

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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May 17 2023

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

SC Court of Appeals

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2023-000607

James John Todd Kincannon,

Petitioner,

v.

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

Respondents.

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

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

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I. The Court of Appeals 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 of Appeals’ 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)6

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CERTIFICATE OF COUNSEL

Petitioner, also referred to as Appellant herein, certifies that the Petition for Rehearing in this matter was made and finally ruled on by the Court of Appeals on March 17, 2023.

INTRODUCTION

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

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

QUESTION PRESENTED

- 1. Did the Court of Appeals 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 of Appeals' finding that any such amendment would be futile?**

STATEMENT OF THE CASE

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

The prosecutor determined that the CDV charge 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 and advised Appellant that she would drop the CDV charge but only if Appellant surrendered the dog to Respondent. Appellant refused, whereupon the State refused to drop the CDV charge and proceeded with the prosecution. (J.A. 18-19.)

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

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

The circuit court issued an order dismissing the abuse of process claim pursuant to Rule 12(b)(6) *with prejudice* and refused to grant Appellant leave amend the complaint. (J.A. 3.) Appellant preserved these issues for appeal by timely filing a motion for reconsideration (J.A. 120.) which the circuit court denied. (J.A. 13.) Appellant timely appealed and properly raised the amendment issue which is the subject of this Petition for Rehearing. See Appellant's Brief, Section III, at p. 19 (J.A. 153). The Court of Appeals 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. (J.A. 220.) Appellant timely petitioned for rehearing (J.A. 225), and Appellant's petition for rehearing was denied by the Court of Appeals on March 17, 2023. (J.A. 253.)

ARGUMENT REGARDING QUESTION PRESENTED

- I. **The Court of Appeals 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 of Appeals' 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 this Court to consider in this Petition for Certiorari is whether Appellant could amend the complaint in this matter (J.A. 16) to set forth facts sufficient to constitute a cause of action for abuse of process. If so, then the Court of Appeals' ruling that amendment would be futile is erroneous, and this Court should reverse the Court of Appeals and direct the circuit court to allow Appellant to amend the complaint to set forth a single cause of action for abuse of process. Appellant's position is that Appellant could amend the complaint to 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) based on a Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983) argument or any other Rule 12(b)(6) argument.

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 to the Court of Appeals:

1. Appellant would make the same jurisdictional allegations that appear in Paragraphs 1-10 of the original complaint. (J.A. 17.)²

2. On April 6, 2015, Appellant was charged with misdemeanor CDV 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 to the CDV 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 Brief, see Appellant's Brief at 24-25 (J.A. 158-59), and is included to prevent dismissal pursuant to Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983).

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. (J.A. 17.)

4 This allegation already appears in Paragraph 14 of the original complaint. (J.A. 18.)

5 This allegation already appears in Paragraph 14 of the original complaint. (J.A. 18.)

6 This allegation already appears in Paragraph 13 of the original complaint. (J.A. 18.)

7 This allegation already appears in Paragraphs 14-15 of the original complaint. (J.A. 18.)

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

12. Appellant was harmed by the conduct of Respondent Griffith. Respondent Griffith's successful request to the prosecutor in the CDV prosecution to attach

⁸ This allegation already appears in Paragraph 14-15 of the original complaint. (J.A. 18-19.)

⁹ This allegation already appears in Paragraph 17 of the original complaint. (J.A. 19.) Appellant, 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.

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 CDV 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. (J.A. 30-34).

*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 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

¹⁰ These allegations already appear in Paragraph 14-15 and 45 of the original complaint. (J.A. 18-19, 30.)

(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 CDV 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. This 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. This 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).

This 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 CDV 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 CDV matter. That was plainly an ulterior purpose because forcing Appellant to surrender a dog to Respondent was not a proper objective of the CDV 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 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 CDV 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.

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.

What the prosecutor did in this case is precisely what this Court found actionable as abuse of process 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 CDV 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 this Court's 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 this 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 the clear and specific fact that Respondent Griffith, upon learning that the prosecutor intended to drop the CDV charge against Appellant, asked the prosecutor to demand that Appellant surrender the dog to Respondent as a condition of dropping the CDV 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 abuse of process claim if Respondent could show that the property she sought to obtain in connection with the criminal matter, a dog, was restitution for the alleged CDV 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 CDV case because the dog had nothing whatsoever to do with the CDV matter. The dog was not involved in any way in the CDV case, and the dispute over the dog did not even arise until approximately a year after the CDV prosecution was commenced.

Further, there is nothing in any material beyond the four corners of Appellant's proposed amended complaint that would establish that the dog would be a proper form of restitution for the CDV 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 dog simply had no relationship of any kind to the CDV 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 restitution for the CDV incident and therefore the abuse of process claim should be dismissed pursuant to Johnson v. Painter, supra.

THE LOWER COURTS' MISUNDERSTANDING OF JOHNSON V. PAINTER

The circuit court ruled in its order dismissing Appellant's original complaint that Johnson v. Painter doomed Appellant's cause of action for abuse of process because, per the circuit court, "Johnson provides that a Solicitor and a

victim may agree to drop charges in exchange for out-of-pocket medical expenses. It is not a far stretch to apply that same premise to a Solicitor and a victim that agree to drop charges in exchange for a pet.” See Order of Dismissal at 4 (J.A. 6.). The Court of Appeals affirmed this ruling. (J.A. 223.)

This was clearly error, and this Court should make that clear in a published opinion. 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 proper for Respondent Griffith to ask the prosecutor to demand Appellant surrender the dog *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 CDV, and that charge had 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 CDV 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 CDV for an ulterior purpose. See Order of Dismissal at 3 (J.A. 5.). However, the circuit court went on to rule—erroneously—that because the CDV 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 of process only began after the CDV prosecution had commenced and was not present when the CDV prosecution first came into existence. Id. The Court of Appeals erroneously affirmed this conclusion. (J.A. 223).

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 CDV prosecution was initiated, the dog dispute did not exist. In fact, the dog dispute did not arise until approximately a year after the CDV prosecution had begun. Despite this, Respondent Griffith, with the prosecutor acting as her willing puppet, nonetheless abused the CDV prosecution by demanding that Appellant surrender the dog to Respondent as a condition of dropping the CDV 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 CDV 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. The Court of Appeals erroneously affirmed this conclusion. (J.A. 220-24.) 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 clear from Huggins, 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. 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.

This Court concluded that this was an abuse of process. Id. at 212. At no point did this 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 this 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 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 claim 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 by virtue of family court orders or 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.¹²

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

Accordingly, Appellant is 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.

¹² Although Appellant contends that the “rightful ownership” of the dog is irrelevant to this particular case, the Court should be aware that Respondent Griffith eventually relinquished all claims to the dog.

Accordingly, the Court of Appeals' conclusion that the circuit court properly denied Appellant's request to submit an amended complaint because any such amendment would be futile was erroneous. 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, the Court of Appeals erred in concluding that Appellant was properly denied an opportunity to submit an amended complaint by the circuit court.

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.

ARGUMENT REGARDING RULE 242(b) CONSIDERATIONS

Rule 242(b), SCACR states this Court's typical considerations when ruling on a certiorari petition. This case appears to squarely fit within the third consideration, "Where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court." Rule 242(b)(3), SCACR. This case involves a situation where the circuit court—relying on this Court's decision in Johnson v. Painter, supra—ruled that there is no limit to the amount of money or type property that an alleged crime victim can seek in exchange for agreeing to

dismissal of a criminal charge. Order of Dismissal at 4 (J.A. 6.). The Court of Appeals affirmed this ruling. (J.A. 223.)

This ruling was plainly erroneous, as it would entirely eliminate the tort of abuse of criminal process in South Carolina. The ruling misinterprets this Court's holding in Johnson v. Painter, which was plainly limited to cases involving restitution, and conflicts with this Court's abuse of process jurisprudence, most notably the cases of Huggins v. Winn-Dixie Greenville, Inc., supra, and Broadmoor Apts. of Charleston v. Horwitz, supra. This Court must correct this error because it is clear that there is widespread confusion among the South Carolina bench and bar as to the exact parameters of the abuse of process tort.

Appellant would also note that Rule 242(b), and South Carolina common law, allow this Court to consider all matters relating to a case when deciding a petition for certiorari, including matters beyond those identified in the rule itself. Appellant would like the Court to consider the fact that this issue is one which often defies appellate consideration, since the vast majority of criminal defendants are entirely willing to be extorted simply to make criminal charges go away. Appellant is an exceptionally rare example of a criminal defendant who refused to be blackmailed and actually commenced civil litigation in the matter. If the Court denies this petition for certiorari, unscrupulous prosecutors and alleged crime victims will continue what is apparently a fairly widespread practice of extorting criminal defendants in exchange for a nolle prosequi disposition of criminal charges. This Court should not, and in justice cannot, allow such a practice to continue, and this case presents the perfect vehicle for this Court to squarely and

plainly address these issues for the bench and bar and citizens of South Carolina. No criminal defendant should be exposed to extortion, and such a thing should *certainly* not happen with the approval of South Carolina's judicial system.

CONCLUSION

Based on the foregoing, Appellant respectfully requests the Court issue a writ of certiorari to the Court of Appeals in the above-captioned action, reverse the Court of Appeals as to the issues described herein, and remand the case to the Lexington County Court of Common Pleas with instructions to the trial judge to allow Appellant to submit an Amended Complaint setting forth a single cause of action for abuse of process, as Appellant's suggested 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.

CERTIFICATE OF SERVICE

The undersigned Appellant hereby certifies that he has, on the date below, properly served the foregoing Amended Petition for Issuance of Writ of Certiorari to the Court of Appeals on opposing counsel.

May 17, 2023

Respectfully submitted,

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