken of. By refusing Appellant any

opportunity to present his own responsive evidence that would have shown that the outside-the-record orders were voided by further proceedings in those matters, the circuit court not only violated Rule 201, SCRE but also violated Appellant's constitutional due process rights.

III.

The circuit court erred by improperly dismissing Appellant's complaint due to alleged pleading errors *with prejudice* and concomitantly improperly refusing to grant Appellant leave to submit an amended complaint seeking to cure the alleged pleading defects cited in the circuit court's order of dismissal, an amendment that would not have prejudiced Respondents and therefore should have been allowed pursuant to Rule 15 and common law.

Even if the circuit court properly concluded that there were pleading defects in Appellant's complaint, the circuit court should not have dismissed the complaint with prejudice but instead should have granted Appellant's timely request for an opportunity to file an amended complaint in an effort to cure whatever pleading defects the court found. Appellant requested permission to file an amended complaint at the hearing in the event the circuit court found any defects in Appellant's pleadings. See Transcript p. 14 ll. 11 – 18 (R. 48). The circuit court did find pleading defects but ignored Appellant's request for an opportunity to amend the complaint and dismissed the complaint with prejudice. See generally Order of Dismissal (R. 1-10).

Appellant preserved this issue for appeal in the motion for reconsideration:

The Court erred by refusing to grant or even rule on Plaintiff's request for an opportunity to amend the Complaint to cure any defects the Court might find in its order on Defendants' Motion to Dismiss. Per Rule 15, SCRCF, Plaintiff should have been given an opportunity to amend the Complaint because none of the pleading defects found by the Court in its dismissal order are incurable.

Appellant's Motion for Reconsideration at 4 (R. 121). The circuit court again ignored Appellant's request for an opportunity to amend and summarily denied the motion for reconsideration without addressing Appellant's request for leave to submit an amended complaint. See generally Order Denying Reconsideration (R. 11-12).

The circuit court committed reversible error by refusing to permit Appellant a single opportunity to submit an amended complaint in an attempt to cure the alleged pleading deficiencies the circuit court found in its dismissal order. As this court is well aware, American trial judges who grant dismissals based on pleading deficiencies pursuant to Rule 12(b)(6) or similar procedural rules generally allow the party whose pleading is at issue a single opportunity to respond to an order of dismissal by submit an amended complaint in an effort to cure the pleading deficiencies identified in the order of dismissal. In jurisdictions with a pleading amendment rule similar to Rule 15, SCRCR, an opportunity to amend is granted as a matter of course except in an exceptionally extreme case where there is absolutely no possible way a party could cure the pleading defect identified in the dismissal order.

Allowing a single amendment opportunity is required in this situation by Rule 15, which mandates that trial judges give parties an opportunity to submit amended pleadings whenever the opponent will not be prejudiced by the amendment, and prejudice is practically always absent in a situation where a Rule 12(b)(6) motion is granted at the beginning of the proceedings. It is indisputable

that Respondents would not have been prejudiced by the circuit court allowing Appellant a single opportunity to submit an amended complaint in response to the dismissal order in an effort to cure the alleged pleading defects identified by the circuit court. Accordingly, the circuit court erred by refusing to grant Appellant a short period of time in which to prepare, serve, and file an amended complaint in response to the order of dismissal, whereupon Respondents would be free to file another motion to dismiss if they believed Appellant had failed to cure the pleading defects identified in the order of dismissal.

The practice of allowing a litigant a single opportunity to cure pleading defects identified in a court's dismissal order or similar ruling is so common in American litigation that it, for all practical purposes, a common law right at this point. It is unheard of for an American court to dismiss a complaint pursuant to Rule 12(b)(6) *with prejudice* while simultaneously denying the plaintiff even a single opportunity to amend to cure pleading defects. A drastic dismissal of that nature is proper *only* in an exceptionally rare case where there is *absolutely* no possibility that the plaintiff could cure the pleading defects identified in the dismissal order, and this is not a case of that nature. Appellant believes in good faith that all of the pleading defects found by the circuit court can be remedied with an amended complaint—even those that Appellant does not believe actually are pleading defects.

Based on the foregoing, it is clear the circuit court erred by refusing to even rule on Appellant's request for leave to file an amended complaint and by

simultaneously dismissing the original complaint with prejudice.⁷ The circuit court should have granted Appellant's request for leave to amend and allowed Appellant a single opportunity to attempt to cure the alleged pleading errors by way of an amended complaint. Accordingly, the Court of Appeals should remand the case to the Lexington County Circuit Court and direct the circuit court to grant Appellant a short period of time in which to prepare, serve, and file an amended complaint in this matter that seeks to cure the pleading defects referenced in the dismissal order.

Because of the manner in which proceedings occurred in the circuit court, Appellant had absolutely no opportunity to prepare or file a proposed amended complaint seeking to address the alleged pleading defects referenced in the order of dismissal. The case was dismissed with prejudice and reconsideration was denied without the circuit court even considering Appellant's request for leave to file an amended complaint, which Appellant timely requested both at the hearing and in the motion for reconsideration as explained above. To aid the Court of Appeals in its determination of whether Appellant should be granted leave to file an amended complaint, Appellant submits the following information as the major ways in which Appellant would seek to cure all the alleged pleading defects described by the circuit court in the order of dismissal:

1. With respect to the abuse of process cause of action, Appellant would expressly allege that the "process" abused by Respondents was the plea bargain

⁷ If the dismissal had been without prejudice, Appellant would simply have filed a new original complaint that attempted to cure the alleged pleading defects.

negotiation incident to the criminal domestic violence matter and *not* the entirety of the criminal domestic violence matter itself. The circuit court plainly misunderstood that issue in its dismissal order and erroneously dismissed Appellant's abuse of process claim on that basis. See Dismissal Order at 3 (R. 3). Appellant attempted to explain that matter to the circuit court in Appellant's amended memorandum in opposition to Respondents' motion to dismiss and in Appellant's motion for reconsideration but the circuit court made no mention of that fact in the order denying reconsideration. See Appellant's Amended Memorandum at 8 (R. 110) (section entitled "Note Regarding 'Process' as Used in the Complaint"); see Appellant's Motion for Reconsideration at 4-5 (R. 121-122); see generally Order Denying Reconsideration (R. 11-12). Appellant believes that clarifying the "process" that was abused in an amended complaint would fully correct any potential defects with the abuse of process claim.

2. With respect to the abuse of process cause of action, Appellant would expressly plead that Respondents are sued pursuant to the "hand of one, hand of all" theory of abuse of process causes of action expressed in Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991) so as to remove any doubt as to the factual basis upon which Appellant is suing Respondents for an abuse of process committed incident to a criminal plea bargain in which they were not the prosecutors. Broadmoor and other cases, including the seminal case Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967) make clear that Appellant's "hand of one, hand of all" theory is correct and allow private parties to be sued for abuses of process directly

committed by a criminal prosecutor if the private party “participates in, aids, abets, advises, consents to, or subsequently ratifies an act constituting abuse of process.” See Appellant’s Amended Memorandum at 4-7 (R. 106-109). This would prevent the circuit court from misconstruing the nature of Appellant’s abuse of process claim, as obviously happened in this case because the circuit court found that Appellant had sued innocent “third parties” even though Broadmoor clearly holds that Respondents are *not* third parties and are fully amenable to suit for abuse of process under the facts of this case due to the nature of their interactions with the criminal prosecutor, who improperly acted as Respondents’ de facto agent in the plea negotiation. See Order of Dismissal at 8 (R. 8).

3. With respect to the abuse of process claim, Appellant would plead numerous additional facts to fully distinguish this case from Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983), a case which involves an entirely different situation where a criminal defendant’s lawyer reached out to the alleged victim and offered to pay restitution in exchange for the alleged victim supporting a termination of the charges, then sued the alleged victim for saying yes. The facts of this case are fully distinguishable because (1) Appellant never reached out to Respondents to offer anything in exchange for Respondents supporting dismissal of the charges; (2) the demand came from Respondents by and through a prosecutor they had co-opted to their cause; and (3) the thing demanded in exchange for dismissal of the criminal charge was not restitutionary and had absolutely no relationship to the criminal matter whatsoever—it involved an

entirely unrelated civil dispute involving non-marital property that had bizarrely cropped up in divorce litigation (despite its non-marital status).

4. Appellant would plead the full history of all adversarial litigation involving himself and Respondents to demonstrate to the circuit court that Appellant is not an “obsessive litigant” and has never committed any impropriety whatsoever in any such litigation. The circuit court is apparently concerned about these matters (see Order of Dismissal at 8 (R. 8)) and Appellant could completely allay those concerns if he had an opportunity to file an amended complaint.

5. Appellant would plead that he eventually prevailed in the non-marital property dispute, contrary to the circuit court’s erroneous findings that the family court (and this Court) ruled against Appellant on those matters. It is true that Appellant lost on that issue during the interlocutory phase of the divorce action but Appellant eventually prevailed in the final order issued by the family court.

6. Appellant would more clearly explain that the civil conspiracy cause of action is *only* asserted in the event that all other causes of action are dismissed and no unnamed or heretofore unrecognized cause of action exists that would allow Appellant to obtain redress for Respondents’ conduct. That should allow Appellant’s case to continue even if all other causes of action are dismissed, since Respondents’ conduct with the prosecutor in the criminal matter plainly constitutes tortious civil conspiracy if it does not qualify as any other tort.

7. Appellant would split the “Trespass on the Case” cause of action into two causes of action entitled “Unnamed but Previously Recognized Tort” and “Previously Unrecognized Tort” and ask the circuit court to proceed on either

theory in the event that all of Appellant's other causes of action fail for some reason. Appellant has a good faith belief that Respondents' conduct with the prosecutor in this matter was or should be tortious under South Carolina law and, frankly, does not care what the tort is called—abuse of process or whatever. Appellant believes he can plead a legitimate case that if Respondents' conduct is not actionable under any currently named tort, it is either actionable as an unnamed tort that has been previously recognized in South Carolina or is actionable under a previously unrecognized tort theory.

8. Appellant would remove the unfair trade practices claim because Appellant believes that recovery under other theories is substantially more likely and simpler as a matter of law.

9. With respect to the negligent supervision theory, Appellant would include additional factual allegations demonstrating that the lawyer defendants in this matter—all Respondents other than Griffith—acted outside the lawful course and scope of their representation with Griffith when they co-opted a prosecutor in a criminal matter to attempt to extort Appellant in connection with a criminal plea bargain process. Criminal and tortious conduct cannot ever be within the proper scope of an attorney-client relationship, so even if the lawyer Respondents thought they were acting as Respondent Griffith's lawyers in the criminal matter, they were not because unlawful conduct cannot be shielded by the attorney-client relationship.

10. With respect to "public policy," which is cited by the circuit court as a basis for dismissing the complaint (see Order of Dismissal at 8 (R. 8)), Appellant

would include substantial material in the complain explaining how public policy supports the causes of action asserted by Appellant and condemns the conduct of Respondents in this case. Obviously, South Carolina public policy does not support alleged victims using extortionate means to extract concessions on unrelated civil disputes from criminal defendants during plea bargain negotiations. Appellant would make all of that crystal clear in an amended complaint.

11. Finally, Appellant would include substantially more facts to “beef up” the complaint which would entirely remove all possible ambiguities as to Appellant’s legal theories and factual allegations that might cause a circuit court judge to erroneously dismiss the case. Appellant honestly believed he had filed a clear complaint that no circuit court judge would dismiss, but apparently that is not the case, but Appellant could easily cure every single additional ambiguity and issue that has cropped up since the original complaint was filed with an amended complaint. If the circuit court still dismissed it, so be it, but at least Appellant would have had a full and fair opportunity to articulate the facts and legal theories underlying his claims in an amended pleading, and obviously Respondents would not be prejudiced by an amendment at this early stage of the proceedings.

IV.

The circuit court erred by failing to rule on Appellant’s timely motion for recusal and, accordingly, continuing to issue rulings on substantive matters in the case during the pendency of Appellant’s motion for recusal.

Upon reviewing the dismissal order, Appellant submitted a motion seeking not only reconsideration but also recusal of the circuit court judge who heard the

matter on several grounds. See Appellant's Motion for Reconsideration and Additional Relief at 5-6 (R. 122-123). The circuit court judge denied the consideration component but did not rule on the judicial disqualification component. The full text of the order is as follows:

This matter comes before the Court pursuant to the Plaintiff's Motion to Reconsider the Court's Order Granting Defendants' Motion to Dismiss and for Additional Relief entered on or about July 2, 2019. The Plaintiff's Motion to Reconsider, dated July 22, 2019, was made pursuant to Rules 59(e), 52(b), 60(a), and 60(b) of the South Carolina Rules of Civil Procedure. After having had the opportunity to carefully review the Plaintiff's Motion, this Court elects to respectfully deny the same.

AND IT IS SO ORDERED.

Order Denying Reconsideration at 1 (R. 11).

A careful reading of the order indicates that the circuit court *only* ruled on the reconsideration aspect of Appellant's motion and did not rule on any of the other relief Appellant sought, which included judicial recusal. This was error. The circuit court judge clearly had a duty to rule on the recusal issue before considering the motion for reconsideration. Both due process and common sense require judges facing motions for disqualification to rule on them prior to issuing any further substantive rulings in a matter—especially a final judgment, as is the case here. The result in this case is that the judicial disqualification matter was entirely avoided by the circuit court judge by denying reconsideration without ruling on recusal.

This is plain error and, as noted above, is a violation of both constitutional due process and common sense. When a party moves for judicial disqualification,

the process that is due is that the judge at least rule on the matter prior to proceeding further in the case. Even if the Court disagrees with all of Appellant's other assignments of error, the order denying reconsideration must be vacated and the matter remanded to the Lexington County Circuit Court for consideration of the judicial disqualification issue prior to the reconsideration issue.

V.

The circuit court made additional errors of varying severity including completely misapprehending the nature of several of Appellant's causes of action and the facts actually alleged in the complaint itself, which led to the circuit court erroneously dismissing several of Appellant's causes of actions for reasons which have nothing to do with what Appellant actually pleaded in the complaint.

Because Appellant seeks leave to amend his complaint prior to further proceedings in the circuit court, as explained in the prior arguments, it is only necessary for the Court of Appeals to consider these additional matters if the Court intends to deny Appellant leave to amend the complaint. That being said, the circuit court made numerous additional errors—some extremely severe, some less so—in its order of dismissal. The most harmful, and the ones that necessitate reversal, are those which radically misconstrue parts of Appellant's complaint. For all practical purposes, the circuit court dismissed a complaint that Appellant did not file.

A. The Circuit Court's Misapprehension of "Process"

The circuit court plainly did not understand the nature of the "process" that Appellant alleges was abused by Respondents. Appellant does not contend that the entirety of the criminal domestic violence prosecution against him was an

abuse of process committed by Respondents. The specific process that was abused was the plea bargain process itself, not the original charge. Appellant made this clear to the circuit court in his amended memorandum which contains a section heading “Note Regarding ‘Process’ as Used in the Complaint.” See Appellant’s Amended Memorandum at 8 (R. 110). In that section of the memorandum, Appellant carefully explained the nature of the process that was abused—the plea bargain process, not the original criminal charge itself. Nonetheless, the circuit court erroneously found in its order of dismissal that the “process” at issue was the criminal domestic violence charge itself, not the plea bargain process. See Order of Dismissal at 3 (R. 3) (“The Court finds and rules that Defendants are entitled to dismissal as to the Plaintiff’s cause of action for Abuse of Process on the grounds that: Plaintiff has failed to sufficient allege that he was charged with criminal domestic violence for an ulterior purpose[.]”) Appellant never argued that he was charged with criminal domestic violence for an ulterior purpose—Appellant’s claim is that Respondents persuaded the prosecutor to abuse the plea bargain process by demanding that Appellant make concessions to Respondent on entirely unrelated civil disputes incident to a divorce action in exchange for termination of the criminal domestic violence prosecution against him. The circuit court entirely failed to understand Appellant’s argument on this point despite the fact that Appellant expressly explained it in his amended memorandum.

Appellant properly preserved this issue by including it in the motion for reconsideration (see Appellant’s Motion for Reconsideration at 4-5 (R. 121-122)) and again explained to the circuit court that the “process” at issue was the plea

bargain process and not the original criminal charge, but the circuit court nonetheless summarily denied the motion for reconsideration without altering the original dismissal order to correct this error. See generally Order Denying Reconsideration (R. 11-12).

B. The Circuit Court's Misapplication of Broadmoor and Related Cases

The circuit court's failure to properly identify the "process" at issue directly led to misapplication of abuse of process precedents, most notably Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 413 S.E.2d 9 (1991) and Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967). If the circuit court had analyzed the conduct of Respondents and the prosecutor alleged in the complaint with respect to the plea bargain process as opposed to the original initiation of the criminal domestic violence charge, which is what Plaintiff intended to plead (and, frankly, did plead) in his complaint, then the circuit court would have come to the conclusion that Appellant properly pleaded a textbook abuse-of-criminal-process claim against Respondents. The facts asserted in the complaint make crystal clear that Respondents secured the assistance of a prosecutor in abusing the plea bargaining process by persuading the prosecutor to demand Appellant make concessions to Respondents in civil litigation regarding non-marital property entirely unrelated to the criminal domestic violence matter. See generally Complaint (R. 14-34). If that is not abuse of criminal process, nothing is—the tort simply does not exist in South Carolina if it cannot be asserted in this case. And the Broadmoor and Huggins cases make crystal clear that Appellant is fully within his rights to sue private parties who

were actively in league with the criminal prosecutor who acted as their de facto agent in the plea bargain process with respect to the improper demand that Appellant make civil concessions to Respondents unrelated to the criminal matter in exchange for termination of the criminal prosecution.

C. The Circuit Court's Misapplication of Johnson

The circuit court also misapplied Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983) in its dismissal order. The Johnson case plainly stands for the proposition that a victim seeking restitution incident to a plea negotiation does not constitute abuse of process. See generally id. This case has absolutely nothing to do with restitution. If all Respondents had done was ask the prosecutor to demand Appellant make restitution for the criminal domestic violence matter in exchange for dropping the prosecution, then Respondents would have not committed any tort whatsoever and Appellant would not have sued them. That is not what happened and it is certainly not what Appellant alleged in his complaint.

The complaint alleges that Respondents persuaded the prosecutor in the criminal domestic violence matter to offer to drop the criminal domestic violence prosecution in exchange for Appellant surrendering to Respondents in a bizarre and entirely unrelated dispute over non-marital property incident to a divorce action, which had nothing whatsoever to do with the criminal domestic violence matter. See generally Complaint. Johnson plainly does not stand for the proposition that the alleged victim of a crime may utilize the plea bargaining process to extort concessions in unrelated civil disputes from the criminal defendant, and the circuit court plainly erred by holding that Johnson does allow

such conduct. If the circuit court's interpretation of the Johnson case were correct, then there would no longer be a tort of abuse of criminal process in the state of South Carolina, and alleged victims of crimes would be free to co-opt prosecutors in extortionate schemes to use plea bargaining processes to gain advantage in unrelated civil litigation and other matters. That is plainly not the law and the circuit court erred by ruling that it was.

D. The Circuit Court's Errors Regarding the Prosecutorial Agency

Although admittedly minor, it is worth noting that the circuit court also erred by stating in its ruling that the Eleventh Circuit Solicitor's Office was the prosecutorial agency that prosecuted Appellant for criminal domestic violence. Appellant pleaded no such thing and expressly stated that the prosecutorial agency was the Lexington County Sheriff's Department in the complaint. See Complaint at 3 (R. 16). The only reference to the solicitor's office appeared in Respondents' filings, and Appellant explained to the circuit court that this was incorrect. E.g. Motion for Reconsideration at 5 (R. 122). The circuit court nonetheless refused to correct the error and summarily denied Appellant's motion for reconsideration without addressing the matter. See generally Order Denying Reconsideration (R. 11-12).

Appellant recognizes that this single issue is by no means outcome determinative, but—with all due respect to the circuit court judge—it demonstrates that the circuit court simply did not pay any meaningful amount of attention to Appellant's filings or arguments. The circuit court did not rule on any of Appellant's objections and apparently ignored everything Appellant argued,

even in situations where Appellant was indisputably correct. When a circuit court judge operates in this fashion, obvious but trivial errors often crop up because the judge has for all practical purposes closed his ears to one of the parties before him. Appellant mentions this matter to the Court of Appeals not because it is fundamentally important to the question of reversal but because it demonstrates a pattern and practice by the circuit court judge in this case of simply ignoring the arguments and submissions presented by Appellant regardless of how plainly correct Appellant was on any particular issue.

E. The Circuit Court's Treatment of Probable Cause as an Element of Abuse of Process

The circuit court additionally erred by erroneously treating probable cause as an element of abuse of process. See Order of Dismissal at 3 (R. 3) (“It is also curious to note that there is no contest from any party but that probable cause existed to initiate the [criminal domestic violence] prosecution”). The absence of probable cause is not an element of abuse of process—the only elements are (1) an ulterior purpose and (2) a willful act in the use of process not proper in the conduct of the proceeding. Food Lion, Inc. v. United Food & Commercial Workers Int’l Union, 351 S.C. 65, 71, 567 S.E.2d 251 (Ct. App. 2002) (a case that is curiously cited in the dismissal order itself). The question of whether the process at issue in an abuse of process case issued with probable cause is entirely irrelevant to the abuse of process claim. A perfectly valid process may be the subject of an abuse of process claim if someone perverts that process for a purpose not intended and uses it as an extortionate club to extract concessions

from the target of the process in an unrelated matter. See generally Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 153 S.E.2d 693 (1967) This is black letter law.

It is entirely immaterial to this case whether the criminal domestic violence prosecution against Appellant was initiated with probable cause. It was not, and Appellant is provably innocent, but none of that is relevant to this case. Even if Appellant was entirely guilty of the criminal domestic violence charge, Respondents still committed abuse of process if they did what Appellant alleged in the complaint: Co-opt the prosecutor and exploit the plea bargain process in an extortionate effort to extract concessions from Appellant in an unrelated civil matter in exchange for discontinuation of the prosecution.

The circuit court plainly erred by considering the fact that Appellant did not plead the absence of probable cause in the complaint. Appellant did not do so because Appellant knows the elements of abuse of process, and lack of probable cause is not one of them. It is an element of malicious prosecution, but Appellant did not include a malicious prosecution claim in the complaint—only abuse of process and related claims. The circuit court plainly erred with respect to the probable cause issue and must be reversed accordingly, as Appellant properly preserved this issue for appeal. See Motion for Reconsideration at 2-3 (R. 119-120).

That being said, Appellant would have included an allegation that the criminal domestic violence prosecution was initiated without probable cause—even though it is not necessary—simply to satisfy the circuit court if the circuit

court had permitted Appellant to submit an amended complaint.

F. The Circuit Court's "Additional Determining Factor"

In the dismissal order, the circuit court employs an “additional determining factor” in deciding whether or not to grant Respondents’ one-issue Rule 12(b)(6) motion, as follows:

As an additional determining factor, it is instructive for this Court to state what is obvious to any person who reviews the relevant history of Plaintiff’s litigation, claims, and prosecutions. The Plaintiff is no doubt aggrieved by the circumstances of the dissolution of his marriage. The Court is sensitive to the inexorable effect of obsessive interpersonal passion. However, lawsuits against third parties who may have had some connection to the marital fallout [sic⁸] are not the responsible or legally appropriate method of redressing interpersonal grievances. . . . The Plaintiff is flailing about wildly through misplaced litigation to recover something which has been lost. Sadly, the Courts are not the venue for recovering this type of loss or for exacting personal retribution.

Order of Dismissal at 8 (R. 8).

The circuit court plainly erred by considering these matters as an “additional determining factor” incident to Respondents’ single-issue Rule 12(b)(6) motion arguing a pleading deficiency in Appellant’s complaint. The question of whether Appellant is an “obsessive” litigant seeking to “redress[] personal grievances” has *absolutely* nothing to do with whether Appellant’s complaint, within its four corners, legally survives a Rule 12(b)(6) motion alleging pleading deficiencies. Appellant’s complaint either states facts sufficient to constitute a cause of action or it does not—Appellant’s personal “obsessiveness” cannot be considered by a court in ruling on a Rule 12(b)(6)

⁸ The circuit court bizarrely concluded that Appellant’s ex-wife—Respondent Griffith—is a “third part[y] who may have had some connection to the marital fallout.” Obviously this is an error.

motion or, frankly, in any other context in ordinary civil litigation.

Individual litigants are often obsessive about litigation involving them, particularly where it involves exceptionally severe matters, as is the case here. Courts cannot punish a litigant merely for being “obsessive” so long as he follows all the rules of court applicable to his case. And the idea that litigants cannot resort to the courts for resolution of personal grievances is as bizarre as it is wrong—if the personal grievance at issue constitutes legally actionable conduct, a tort or breach of contract or similar matter—a private litigant not only has the right to seek redress for that grievance before the courts, he has an obligation to do so. The court’s order suggests that Appellant, instead of coming to court, should have found some other way to injure Respondents for their tortuous conduct outside the judicial system. That is not how things are done in the United States, nor is it how they should be done. Appellant had every right to seek the court’s assistance in vindicating his right to be free from Respondents’ tortuous conduct, and the circuit court’s suggestion to the contrary is inappropriate and bizarre.

It is such a basic proposition of law that a court considering Rule 12(b)(6) motions may not consider the personal motivations and feelings of the litigants that Appellant has been unable to find any authority on the matter. It would appear the circuit court judge in this case is the very first American judge to dismiss a case pursuant to Rule 12(b)(6) by considering a litigant’s personal obsessiveness and feelings as an “additional determining factor” in granting the

dismissal.⁹ This Court plainly cannot let that stand and necessarily must reverse the circuit court's ruling because nothing of this nature can be properly considered in connection with a Rule 12(b)(6) motion.

Appellant properly preserved this issue for appeal. See Appellant's Motion for Reconsideration at 6-7 (R. 123-124).

*G. The Circuit Court's Reliance on Knowledge
of Proceedings Outside the Record*

The circuit court also erred by considering proceedings outside the record that the judge apparently conducted independent personal research into outside of court between the hearing on the Rule 12(b)(6) motion and the issuance of the order of dismissal. Part of the "additional determining factor" was this: "As an additional determining factor, it is instructive for this Court to state what is obvious to any person who reviews the relevant history of Plaintiff's litigation, claims, and prosecutions." Order of Dismissal at 8 (R. 8).

It is plainly improper for a judge to dismiss a case pursuant to Rule 12(b)(6) because he conducted a global review of all litigation involving the parties before him conducted in other courts and involving other matters and has developed a bad taste in his mouth with respect to one of the litigants. Courts cannot punish litigants because they do not approve of how those parties litigated cases that are not before them. That being said, Appellant has not engaged in any sort of litigation impropriety in any other case involving these litigants and no

⁹ Obviously some judge somewhere may have done something like this in the past in a case that did not result in a published appellate opinion or other published case. But Appellant cannot find a single appellate authority involving a situation where a judge dismissed a case pursuant to Rule 12(b)(6) after determining a litigant's personal "obsessiveness" as an "additional determining factor" in dismissing the action.

court has ever found that he did. Even so, it was entirely improper for the circuit court to consider these matters while ruling on a simple one-issue Rule 12(b)(6) motion aimed at an alleged pleading deficiency that has absolutely nothing to do with any other litigation Appellant is or has been involved in.

Nonetheless, if the circuit court had given Appellant a full and fair opportunity to present his side of the litigation story involving Respondents, Appellant would have done so and would have shown that Respondents, not Appellant, are the parties that have abused the judicial system in these particular matters. But the circuit court did not conduct such an inquiry and gave Appellant no opportunity to be heard on these matters prior to ruling that Appellant is, essentially, a troublesome litigant who should have his complaint dismissed because of his troublesomeness as an “additional determining factor.” This Court obviously must reverse the circuit court on this issue.

H. The Circuit Court’s Reliance on Public Policy

The circuit court also relies on “public policy” in dismissing Appellant’s complaint pursuant to Rule 12(b)(6). Public policy has absolutely nothing to do with whether Appellant has stated facts sufficient to constitute a cause of action for abuse of process or any other cause of action. Neither side argued at any point that public policy has anything to do with this case, and it does not. Either Appellant stated a cause of action for abuse of process etc. or he did not. Public policy is not a proper basis for dismissal in this case and should not have been considered in any fashion by the circuit court. Appellant properly preserved this issue for appeal in his motion for reconsideration. See Appellant’s Motion for

Reconsideration at 6-7 (R. 123-124).

I. The Circuit Court's Treatment of the Civil Conspiracy Claim

In the alternative that none of Appellant's causes of action survived dismissal, Appellant pleaded a civil conspiracy cause of action. The circuit court dismissed this cause of action solely because Appellant had pleaded other causes of action, even though the circuit court also dismissed them. This was plain error. If none of Plaintiff's other causes of action survive, civil conspiracy cannot be dismissed on the grounds that Plaintiff has asserted other causes of action seeking the same damages. Likewise, the circuit court refused to even consider Appellant's contention that if Respondents' conduct was not actionable under an abuse of process theory, civil conspiracy theory, or other cause of action Appellant asserted in the complaint, the court should consider whether the conduct is actionable as an unnamed tort or heretofore unrecognized tort. Appellant has every right to ask the circuit court to rule on these matters, but the circuit court did not do so and instead dismissed Appellant's complaint without consideration of whether the plainly improper conduct of Respondents is actionable under any theory other than abuse of process or a related claim, including but not limited to civil conspiracy, an unnamed tort, or a heretofore unrecognized tort. Appellant properly preserved this issue for appeal. See Appellant's Motion for Reconsideration at 7 (R. 124).

CONCLUSION

With all due respect to the circuit court judge in this matter, the proceedings below were carried out in a fashion that was patently unfair to Appellant. The circuit court flatly ignored Appellant's valid objections to Respondents' improper memorandum of law filed less than two days before the hearing which substantially consisted of arguments entirely unrelated to Respondents' simple one-issue motion to dismiss and caught Appellant entirely off guard. The circuit court flatly ignored Appellant's valid objections to Respondents' equally improper and patently untimely supporting affidavit. The circuit court flatly ignored Appellant's valid objections to the order of dismissal citing "exhibits" that were not in the record and were not even attached to the order itself. The circuit court flatly ignored Appellant's good faith request for leave to file an amended complaint seeking to cure whatever pleading defects the circuit court found in its dismissal order. The circuit court flatly ignored Appellant's legitimate motion for recusal which Appellant felt necessary to file after the overwhelmingly unfair and, frankly, unconstitutional manner in which proceedings were conducted in the case.

There are numerous ways the Court of Appeals might fashion adequate relief in this case, but the simplest is to simply remand the case with instructions to the circuit court to: (1) allow Appellant a single opportunity to file an amended complaint seeking to correct all alleged pleading defects identified in the order of dismissal and (2) direct the circuit court to carefully follow the rules of civil procedure applicable to motions and supporting affidavits in proceedings on any

motion to dismiss Respondents might file. Although the Court of Appeals may certainly choose to rule on additional matters in this case, it is not necessary in order to afford Appellant full relief—allowing Appellant the chance to submit an amended complaint and directing the circuit court to carefully follow the rules of civil procedure regarding motions practice going forward is all that is truly necessary.

That being said, any ruling by the Court of Appeals that corrects or enables the correction of the numerous errors in this case is welcome.

Respectfully submitted,

October 30, 2020

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001501

RECEIVED
Oct 30 2020
SC Court of Appeals

James John Todd Kincannon,

Appellant,

v.

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

Respondents.

CERTIFICATE OF COUNSEL

The undersigned Appellant hereby certifies that this Final Brief complies
with Rule 211(b), SCACR.

October 30, 2020

s/James John Todd Kincannon
James John Todd Kincannon

THE STATE OF SOUTH CAROLINA
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Sep 25 2020

SC Court of Appeals

James John Todd Kincannon, ...Appellant,

v.

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

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STATEMENT OF THE CASE

On April 6, 2015, the Lexington County Solicitor's Office charged James John Todd Kincannon ("Kincannon") with criminal domestic violence arising out of an assault on his then wife, Ashley Griffith that occurred on March 26, 2015. On September 1, 2015, Griffith filed for divorce from Kincannon in Lexington County Family Court. Griffith hired Vance Stricklin and Amber Fulmer to represent her in the divorce. Mr. Stricklin and Ms. Fulmer were employed as attorneys at the Moore Taylor Law Firm.¹ The next day, the Honorable W. Greg Seigler granted Griffith an *Ex Parte* Restraining Order against Kincannon. The Family Court case ended with a hearing on January 24, 2017, at which time the Honorable Peter R. Nuessle approved an agreement between Kincannon and Griffith and granted a divorce to Griffith. The Decree of Divorce and Order Approving Agreement were issued on February 17, 2017, and filed on March 1, 2017, with the Lexington County Clerk of Court Office.

Two years later, on March 21, 2019, Kincannon filed a Complaint alleging the following causes of action: abuse of process, civil conspiracy, trespass on the case, unfair trade practices, negligent supervision, and a violation of the South Carolina Omnibus Adult Protection Act. On April 23, 2019, Griffith, Stricklin, Fulmer, and the Moore Taylor Law Firm (collectively "Moore Taylor") filed an Answer and Motion to Dismiss with Prejudice. Moore Taylor moved to dismiss on the following basis: Kincannon was charged with Criminal Domestic Violence by a Solicitor in the Lexington County Solicitor's Office; Moore Taylor is not in control of the actions of the Lexington County Solicitor's office; and Moore Taylor cannot be held liable for actions of the Lexington County Solicitor's Office. On May 24, Moore Taylor filed a Memorandum in Support

¹ Mr. Stricklin has since left Moore Taylor to become a Richland County Family Court Judge. Ms. Fulmer is also no longer with Moore Taylor.

of its Motion to Dismiss. Subsequently, Kincannon filed a Memorandum in Opposition to Moore Taylor's Motion to Dismiss on May 29, 2019, which was the day the parties came before The Honorable Robin B. Stilwell to argue said Motion to Dismiss. On July 2, 2019, Judge Stilwell granted Respondents' Motion to Dismiss with Prejudice. Then, on July 22, 2019, Appellant made a Motion to Reconsider. Judge Stilwell denied Appellant's Motion for Reconsideration on July 30, 2019.

The Notice of Appeal was received on August 31, 2019, from Kincannon. This appeal arises from Judge Stilwell's Order of Dismissal of Kincannon's Complaint with Prejudice pursuant to Rule 12(b)(6), SCRCP and the Order denying Kincannon's motion for reconsideration of the dismissal order.

ARGUMENT

I. JUDGE STILWELL PROPERLY ALLOWED MOORE TAYLOR TO SUPPORT ITS MOTION WITH A MEMORANDUM AND AN AFFIDAVIT.

Kincannon argues that Moore Taylor improperly filed a memorandum of law and an affidavit to support its Motion to Dismiss. (Appellant's Initial Br., p. 7). He asserts that Moore Taylor's Memorandum in Support of its Motion to Dismiss contains arguments that are entirely unrelated to its motion to dismiss. (Appellant's Initial Br., p. 7). This is not the case. In Moore Taylor's motion to dismiss, it specifically lists each and every cause of action that Kincannon raised in his Complaint as follows:

Defendants move to dismiss the allegations of this Complaint as they fail to state a claim upon which relief may be granted. In particular, the Complaint alleges claims for Abuse of Process, Civil Conspiracy, Trespass on the Case, South Carolina Unfair Trade Practices Act, Negligent Supervision, and the South Carolina Omnibus Adult Protection Act.

(R. p. 54).

Moore Taylor's memorandum addresses every cause of action that Kincannon alleges and shows that Kincannon failed to state a claim upon which relief could be granted. (R. pp. 57-61). Memoranda are commonly submitted to support legal arguments. For a Memorandum in Support of a Motion to Dismiss to be helpful, efficient, and relevant to the court, it should address why each cause of action fails to state a claim upon which relief could be granted.

Furthermore, Kincannon asserts that Moore Taylor has violated Rule 7(b)(1) of the South Carolina Rules of Civil Procedure. (Appellant's Initial Br., p. 8). Rule 7(b)(1), SCRCR requires that motions "shall state with particularity the grounds therefor, and shall set forth the relief or order sought." The particularity requirement "is to be read flexibly in 'recognition of the peculiar circumstances of the case.'" *Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010). "By

requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that 'the court can comprehend the basis of the motion and deal with it fairly.'" *Id.* Therefore, when a motion is challenged for a lack of particularity, the court should ask "whether any party is prejudiced by a lack of particularity or 'whether the court can comprehend the basis for the motion and deal with it fairly.'" *Id.* "The particularity requirement should not be applied in an overly technical fashion when the purpose behind the rule is not jeopardized." *Id.*

In *Camp*, the Supreme Court of South Carolina held that the lower Court was able to comprehend the motion and deal with it fairly and neither party was prejudiced. *Id.* This was a dispute in Family Court over who would pay their son's tuition. *Id.* The family court concluded that the father would pay seventy percent of the tuition. *Id.* The father filed a motion for reconsideration which stated:

PLEASE be advised that the Defendant through his undersigned attorney, will move before the Honorable David Sawyer, Jr., to reconsider the ruling in his Order dated July 26, 2006, in awarding Plaintiff, William James Camp's college expenses and costs.

Id.

The mother argued that the father's motion failed to state with particularity the grounds upon which the motion was based or the specific relief sought. *Id.* The Supreme Court reasoned that applying an overly technical analysis of the particularity requirement in this instance would not reduce prejudice to either party nor would it assure the court that it would be able to deal with the motion fairly. *Id.* Since neither party was prejudiced and the court dealt with the motion fairly, the father's motion for reconsideration did not violate Rule 7(b)(1), SCRPC. *Id.*

Kincannon argues that Moore Taylor did not state with particularity the grounds for its Motion to Dismiss. (Appellant's Initial Br., p. 8). Similar to *Camp*, Moore Taylor's motion was

easily understood by the court and did not prejudice either party. The motion lists each claim and alleges that each claim fails to state a cause of action. Moore Taylor filed its Motion to Dismiss on April 23, 2019. The Motion hearing in front of Judge Stilwell was not until May 29, 2019. Mr. Kincannon had over a month to prepare his arguments against Moore Taylor's Motion and even submitted a Memorandum in Opposition to the Motion to Dismiss on that same day. Since Rule 7(b)(1) SCRPC is to be read flexibly, and there is no evidence of prejudice to either party, Moore Taylor's Motion to Dismiss was proper.

Next, there was nothing in Moore Taylor's Memorandum unrelated to its Motion to Dismiss. Kincannon argues that the motion to dismiss contains a "single 'prosecutorial control' ground" for which the motion was made. (Appellant's Initial Br., p. 8). However this motion to dismiss includes every cause of action that is alleged in Kincannon's complaint. Judge Stilwell properly allowed Moore Taylor to file its Memorandum in Support of the Motion to Dismiss. Mr. Kincannon cites no authority to support his argument that a trial court commits error by reviewing a memorandum. And, Moore Taylor knows of no authority to support this argument. Trial Courts in general have inherent authority and discretion to decide what motions to review and what arguments to accept or deny. *See generally Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888 (2014) (reviewing filed Memorandum of Law when ruling on a declaratory judgment action). With this in mind, Judge Stilwell properly exercised his discretion in reviewing Moore Taylor's memorandum.

Next, Kincannon argues that Moore Taylor submitted an improper and untimely affidavit in support of its Motion to Dismiss. (Appellant's Initial Br., p. 10). Rule 12(b)(6) of the South Carolina Rules of Civil Procedure provides:

[I]f on a motion asserting the defense numbered (6) to dismiss for failure to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

S.C. R. Civ. P. 12(b)(6).

Moore Taylor submitted an affidavit on May 24, 2019 to support its Motion to Dismiss. (R. p. 62). The Order of Judge Stilwell does not indicate that he relied upon the affidavit in ruling on the motion to dismiss. Instead, he ruled on the pleadings alone. Judge Stilwell had the discretion to change the 12(b)(6) motion into a summary judgment motion to which Kincannon could submit affidavits in response. Nothing indicates that he did so. Instead, he ruled on the motion without relying upon the affidavit of Mr. Stricklin. Judge Stilwell did review Mr. Kincannon's long history of filing lawsuits against his ex-wife, but this information is in the public record and not solely obtained from Mr. Stricklin's affidavit. In addition, Judge Stilwell did not rely on Mr. Kincannon's extensive history of *pro se* litigation to rule. Instead, he ruled on the law and the pleadings. Judge Stilwell's order does mention Mr. Kincannon's extensive litigation history as an additional determining factor. (R. p. 8). This history was a topic of oral argument to the Judge and readily available to the Judge as a matter of public record. (R. p. 38, line 18-p. 39, line 25). Therefore, the affidavit of Mr. Stricklin was not determinative to Judge Stilwell's ruling, and his review of it is not a basis for overturning his order.

In addition, Judge Stilwell offered the opportunity to both parties to submit proposed orders. Mr. Kincannon did not submit any additional motions or respond to the statements regarding his extensive history of *pro se* litigation or submit any affidavit in response to Mr. Stricklin's affidavit. (R. p. 52, lines 4-10).

II. JUDGE STILWELL PROPERLY TOOK NOTICE OF PREVIOUS PLEADINGS AND COURT RULINGS.

Kincannon argues that Judge Stilwell referenced material outside of the record in his Order granting the Rule 12(b)(6) motion. (Appellant's Initial Br., p. 14). In the Order of Dismissal, Judge Stilwell judicially noticed that the Family Court had issued an Interim Temporary Order in favor of Ms. Griffith after a hearing about the return of her pet. (R. p. 4). Rule 201 of the South Carolina Rules of Evidence titled "Judicial Notice of Adjudicative Facts" states that: "[a] court may take judicial notice, whether requested or not." S.C. R. Evid. 201. For a fact to be subject to judicial notice, "it must be so notorious that the court may properly assume its existence without proof." *Masters v. Rodgers Dev. Group*, 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984).

Judge Stilwell took notice of prior judicial findings in cases involving Mr. Kincannon himself. "The Court also takes judicial notice that the Family Court issued an Interim Temporary Order on July 1, 2016 from a June 30, 2016 hearing ordering a return of the pet." (R. p. 4). Those proceedings are matters of public record which are available in the Courthouse or on electronic filing systems. Mr. Kincannon cannot complain of surprise that the Court reviewed his extensive filing history. The history is a public record of proceedings in which Mr. Kincannon was involved.

Kincannon cannot dispute his own actions found in court records. Therefore, Rule 201 of the South Carolina Rules of Evidence and Appellant's constitutional due process rights were not violated by Judge Stilwell properly taking notice of previous pleadings and court rulings.

III. JUDGE STILWELL PROPERLY DISMISSED KINCANNON'S COMPLAINT WITH PREJUDICE WITHOUT LEAVE TO AMEND BECAUSE THE AMENDMENT WOULD BE FUTILE.

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.” S.C. R. Civ. P. 15(a). Although leave to amend should generally be “freely given,” it may be denied where the proposed amendment would be futile. *Doe v. Charleston County Sch. Dist.*, 2019 S.C. C.P. LEXIS 2386. In *Doe*, the Court held the Plaintiff's Complaint against one defendant should be dismissed with prejudice. *Id.* There, the Plaintiff sued multiple Defendants based on alleged sexual abuse of a minor. *Id.* One Defendant filed a Rule 12(b)(6), SCRCP, motion to dismiss with prejudice. *Id.* They argued that the claim was barred by the Tort Claims Act, and since the Plaintiff had alleged no additional facts or theories of recovery, their motion should be granted. *Id.* The Court agreed and dismissed the Complaint with prejudice. *Id.* The Court reasoned that allowing the Plaintiff to amend the Complaint would be futile because the Plaintiff proposed no additional facts or theories of recovery that could survive a 12(b)(6) motion. *Id.*

Here, like in *Doe*, the Judge has the discretion and power to dismiss a Complaint with prejudice if there are no additional facts or theories of recovery which the Plaintiff can point to which would make leave to amend futile. Since Mr. Kincannon did not allege any additional facts or theories of recovery before the motion hearing, at the hearing, or after the hearing, Judge Stilwell granted Moore Taylor's Motion to Dismiss with Prejudice. Judge Stilwell had the discretion to dismiss a complaint with or without prejudice. He properly decided to grant Moore Taylor's Motion to Dismiss with Prejudice based on the complete record.

However, even if the Appellate Court decides that the dismissal with prejudice was erroneous and Kincannon should have been granted leave to amend, the Court of Appeals may still affirm the dismissal with prejudice.

When a complaint is dismissed with prejudice and the plaintiff erroneously is denied the opportunity to file and serve an amended complaint, but the plaintiff fails to present additional factual allegations or a different theory of recovery which may give rise to a claim upon which relief may be granted, the appellate court may in its discretion affirm the dismissal of the complaint with prejudice.

Spence v. Spence, 368 S.C. 106, 131, 628 S.E.2d 869, 882 (2006).

In *Spence*, the Second Owner of real property brought action against the original owner, third owners, ultimate purchasers, and agent, seeking reformation of deeds due to a mutual mistake about lot size. *Id.* at 131, 628 S.E.2d at 869. Ultimate Purchasers brought a motion to dismiss for failure to state a claim. *Id.* The Second Owner asked the Court to grant her at least fifteen days to file and serve an amended complaint instead of dismissing the complaint with prejudice. *Id.* at 128, 628 S.E.2d at 880. The court refused and granted Ultimate Purchaser's Motion to Dismiss with prejudice. *Id.* Second Owner appealed contending that the Court erred in denying her motion to amend the complaint. *Id.* The Supreme Court states that while ordinarily the dismissal should have been without prejudice, Second Owner failed to present any additional factual allegations or a different theory of recovery which may give rise to a cause of action upon which relief may be granted against Ultimate Purchaser. *Id.* at 131, 628 S.E.2d at 882. Second Owner merely reiterated the same allegations on appeal as originally plead in her complaint. *Id.* Therefore, the Supreme Court affirmed the lower Court's dismissal with prejudice of Second Owner's complaint against Ultimate Purchaser. *Id.*

Similar to *Spence*, Kincannon has failed in his Initial Brief to present any additional factual allegations or theories of recovery which would give rise to a valid Complaint and compel the

Court of Appeals to allow him leave to amend. Kincannon listed eleven (11) ways in which he would “cure” the pleading defects. (Appellant’s Initial Br., pp. 20-25). However, he listed no additional facts or no additional theories of recovery, and he wants to remove one theory of recovery initially pled. Additionally, Kincannon states he “would include substantially more facts” but he does not list or include any. (Appellant’s Initial Br., p. 24). Kincannon has had more than enough time to include additional facts and research new theories of recovery, but he has not. Therefore any amendment would be futile.

IV. JUDGE STILWELL PROPERLY DENIED KINCANNON’S MOTION FOR RECUSAL.

On July 30, 2019, Judge Stilwell denied Kincannon’s Motion to Reconsider the Court’s Order Granting Defendants’ Motion to Dismiss and for Additional Relief. (R. p. 11). Kincannon included several paragraphs in his Motion for Reconsideration alleging Judge Stilwell had a duty to recuse himself. (R. pp. 119-22).

Because a review of the dismissal order indicates the Presiding Judge evidently had or *sua sponte* gained personal knowledge of matters relating to the case that are not part of the record and intended to rely on such knowledge in the ruling, the Presiding Judge had a duty to recuse. The Presiding Judge should also recuse at this juncture due to multiple, apparently intentional, violation of Plaintiff’s due process rights incident to the consideration of the Rule 12(b)(6) motion filed by Defendants. The record of proceedings in this matter and the dismissal order itself indicate that the Presiding Judge’s ruling was based, in whole or in part, on personal prejudice against the Plaintiff entirely unrelated to the sole issue before the Court, i.e. whether or not Plaintiff’s Complaint adequately stated facts sufficient to constitute a cause of action for abuse of process and other causes of action asserted in the Complaint. The dismissal order in particular that the Presiding Judge considered numerous matters that were entirely improper in the context of the one-issue Rule 12(b)(6), SCRCF motion made by Defendants and the Presiding Judge should vacate the dismissal order and recuse from further proceedings in this matter due to the realistic possibility that future rulings in this case by the Presiding Judge will be tainted by matters outside the record that the Presiding

Judge became personally familiar with and, in whole or in part, animated his decision-making process at the Rule 12(b)(6) stage. Plaintiff respectfully submits that non-recusal at this point would violate Plaintiff's rights to a judge whose rulings are untainted by outside-the-record personal research secured by South Carolina common law, the South Carolina Constitution, and the United States Constitution.

(R. pp. 122-23).

This motion was denied in its entirety by Judge Stilwell.² (R. p. 11). Under South Carolina law, if there is no evidence of judicial prejudice, a judge's refusal to disqualify himself will not be reversed on appeal. *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004). Pursuant to Canon 3(E)(1) of the Judicial Code of Conduct, a judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party. Canon 3(E)(1), Rule 501, SCACR. It is not sufficient for a party seeking disqualification to simply allege bias; the party must show some evidence of bias or prejudice. *Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996). If there is no evidence of judicial bias or prejudice, a judge's refusal to disqualify himself will not be reversed on appeal. *Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856 (1993). Appellate courts accord great weight to the trial judge's assurance of his own impartiality. *Patel*, 359 S.C. at 524, 599 S.E.2d 114, 118. It is the movants responsibility to provide some evidence of the existence of the judge's impartiality. *Davis v. Parkview Apts.*, 409 S.C. 266, 285, 762 S.E.2d 535, 545 (2014).

In *Davis*, the Supreme Court of South Carolina held that the presiding circuit judge was not required to recuse himself. *Id.* at 289, 762 S.E.2d at 547. There, the presiding judge had

² "After having had the opportunity to carefully review the Plaintiff's Motion, this Court elects to respectfully deny the same."

multiple past relationships with counsel to one of the parties. *Id.* at 285, 762 S.E.2d at 545. This includes officiating one of the lawyers' weddings, being a fraternity brother with the lawyer's ex-husband, going on a fishing trip with one of the lawyer's brothers, and many more instances of prior relationships with counsel. *Id.* The Court reasoned that there was no evidence proving bias or prejudice for recusal other than the adverse rulings. *Id.* at 288, 762 S.E.2d at 547. "The fact that a trial judge ultimately rules against a litigant is not proof of prejudice by the judge." *Id.*

Mr. Kincannon presents no evidence of bias or prejudice against him from the Judge. Kincannon alleges that Judge Stilwell relied on knowledge of matters outside of the record but does not state what those matters are. Since the party alleging bias or prejudice must show evidence of the impartiality and not merely allege there was bias, Judge Stilwell's decision not to recuse himself is proper. Mr. Kincannon's only real criticism of Judge Stilwell is the ruling against Mr. Kincannon. This is not proof of prejudice or bias.

V. JUDGE STILWELL CORRECTLY DISMISSED ALL OF KINCANNON'S CAUSES OF ACTION.

Kincannon contends that Judge Stilwell "dismissed a complaint that Appellant did not file." (Appellant's Initial Br., pp. 26-38). He argues that Judge Stilwell misapprehended the nature of a multitude of the causes of action and misapplied the facts alleged in the complaint itself. (Appellant's Initial Br., pp. 26-38).

Kincannon's first alleged misapprehension was the Court's understanding of "process." According to Kincannon, the process that Moore Taylor allegedly abused was the plea bargaining process itself, not the original charge brought against him for criminal domestic violence. (Appellant's Initial Br., pp. 27-28). Kincannon asserts that "Respondents persuaded the prosecutor to abuse the plea bargaining process by demanding that Appellant make concessions to Respondent on entirely unrelated civil disputes incident to a divorce action in exchange for termination of the

criminal domestic violence prosecution against him.” (Appellant’s Initial Br., p. 28). Moore Taylor did not enlist the Solicitor in a scheme to condition the dismissal of a criminal charge against Kincannon, and Moore Taylor does not have the ability to make the Solicitor’s office prosecute or not prosecute a crime. Because Moore Taylor does not have the power to control the Solicitor, Moore Taylor cannot be liable for the Solicitor’s decisions.

It is not an abuse of process for a crime victim to agree to a dismissal conditioned on payment of medical bills. *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (1983). In *Johnson*, the Supreme Court of South Carolina held that it was not abuse of process for a victim of a crime to agree to drop charges if the suspect paid for his medical expenses. *Id.* at 391, 307 S.E.2d at 860. This case arose from a fight between Mr. Johnson and Mr. Painter which resulted in physical injuries to the Mr. Painter. *Id.* Mr. Johnson was charged with assault and battery of a high and aggravated nature. *Id.* Mr. Painter agreed to drop all charges upon payment of his medical expenses by Mr. Johnson. *Id.* Mr. Johnson denied the offer, and the case went to trial where he was acquitted. *Id.* He then sued Mr. Painter alleging abuse of process. *Id.* Mr. Johnson won at the Trial Court. *Id.* But the South Carolina Supreme Court reversed. *Id.* The Court reasoned that it has always looked with favor upon restitution and reconciliation. *Id.* And held that offering to consent to dismiss a criminal charge for restitution is not abuse of process, by definition, because it is not a wrongful act. *Id.*

Mr. Kincannon alleges that Ms. Griffith, through her lawyer, Mr. Stricklin, consented to the Solicitor dismissing the criminal domestic violence charge if Mr. Kincannon would return Ms. Griffith’s dog, which he refused to do. Thus, like the injured defendant in *Johnson*, Ms. Griffith cannot be sued for attempting to agree to dismiss criminal charges. There is no abuse of the plea bargaining process because no unlawful act was committed. (R. p. 42, line 19-p. 43, line 1).

Kincannon next argues Judge Stilwell misapplied the *Broadmoor Apts. v. Horwitz*, 306 S.C. 482, 413 S.E.2d 9 (1991) and *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967) cases. Kincannon argues Judge Stilwell applied these two cases to the incorrect process. (Appellant's Initial Br., pp. 28-29). The *Broadmoor* and *Huggins* cases set out the same essential elements required for an abuse of process action: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings. *Broadmoor*, 306 S.C. 482, 413 S.E.2d 9; *Huggins*, 249 S.C. 206, 153 S.E.2d 693. Kincannon argues the Judge would not have dismissed his abuse of process claim because it was a textbook claim based on Kincannon's own plea bargain. (Appellant's Initial Br., pp. 28-29). There is no allegation that Moore Taylor had control of the Solicitor's decision to offer Kincannon a plea bargain. This duty resides entirely with the solicitor. In addition, Moore Taylor did not initiate criminal proceedings. Kincannon was arrested without any involvement of Moore Taylor. Mr. Kincannon does not allege a wrongful act undertaken by Moore Taylor.

Kincannon next alleges Judge Stilwell misapplied the *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (1983) case. The *Johnson* case provides that a Solicitor and a victim may agree to drop charges in exchange for out-of-pocket medical expenses. *Johnson*, 279 S.C. at 391, 307 S.E.2d at 861. Even if Moore Taylor suggested that the Solicitor drop charges in exchange for the return of Ms. Griffith's dog, this is allowed by the *Johnson* case which encouraged people to resolve disputes by restitution. *Id.* Likewise it is proper for a Solicitor and a victim to agree to drop charges in exchange for the return of a pet. Thus, Kincannon fails to distinguish the alleged facts from the facts of *Johnson*, and Moore Taylor is entitled to dismissal as a matter of law.

Kincannon also argues that Judge Stilwell improperly treated probable cause as an element of an abuse of process claim. (Appellant's Initial Br., pp. 31-33). The Order of Dismissal states

“[Kincannon] has failed to sufficiently allege an ulterior purpose to his criminal domestic violence charge or a willful act as required by South Carolina Law.” (R. p. 3). There is no indication that Judge Stilwell relies upon probable cause in his ruling. Judge Stilwell did note that Kincannon was arrested with probable cause.³ His noting that probable cause existed to initiate Kincannon’s prosecution does not alter his analysis of South Carolina Law.

Kincannon’s next alleged error is Judge Stilwell’s Additional Determining Factor. (Appellant’s Initial Br., pp. 33-35). Judge Stilwell recited Mr. Kincannon’s extensive pro se litigation history as follows:

As an additional determining factor, it is instructive for this Court to state what is obvious to any person who reviews the relevant history of Plaintiff’s litigation, claims, and prosecutions. The Plaintiff is no doubt aggrieved by the circumstances of the dissolution of his marriage. The Court is sensitive to the inexorable effect of obsessive interpersonal passion. However, lawsuits against third parties who may have had some connection to the marital fallout are not the responsible or legally appropriate method of redressing interpersonal grievances. These Defendants, in part, were the Wife’s lawyers who were simply representing her interests in keeping with their prescribed ethical duties. The Plaintiff is flailing about wildly through misplaced litigation to recover something which has been lost. Sadly, the Courts are not the venue for recovering this type of loss or for exacting personal retribution. It is simply contrary to sound public policy to allow this lawsuit, given all attendant and obvious circumstances, to proceed against faultless third parties.

(R. p. 8).

Judge Stilwell’s comments on the impropriety of Kincannon’s reported lawsuits do not affect the soundness of his reasoning for granting the Motion to Dismiss. Also, Judge Stilwell’s comments regarding public policy and Mr. Kincannon’s history are proper considerations for a judge. And, they are court statements of public policy.

³ “It is also curious to note that there is no contest from any party but that probable cause existed to initiate the prosecution.” (R. p. 3).

Kincannon next alleges Judge Stilwell relied on knowledge of proceedings outside of the record. (Appellant's Initial Br., pp. 35-36). Moore Taylor filed an affidavit of Mr. Stricklin in support of its Motion to Dismiss. This affidavit was in the record. This affidavit set forth the relevant history of Kincannon's litigation, claims, and prosecutions. It recites matters of public record. Kincannon's claim that Judge Stilwell conducted a "global view of all litigation involving the parties before him conducted in other courts and involving other matters and has developed a bad taste in his mouth with respect to one of the litigants" is baseless. (Appellant's Initial Br., p. 36). The Court rightly considered this lawsuit in the context of Kincannon's litigation history, his previous claims, and prosecutions. Judging a person and the pleadings in the context of all that person's actions is fair and appropriate.

Kincannon also faults Judge Stilwell's reliance on public policy to dismiss the Complaint. (Appellant's Initial Br., p. 37). Judge Stilwell properly noted that Kincannon's obsessive litigation history has burdened the court system, the public, and the people he sues. Judge Stilwell had already concluded that Kincannon's Complaint failed to set forth any cause of action upon which relief could be granted. Here, Judge Stilwell determined that public policy was an additional factor to consider in dismissing Kincannon's Complaint with Prejudice based upon Kincannon's own actions.⁴ This was proper and within Judge Stilwell's discretion.

Finally, Kincannon argues that Judge Stilwell dismissed the Civil Conspiracy claim solely because Kincannon had plead other causes of action. (Appellant's Initial Br., pp. 37-38). In the Order of Dismissal, Judge Stilwell laid out the elements to establish a claim for civil conspiracy and additional common law rules to prevail on the claim. (R. p. 5). Kincannon did not meet these

⁴ "It is simply contrary to sound public policy to allow this lawsuit, given all attendant and obvious circumstances, to proceed against faultless third parties." (R. p. 8)

elements for his civil conspiracy claim. To establish a claim for civil conspiracy, the plaintiff must prove three elements: (1) a combination of two or more persons, (2) for the purpose of injuring plaintiff, and (3) causing plaintiff special damage. *Hackworth v. Greywood at Hammett, LLC*, 335 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009). “In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim.” *Id.* See *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981) (dismissing plaintiff’s civil conspiracy claim because “the civil conspiracy action does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy. No additional acts in furtherance of the conspiracy [were] plead”). Similarly, “if plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed.” *Id.* at 117.

In *Hackworth*, the Court held that the civil conspiracy counterclaim should be dismissed because Defendant repeated verbatim the same allegations and damages in its civil conspiracy claim as were alleged in its claim for breach of contract accompanied by a fraudulent act. *Id.*

Here, Kincannon relied on allegations contained in his cause of action for abuse of process. Specifically he alleges as follows: “Plaintiff alternatively pleads a cause of action for civil conspiracy as to such conduct” without informing Moore Taylor of what acts have been committed in furtherance of the alleged conspiracy they are being accused of. (R. p. 21). Furthermore, he “seeks all damages available under the tort of civil conspiracy” without identifying any special damages that have been caused as a result of the alleged civil conspiracy. (R. p. 21). Mr. Kincannon has sued his former wife and her lawyers for essentially being engaged in a domestic lawsuit. This

is an attorney-client relationship required at law for the purpose of representing a client and not a wrongful conspiracy.

CONCLUSION

The Circuit Court properly granted Moore Taylor's Motion to Dismiss with Prejudice against Mr. Kincannon based on the facts and the pleadings. This Court should affirm the dismissal with prejudice.

Respectfully submitted,

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September 25, 2020

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001501

RECEIVED

Sep 25 2020

SC Court of Appeals

James John Todd Kincannon, ...Appellant,

v.

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

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule
211(b), SCACR.

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Appellant,

v.

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

Respondents.

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INTRODUCTION

Appellant respectfully submits this brief in reply to Respondents' Brief in this matter. Appellant does not wish to waste this Court's time reading a rehash of arguments in Appellant's main brief. This brief principally seeks to (a) address matters that Appellant's main brief does not address but which have been raised in some fashion by Respondents in their brief and (b) point out apparent waivers of issues by Respondents where they have elected not to respond to some argument raised by Appellant's main brief.

ARGUMENTS

I.

In reply to Respondents' argument numbered "I" in Respondents' Brief

Respondents' contention that their memorandum in support of their Rule 12(b)(6) was appropriate is obviously wrong and must be rejected by this Court. Respondents' contention that their untimely and improper supporting affidavit was not relied on by the circuit court is also wrong and must be rejected by this Court.

Respondents' Brief attempts to characterize Respondents' memorandum (R. 56-61) filed in support of their Rule 12(b)(6) motion to dismiss (R. 54-55) as a perfectly proper supporting memorandum. It is anything but. The South Carolina Rules of Civil Procedure do not expressly address what is proper for inclusion in a memorandum filed in support of a motion (also known as a brief). But by clear implication, the South Carolina Rules of Civil Procedure prohibit a party from including arguments in a supporting brief that are unrelated to the grounds stated in the motion itself. Respondents chide Appellant for not citing a reported South Carolina case on this point, but Appellant cannot find one, and the reason is obvious: this is such a clear point of law that no controversy has ever arisen over this particular issue that generated a published appellate opinion.

It is beyond obvious that a supporting memorandum may not include argument on grounds outside those raised in the motion itself, particularly where the supporting memorandum is filed a single day before the hearing on the motion. A trial court might choose to give some leeway to a party who filed a motion and memorandum at the same time more than ten days prior to the motion hearing—in that sort of situation, the party opposing the motion cannot complain

about unfair surprise. But no court can permit the proceedings to occur as they have in this case, where the movant filed a dispositive motion—a Rule 12(b)(6) motion (R. 54-55)—alleging only a single ground, then waited until the day before the hearing to serve a “supporting memorandum” (R. 56-61) that does not actually support the motion filed but, in truth, advances all sorts of different and additional grounds for dismissal that are not included in the motion itself and are entirely unrelated to the single ground for dismissal asserted in the motion itself.

Appellant trusts this Court to compare Respondents’ single-ground motion to dismiss (R. 54-55) with Respondents’ memorandum in support (R. 56-61) and conclude that the supporting memorandum makes all sorts of arguments for dismissal that have nothing to do with the single ground for dismissal raised in the motion to dismiss. Because of this, the circuit court should have sustained Appellant’s objection to Respondents’ supporting memorandum and should not have considered such improper material when issuing its ruling, which is plainly what happened—Respondents’ memorandum in support (R. 56-61) tracks closely with the circuit court’s order of dismissal (R. 1-10), and it appears to be undisputed that the circuit court did in fact rely on Respondents’ memorandum in support when issuing its ruling in this case.

Of note, Respondents do not appear to contest Appellant’s claim that even if Respondents’ memorandum complies with the South Carolina Rules of Civil Procedure, the fact that Respondents waited until the day before the hearing to serve and file the memorandum violates Appellant’s federal and state due process rights by depriving Appellant of any reasonable opportunity to prepare and submit

a well-researched and well-prepared response to all the various arguments for dismissal which first appear in Respondents' memorandum and are entirely absent from Respondents' motion to dismiss. This Court should regard Respondents' failure to dispute Appellant's constitutional claims on this issue as a waiver and rule that Appellant's constitutional due process rights were violated by Respondents' filing of a single-ground motion to dismiss then waiting until the day before the hearing to serve and file a "supporting memorandum" adding all sorts of different and additional grounds for dismissal that Appellant had no reasonable opportunity to respond to prior to the hearing.

Respondents' Brief also appears to concede Appellant's arguments that the affidavit (R. 62-90) Respondents filed in support of their Rule 12(b)(6) motion to dismiss—served one day prior to the hearing—was untimely (per Rule 6(d), SCRCPP) and improper (per the well known principle of law that, with rare exceptions inapplicable to this case, Rule 12(b)(6) motions may not be supported by affidavits). Respondents obviously have no choice but to concede these points—the affidavit (R. 62-90) was indisputably untimely per Rule 6(d), SCRCPP and is not within the very narrow category of affidavits that may properly support a Rule 12(b)(6) motion.

It appears that the only argument Respondents have elected to advance with respect to the affidavit (R. 62-90) is that the circuit court's failure to sustain Appellant's timely objection was harmless error, on the theory that the circuit court did not rely on the affidavit in issuing its ruling. A fair-minded comparison of the Order of Dismissal (R. 1-10) and the three filings Respondents made ((1)

Respondents' motion to dismiss (R. 54-55), (2) Respondent's memorandum in support of their motion to dismiss (R. 56-61), and (3) Respondents' affidavit in support of their motion to dismiss (R. 62-90)) shows that various material towards the end of the Order of Dismissal (R. 1-10) did not come from either the motion to dismiss nor the supporting memorandum but did come from the untimely and improper supporting affidavit. Specifically, the material where the circuit court concluded that Appellant is an "obsessive" litigant based on a review of the history of other litigation involving these parties (R. 8), which was not and is not part of the record in this case, could only have come from Respondents' supporting affidavit and original research the circuit judge performed based on information contained in Respondents' supporting affidavit.

This is the only conclusion that can be supported by the record. Neither the motion to dismiss (R. 54-55) nor Respondents' memorandum in support of their motion to dismiss (R. 56-61) make any mention of Appellant being an "obsessive" litigant, nor do they suggest to the trial judge that outside-the-record research into other cases would be either necessary or advisable with respect to this case. The only filing made by Respondents that contains any material of that nature is the untimely and improper supporting affidavit (R. 62-90), which the circuit judge plainly relied on, at least in part, in concluding that dismissal of Appellant's complaint with prejudice was proper because, as an "additional determining factor," Appellant is an "obsessive" litigant. See Order of Dismissal at 8 (R. 8). There is no possible source for these findings other than Respondent's untimely and improper affidavit (and whatever research the circuit judge was

motivated to perform sua sponte upon reviewing Respondents' untimely and improper affidavit).

Respondents' contention that the foregoing errors are harmless is absurd. By permitting Respondents to proceed in the manner they did, the circuit court prevented Appellant from preparing and filing a memorandum of his own in opposition to the arguments raised in Respondents' memorandum. Appellant had no time to prepare such a memorandum since Respondents served their memorandum introducing numerous additional grounds for dismissal only one business day prior to the hearing. The same thing happened with the affidavit—Appellant would ordinarily have prepared and submitted one or more counteraffidavits to the court but because Respondents served their supporting affidavit in an untimely fashion, only one business day prior to the hearing, Appellant had no opportunity to prepare any counteraffidavits to contest the claims made in Respondents' supporting affidavit, many of which are patently false or intentionally misleading.

By permitting Respondents to—one business day prior to the hearing—serve a supporting memorandum which introduced numerous additional grounds for dismissal not part of the motion and a supporting affidavit which introduced numerous factual matters which Appellant had no time to respond to with counteraffidavits, the circuit court erred, and the error is clearly not harmless. The circuit court issued a ruling dismissing Appellant's complaint without giving Appellant a full and fair opportunity to be heard in opposition to Respondents' arguments and without giving Appellant a full and fair opportunity to counter

Respondents (substantively improper) affidavit with counteraffidavits that would likely have prevented the circuit court from making many of the patently erroneous findings in this case.

II.

In reply to Respondents' argument numbered "II" in Respondents' Brief

Respondents' contention that the circuit court's efforts to take judicial notice of interlocutory rulings in the divorce action between Appellant and Respondent Griffith is wrong and must be rejected by this Court.

Next, Respondents' Brief seeks to defend the indefensible manner in which the circuit court attempted to take judicial notice of three interlocutory orders issued in the divorce action between Appellant and Respondent Griffith. Yet the circuit court's actions with respect to judicial notice cannot be defended for two reasons: first, although the circuit court's Order of Dismissal (R. 1-10) purports to sua sponte take judicial notice of three interlocutory orders in the divorce action between Appellant and Respondent Griffith, at no point in time did the circuit judge or Respondents ever seek to include such orders in the record in this case (and Appellant obviously did not). Obviously a court cannot take judicial notice of the existence of a court order in some other litigation without making that order part of the record in the case where judicial notice is to be taken, but that did not happen here. The interlocutory orders the circuit court purported to take judicial notice of are not, and never have been, made a part of the record in this case. On that basis alone, the circuit court's decision to take judicial notice of the orders must be reversed—courts obviously cannot take judicial notice of documents that are never made part of the record.

Appellant has no doubt that if Respondents could respond to this reply brief, they would chide Appellant for failing to support this contention with a citation to caselaw. Appellant is unable to do so, however, because Appellant cannot locate a single reported South Carolina appellate decision where a trial court attempted to take judicial notice of a document that none of the parties nor the judge ever sought to enter into the record in the case. Such a bizarre situation has never apparently come before a South Carolina appellate court before, but the novelty of the issue in no way makes the correct result hard to figure out. A court cannot take judicial notice of a document—a court order or otherwise—that is never made part of the record by any party or by the judge sua sponte. If the document is never made part of the record by any party or the judge, it is a nullity with respect to the case at hand. This is obviously a correct statement of the law, but the issue is so bizarre that Appellant cannot find any South Carolina caselaw to support it. Nonetheless, Appellant trusts this Court to rule correctly on the matter because, quite frankly, the opposite ruling—that a court can take judicial notice of a document that is never entered into the record—is patently absurd.

Amazingly, Appellant tried to correct this issue by way of his motion for reconsideration (R. 118-129) but the circuit judge refused Appellant's request for correction. Appellant expressly pointed out to the circuit court that the Order of Dismissal referenced three interlocutory orders (that it purportedly took judicial notice of) that were not part of the record below and that no party, nor the court, had ever sought to make part of the record below. Despite Appellant pointing out this problem in proceedings below both to the court and to Respondents, neither

the circuit judge nor Respondents took any action whatsoever to include the interlocutory orders at issue in the record below.

This Court must therefore regard these interlocutory orders as nullities for the purpose of this litigation and rule that even if the circuit court could have properly taken judicial notice of them, the circuit court failed to do so when it failed to make them part of the record in this case and denied Appellant's motion for reconsideration which sought to correct this error. This is a weird ruling but it is mandated in this case by the odd decisions of the circuit judge and Respondents to take no effort to correct the omission of the interlocutory orders from the record when Appellant raised the matter in good faith in his motion for reconsideration (R. 118-129).

All that being said, even if the circuit court had properly entered the interlocutory orders in the record in this case when taking judicial notice of them, the manner in which the circuit court took judicial notice of the interlocutory orders nonetheless violates the due process protections in Rule 201(e), SCRE and independently Appellant's constitutional due process rights. Neither party asked the trial court to take judicial notice of anything, either in their filings prior to the hearing on the motion to dismiss or during the oral argument itself. The circuit judge elected to take judicial notice of the interlocutory orders referenced in the Order of Dismissal after the hearing was over. Appellant had no idea the circuit court intended to take judicial notice of anything until Appellant was served with the Order of Dismissal dismissing Appellant's complaint with prejudice.

This clearly violates the intent of Rule 201(e), SCRE, which purports to

guarantee parties affected by judicial notice the opportunity to be heard with respect to judicial notice:

(e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

Rule 201(e), SCRE.

The record below indicates that the circuit court never gave Appellant any opportunity to be heard as to the propriety of taking judicial notice of the interlocutory orders referenced in the Order of Dismissal (R. 1-10). The court had already taken judicial notice of these matters *and* issued an order dismissing the entirety of Appellant's complaint with prejudice before Appellant had any idea that the circuit court was even considering taking judicial notice of anything. This is plainly not what Rule 201(e), SCRE intends, nor is it permissible under constitutional due process considerations.

Whenever a participant in a case attempts to introduce evidence—whether that participant be a party or the judge acting sua sponte—every other party has a constitutional right to be heard on any objections the party might have *and* to introduce his own responsive evidence. These constitutional due process principles apply just as much to judicial notice as they do to ordinary means by which parties present evidence in a case. Even if Rule 201(e), SCRE did permit the circuit court to proceed in the fashion that it did in this case, Appellant's federal and state constitutional due process rights would still be violated. Appellant had and has a clear right to respond to any judicially noticed matter

both with objections and with the submission of additional evidence related to the matter judicially noticed *prior* to the circuit court issuing a final ruling in the matter. Respondents would likely chide Appellant for failing to cite a reported South Carolina judicial decision for this proposition but, as is the case with much of what has happened in this case, the situation is so bizarre that it doesn't appear that any prior South Carolina appellate court has dealt with this precise issue before.

The absence of precedent, however, in no way makes this decision difficult. The essence of constitutional due process is notice and an opportunity to be heard. To whatever extent Rule 201, SCRE permits a trial court to do what was done in this case, it is unconstitutional as applied to Appellant. The circuit court had a duty to advise Appellant of its intention to take judicial notice of the interlocutory orders referenced in the Order of Dismissal *prior* to issuing the Order of Dismissal, and the circuit court had a duty to hear any objections Appellant might have and receive any additional argument or evidence Appellant might wish to submit in good faith responsive to the judicially noticed matters prior to issuing a final ruling dismissing Appellant's complaint with prejudice. This is basic constitutional due process, and it is crystal clear that Appellant was denied basic constitutional due process in this case.

III.

In reply to Respondents' argument numbered "III" in Respondents' Brief

Respondents contend that any effort Appellant might make to cure or avoid the various pleading deficiencies Respondents have alleged would be futile because the pleading deficiencies are incurable. Appellant has outlined to this

Court what he would do if given a single opportunity to amend his pleading, and a review of Appellant's intentions with regard to an amendment pleading indicates that Appellant has a good faith belief that he can amend the complaint such that it will survive a Rule 12(b)(6) motion, at least in part. In accordance with the policies underlying Rule 15, SCRCp, Appellant respectfully submits that this Court should freely give Appellant one single opportunity to submit an amended complaint to the circuit court.

Appellant has nothing to add to the foregoing except this: Appellant twice sought leave to file an amended complaint in the circuit court, once at the hearing on Respondents' motion to dismiss and once by way of Respondents' motion for reconsideration of the order of dismissal. Respondents did not oppose Appellant's request for leave to amend in either case. Based on that alone, this Court should remand this case to the circuit court with instructions to permit Appellant to file a single amended complaint which Respondents will then be free to attack by way of Rule 12(b)(6) or any other grounds for dismissal or summary judgment they can come up with in good faith.

IV.

In reply to Respondents' argument numbered "IV" in Respondents' Brief

Respondents contend that the circuit judge in this matter properly denied Appellant's motion for judicial disqualification. Appellant contends that the circuit judge did not rule on the motion for judicial disqualification, and the record supports Appellant's contention. The only relief Appellant seeks is that if this Court is so minded to affirm the rulings of the circuit court and deny Appellant an opportunity to file an amended complaint, the Court first remand the case to the circuit court with instructions for the circuit judge who ruled on the motion to dismiss to either (a) rule on Appellant's motion for judicial disqualification or (b) state that he has already done so and thereby create a record that Appellant can appeal from.

Appellant has nothing to add to the foregoing.

V.

In reply to Respondents' argument numbered "V" in Respondents' Brief

Respondents contend that the circuit court correctly dismissed each of Appellant's causes of action. Appellant's contention is that the circuit court's ruling was improper because the court relied on Respondents' improper supporting memorandum and untimely and improper supporting affidavit in deciding Respondents' Rule 12(b)(6) motion. Had the circuit court limited itself to what was properly before it—Respondents' motion and Appellant's memorandum in opposition—the circuit court would have ruled for Appellant and denied Respondents' motion to dismiss.

Respondents contend that the circuit court correctly dismissed each of Appellant's causes of action. But this argument presumes that the circuit court correctly considered Respondents' memorandum in support of the motion to dismiss (R. 56-61) and Respondents' affidavit in support of the motion to dismiss (R. 62-90). As Appellant argued in his main brief, and in section I of this brief, the circuit court erred by permitting Respondent to make any arguments for dismissal beyond the single "prosecutorial control" ground asserted in Respondents' motion to dismiss itself.

CONCLUSION

In conclusion, Appellant respectfully requests this Court fashion a ruling that will allow Appellant an opportunity to submit an amended complaint in this matter or to otherwise proceed on the original unamended complaint.

Respectfully submitted,

October 30, 2020

s/James John Todd Kincannon

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Appellant Pro Se

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001501

James John Todd Kincannon,

Appellant,

v.

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

Respondents.

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Oct 30 2020

SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned Appellant hereby certifies that this Final Reply Brief
complies with Rule 211(b), SCACR.

October 30, 2020

s/James John Todd Kincannon

James John Todd Kincannon

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

James John Todd Kincannon, Appellant,

v.

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

Appellate Case No. 2019-001501

Appeal From Lexington County
Robin B. Stilwell, Circuit Court Judge

Unpublished Opinion No. 2023-UP-070
Submitted May 6, 2022 – Filed February 22, 2023

AFFIRMED

James John Todd Kincannon, of Simpsonville, pro se.

James Edward Bradley, of Moore Bradley Myers, PA of
West Columbia for Respondents.

PER CURIAM: James John Todd Kincannon appeals the circuit court's dismissal of his complaint against Ashley Griffith, Moore Taylor Law Firm, P.A. (Moore Taylor), Vance Stricklin, and Amber Fulmer (collectively, Respondents) for failure to state a claim. On appeal, Kincannon argues the circuit court erred by (1) considering Respondents' untimely and improper memorandum and affidavit in

support of the motion to dismiss; (2) relying on materials outside the record and denying Kincannon the opportunity to respond to judicially noticed materials; (3) dismissing the complaint with prejudice and denying Kincannon the opportunity to amend his complaint; (4) failing to rule on his motion for recusal; and (5) committing additional errors of varying severity. We affirm pursuant to Rule 220(b), SCACR.

1. We hold Kincannon's argument regarding Respondents' untimeliness in filing their memorandum of law is abandoned. *See Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 599, 635 S.E.2d 649, 660 (Ct. App. 2006) (finding appellant abandoned an issue on appeal when he made only a conclusory argument and cited no legal authority to support the issue). We further hold Respondents' motion to dismiss sufficiently alleged that Kincannon failed to state a claim regarding the causes of action in his complaint, and the circuit court was able to comprehend the motion and deal with it appropriately. *See* Rule 7(b)(1), SCRCPP ("An application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought."); *Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010) (explaining the particularity requirement "is to be read flexibly in recognition of the peculiar circumstances of the case" (quoting *Cambridge Plating Co., Inc. v. Napco, Inc.*, 85 F.3d 752, 760 (1st Cir. 1996))); *id.* ("By requiring notice to the court and the opposing party of the basis for the motion, [R]ule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that 'the court can comprehend the basis of the motion and deal with it fairly.'" (quoting *Calderon v. Kansas Dept. of Soc. and Rehab. Servs.*, 181 F.3d 1180, 1186 (10th Cir. 1999))); *id.* ("The particularity requirement should not be applied in an overly technical fashion when the purpose behind the rule is not jeopardized." (quoting *Andreas v. Volkswagen of Am., Inc.*, 336 F.3d 789, 793 (8th Cir. 2003))).

Additionally, although we agree with Kincannon that it would be improper for the circuit court to consider an affidavit at the Rule 12(b)(6), SCRCPP, stage of litigation, we find the circuit court did not rely on the affidavit when ruling. *See Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) ("In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint."). Thus, we find no error.

2. We hold the circuit court did not err by taking judicial notice of family court orders from Kincannon and Griffith's divorce action. *See Flateau v. Harrelson*,

355 S.C. 197, 201-02, 584 S.E.2d 413, 415 ("Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint."); Rule 201(f), SCRE ("Judicial notice may be taken at any stage of the proceeding."); Rule 201(b), SCRE ("A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."); Rule 201(c), SCRE ("A court may take judicial notice, whether requested or not."). Additionally, Kincannon was given the opportunity to be heard on this issue when he addressed the family court orders in his motion for reconsideration, which the circuit court subsequently denied. *See* Rule 201(e), SCRE ("A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.").

3. We hold the circuit court properly dismissed all of Kincannon's claims with prejudice because any amendment would be futile. *See Spence v. Spence*, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006) ("The plaintiff in most cases should be given an opportunity to file and serve an amended complaint."); *id.* at 130-31, 628 S.E.2d at 882 (explaining if the plaintiff fails to supply additional facts "[that] may give rise to a claim upon which relief may be granted," the appellate court may "affirm the dismissal of the complaint with prejudice"); *Alterna Tax Asset Grp., LLC v. York Cnty.*, 434 S.C. 328, 334, 863 S.E.2d 465, 468 (Ct. App. 2021) ("[W]e are mindful that trial courts should not dismiss pleadings with prejudice at the 12(b) stage without allowing the pleader to amend its complaint (*unless amendment would be futile*).") (emphasis added)). Kincannon's final brief contained eleven proposals to amend his complaint to survive a motion to dismiss. Although we are cognizant of the gravity of dismissing a case with prejudice as discussed in *Skydive Myrtle Beach, Incorporated v. Horry County*, 426 S.C. 175, 826 S.E.2d 585 (2019), we have reviewed Kincannon's allegations and find he failed to supply necessary facts to plead a survivable cause of action. *See Pallares v. Seinar*, 407 S.C. 359, 370, 756 S.E.2d 128, 133 (2014) ("The essential elements of abuse of process are (1) an ulterior purpose, and (2) a willful act in the use of the process that is not proper in the regular conduct of the proceeding."); *Paradis v. Charleston Cnty. Sch. Dist.*, 433 S.C. 562, 574, 861 S.E.2d 774, 780 (2021) ("[A] plaintiff asserting a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff."); *Michalson v.*

All, 43 S.C. 459, 21 S.E. 323, 323 (1895) (explaining that the specific action of trespass on the case was abolished); *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 270, 536 S.E.2d 399, 407 (Ct. App. 2000) ("To be actionable under the [South Carolina Unfair Trade Practices Act], the unfair or deceptive act or practice must have an impact upon the public interest."); *Charleston, S.C. Registry for Golf & Tourism, Inc. v. Young Clement Rivers & Tisdale, LLP*, 359 S.C. 635, 644, 598 S.E.2d 717, 722 (Ct. App. 2004) (explaining that if there is no duty owed to the plaintiff, any harm suffered is irrelevant); S.C. Code Ann. § 43-35-10(11) (2015) (defining "vulnerable adult" as "a person eighteen years of age or older who has a physical or mental condition which substantially impairs the person from adequately providing for his or her own care or protection"); S.C. Code Ann. § 43-35-10(10) (2015) (defining "psychological abuse" as "deliberately subjecting a vulnerable adult to threats or harassment or other forms of intimidating behavior causing fear, humiliation, degradation, agitation, confusion, or other forms of serious emotional distress").

4. We hold the circuit court properly denied Kincannon's motion for recusal when it denied his motion for reconsideration. *See Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004) ("Under South Carolina law, if there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal."); *id.* ("It is not sufficient for a party seeking disqualification to simply allege bias; the party must show some evidence of bias or prejudice."); *Reading v. Ball*, 291 S.C. 492, 494, 354 S.E.2d 397, 398 (Ct. App. 1987) ("When no evidence is presented other than claimed 'adverse' rulings by the judge, the judge is not required to recuse himself.").

5. Kincannon argues the circuit court erred in nine additional ways. As to his argument (a), that the circuit court misapprehended the "process" he alleged in his complaint, we find the circuit court properly contemplated the "process" as used in the complaint. Regarding argument (b), that the circuit court misapplied *Broadmoor Apartments of Charleston v. Horwitz*, 306 S.C. 482, 413 S.E.2d 9 (1991), and related cases as a result of the aforementioned misapprehension of "process," we hold the "hand of one, hand of all" dictated by *Broadmoor* is inapplicable because we find Kincannon failed to allege unlawful conduct. Because we find the circuit court did not misapprehend the "process" alleged, we do not believe it misapplied *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (1983) as Kincannon argues in (c). As to argument (d), we find the circuit court properly identified the Eleventh Circuit Solicitor's Office as the prosecuting agency. Regarding argument (e), we disagree with Kincannon's assertion that the circuit court treated probable cause as an element of the abuse of process claim

because the circuit court's statement regarding probable cause was made after it concluded Kincannon failed to state facts sufficient to support an abuse of process claim; thus, we find no error.

As to Kincannon's arguments (f), (g), and (h), we hold he abandoned these arguments on appeal because he cited no authority to support his propositions. *See Glasscock, Inc. v. U.S. Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review."). Finally, as to argument (i), we find the dismissal of the civil conspiracy claim was proper because Kincannon failed to supply additional facts that may give rise to a claim upon which relief may be granted. *See Spence*, 368 S.C. at 130-31, 628 S.E.2d at 882 (explaining if the plaintiff fails to supply additional facts "[that] may give rise to a claim upon which relief may be granted," the appellate court may "affirm the dismissal of the complaint with prejudice").

AFFIRMED.¹

GEATHERS and HILL, JJ., and LOCKEMY, A.J., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001501

James John Todd Kincannon,

Appellant,

v.

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

Respondents.

APPELLANT'S PETITION FOR REHEARING

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APPELLANT'S PETITION FOR REHEARING

Appellant respectfully petitions the South Carolina Court of Appeals for rehearing by the three-judge panel that decided this appeal on February 22, 2023. Appellant would also respectfully advise the Court that unlike most petitions for rehearing, this is *not* merely a pro forma “Hail Mary” filing en route to a cert petition.

This Petition for Rehearing seeks to call the Court’s attention to what appears to be an error in the Court’s decision that directly conflicts with three South Carolina Supreme Court cases relating to abuse of process: (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 plainly 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 are *not* restitution in exchange for the termination of a criminal prosecution.

Appellant is certain the Court did not mean to issue a decision that conflicts with Huggins, Broadmoor, or Johnson or any other decision of the South Carolina Supreme Court and respectfully requests the Court rehear this matter, issue a corrected decision that does not conflict with Huggins, Broadmoor, or

Johnson, and thereby permit Appellant to proceed solely on an abuse of process claim by way of an amended complaint in the circuit court.

Finally, Appellant would implore the Court to recognize that the issues in this case directly implicate the integrity of the criminal justice system in South Carolina. This case presents a situation where the alleged victim of a crime plainly and unashamedly used the criminal prosecution process as a tool of extortion against Appellant, the criminal defendant. That is precisely why the tort of abuse of process exists, and Appellant respectfully submits that the facts of this controversy, as Appellant would set out in an amended complaint, are squarely within the scope of that tort. If what happened in this case is not actionable as abuse of process, then the abuse of process tort is a dead letter in South Carolina.

STATEMENT OF THE CASE

Facts

On April 6, 2015, Appellant was charged with criminal domestic violence and Respondent Griffith (“Respondent”) was the alleged victim. (R. 15.) 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. (R. 16.) 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. (R. 16-17.)

Procedural History

On February 23, 2019, Appellant filed a civil complaint alleging a cause of action for abuse of process against Respondent¹ 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

(R. 14-32). 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. (R. 54.) 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 (R. 48.).

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 to submit an amended complaint. (R. 1.) Appellant preserved these issues for appeal by timely filing a motion for reconsideration (R. 118.) which the circuit court denied. (R. 11.) 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 committed 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

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

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

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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,

March 9, 2023

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Mar 09 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001501

James John Todd Kincannon,

Appellant,

v.

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

Respondents.

CERTIFICATE OF SERVICE

The undersigned Appellant hereby certifies that he has, on the date below, properly served the foregoing on opposing counsel.

March 9, 2023

s/James John Todd Kincannon

James John Todd Kincannon

Appellant Pro Se

The South Carolina Court of Appeals

James John Todd Kincannon, Appellant,

v.

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

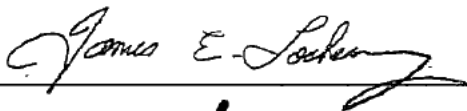
Appellate Case No. 2019-001501

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



A.J.



A.J.

Columbia, South Carolina

cc:

James John Todd Kincannon
James Edward Bradley, Esquire
The Honorable Robin B. Stilwell

FILED
Mar 17 2023