

STATE OF SOUTH CAROLINA )  
COUNTY OF LEXINGTON )

IN THE COURT OF COMMON PLEAS  
Case No.: 2023CP3200091

DENNIS GALLIPEAU, )  
Plaintiff, )

vs. )

D. RYAN McCABE and )  
MARION J. SMITH, )  
Defendants. )

ORDER ON DEFENDANTS' MOTION  
FOR DISMISSAL UNDER RULE 12(B)(6)  
FILED MARCH 10, 2023

**RECEIVED**  
JUN 20 2023  
SC Court of Appeals

Heard: April 24, 2023 via Webex Virtual Courtroom  
Plaintiff is self-represented  
Defendants' Attorney: Ryan McCabe  
Court Reporter: None – Webex Recording by Consent

The plaintiff filed this suit against Marion J. Smith, the owner of MJS, Inc., an opponent in a pending case (Case No. 2020CP3200109), and the attorney for MJS, D. Ryan McCabe, asserting that the plaintiff is entitled to civil remedies under criminal statutes related to perjury, S.C. Code §§ 16-9-10, et seq. The defendants seek dismissal of the present Complaint under Rule 12(b)(6), SCRCF. The motion is granted.<sup>1</sup> There are remaining counterclaims under the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code §§ 15-36-10 et seq. which are not dismissed.

Rule 12(b)(6), SCRCF reads:

Every defense, in law or fact, to a cause of action . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses

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<sup>1</sup> This is a difficult issue because of the language in S.C. Code §16-9-50 referenced later in this order. Even if a civil cause of action were to arise under §16-9-50, which the court finds not to be the case, the cause of action should not arise until after there is a determination that the perjury or subornation of perjury resulted in a judgment against the plaintiff. To determine otherwise would open the courts to multiple overlapping lawsuits.

may . . . be made by motion: . . . (6) failure to state facts sufficient to constitute a cause of action[.]

In ruling on a motion under Rule 12(b)(6), the court is limited to reviewing the allegations in the four corners of the Complaint. All averments and reasonable inferences therefrom must be accepted as true and construed in favor of the plaintiff.

The question is whether South Carolina recognizes a civil cause of action based on the criminal statutes regarding perjury and subornation of perjury.<sup>2</sup> The court finds that the criminal statutes do not give rise to an individual cause of action in Common Pleas court, though no ruling is made as to whether commission of perjury or subornation of perjury may be used as proof of some other recognized civil cause of action. This decision is reached even though South Carolina has enacted § 16-9-50, which reads:

**SECTION 16-9-50.** Disposition of fines.

The one moiety of the fines imposed by this article shall be for the State and the other moiety to such person as shall be grieved, hindered or molested by reason of the offense or offenses before mentioned that will sue for the same by action in any court of competent jurisdiction.

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<sup>2</sup> **SECTION 16-9-10.** Perjury and subornation of perjury.

(A)(1) It is unlawful for a person to wilfully give false, misleading, or incomplete testimony under oath in any court of record, judicial, administrative, or regulatory proceeding in this State.

(2) It is unlawful for a person to wilfully give false, misleading, or incomplete information on a document, record, report, or form required by the laws of this State.

(B)(1) A person who violates the provisions of subsection (A)(1) is guilty of a felony and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years, or both.

(2) A person who violates the provisions of subsection (A)(2) is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than six months or fined not less than one hundred dollars, or both.

(C) A person may be convicted under this section if he induces, procures, or persuades another person to commit perjury or if he commits perjury by his own act, consent, or agreement.

**SECTION 16-9-20.** Subornation of perjury in civil actions.

(A) It is unlawful for a person to:

(1) wilfully induce, procure, or persuade another person by any means to commit perjury in initiating a civil action or proceeding; or

(2) wilfully induce, procure, or persuade another person to give false, misleading, or incomplete testimony while under oath in a civil action or proceeding.

(B) A person who violates the provision of this section is guilty of a misdemeanor and, upon conviction, must be imprisoned not more than six months and fined not less than two hundred dollars.

Perjury is defined in Black's Law Dictionary as follows:

In criminal law. The willful assertion as to a matter of fact, opinion, belief, or knowledge, made by a witness in a judicial proceeding as part of his evidence, either upon oath or in any form allowed by law to be substituted for an oath, whether such evidence is given in open court, or in an affidavit, or otherwise, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding. 2 Whart. Crim. Law.

Subornation of perjury is defined as follows:

In criminal law. The offense of procuring another to take such a false oath as would constitute perjury in the principal. See *Stone v. State*, US Ga. 705, 45 S. E. 030, 9S Am. St. Rep. 145; *State v. Faliey*, 3 Pennwill (Del.) 504, 54 Atl. 090; *State v. Geer*, 40 Kan. 529, 20 Pac. 1027.

A detailed law review article discusses the status of the law in the United States concerning whether criminal laws against perjury give rise to a private cause of action. See *Lying On The Stand Won't Cost You A Dime: Should Courts Recognize A Civil Action In Tort For Perjury?*, 44 Wash. & Lee L. Rev. 1257 (1987). Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol44/iss4/6> as read on April 28, 2023.

The author of the article advocates expansion of the law so as to allow such a cause of action to exist in tort. It details that Maine has a statute that authorizes a private cause of action and that Oklahoma's courts have recognized that perjury may form the basis for civil damages. However, the article recognizes that a private cause of action did not exist in common law, nor is it recognized in the vast majority of states. The article sets out the reasoning for the failure to allow this cause of action to be pursued.

In *Doe v. Marion*, 373 S.C. 390, 395 S.E.2d 245 (2007), the Supreme Court of South Carolina wrote:

In determining whether a statute creates a private cause of action, the main factor is legislative intent:

The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute.... In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability. *Dorman v. Aiken Communications, Inc.*, 303 S.C. 63, 67, 398 S.E.2d 687, 689 (1990) (quoting *Whitworth v. Fast Fare Markets of South Carolina, Inc.*, 289 S.C. 418, 420, 338 S.E.2d 155, 156 (1985)). When a statute does not specifically create a private cause of action, one can be implied only if the legislation was enacted for the special benefit of a private party. *Citizens of Lee County v. Lee County*, 308 S.C. 23, 416 S.E.2d 641 (1992).

Allowing civil actions sounding in perjury or subornation of perjury would likely open a Pandora's Box of litigation. Therefore, this court believes that interpreting the statutes should be especially sensitive to ambiguities and that there is ambiguity because §16-9-50 deals with the disposition of fines. It is true that the language mentions bringing suit in a court of competent jurisdiction, but that language can be read in the context of seeking one-half of any fines imposed under the chapter, if the person aggrieved sues to recover it. Fines in common parlance are those imposed in the discretion of the court or some administrative agency. As the language in *Doe v. Marion* states, there is a general rule, and if the court has to evaluate whether to imply a private cause of action if the statute "was enacted for the special benefit of a private party." As stated above, this is a difficult question which may be interpreted differently that is being decided in this order. The perjury laws were clearly created for the welfare of the public. It is §16-9-50 which can be argued to provide a special benefit to a private party.

The Maine statute clearly creates a private cause of action.<sup>3</sup> However, it appears to deal with situations where a judgment has first been obtained against the party aggrieved by the

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<sup>3</sup> **Title 14: COURT PROCEDURE -- CIVIL**  
**Part 2: PROCEEDINGS BEFORE TRIAL**  
**Chapter 205: LIMITATION OF ACTIONS**  
 Subchapter 3: MISCELLANEOUS ACTIONS

perjury. That would appear to reduce the concern about multiple lawsuits going on simultaneously concerning the same basic dispute. The law review article cited above mentions collection of damages in terms of post-judgment actions.

While the court is concerned with the language in §16-9-50, it is convinced that South Carolina would follow the overwhelming majority of jurisdictions that do not have a private cause of action for perjury. Earlier in this order, the court stated that no ruling is made on whether anyone affected by perjury could use perjurious misconduct as evidence in a different cause of action recognized in this state. That seems a more plausible interpretation of South Carolina law. Obviously, the admissibility of such evidence would be subject to the immunities

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§871

**§870. Judgment by perjury; action on case**

**1. Action; within 3 years.** When a judgment has been obtained against a party by the perjury of a witness introduced at the trial by the adverse party, the injured party may, within 3 years after that judgment or after final disposition of any motion for relief from the judgment, bring an action against such adverse party, or any perjured witness or confederate in the perjury, to recover the damages sustained by the injured party by reason of such perjury. The judgment in the former action does not bar an action under this section.

[PL 2009, c. 187, §1 (NEW).]

**2. Specificity of claim.** A claim under this section must identify the specific testimony alleged to be false at the initial filing of the claim.

[PL 2009, c. 187, §1 (NEW).]

**3. Record; evidence.** A claim may not be submitted under this section solely on the same record as in the former trial. Evidence discoverable by due diligence before the trial cannot be introduced as new evidence to establish perjury.

[PL 2009, c. 187, §1 (NEW).]

**4. Standard of proof.** The plaintiff in an action under this section must prove the alleged perjury by clear and convincing evidence.

[PL 2009, c. 187, §1 (NEW).]

**5. Affirmative defense.** It is an affirmative defense to an action under this section that the plaintiff has no new evidence to present concerning the alleged perjury.

[PL 2009, c. 187, §1 (NEW).]

**6. Strictly construed.** The pleading and proof requirements of this section must be strictly construed.

[PL 2009, c. 187, §1 (NEW).]

granted in actions related to court. Further, the fact that no cases have been cited to the court that have imposed liability in a private cause of action for perjury bolsters the court's conclusion.

THEREFORE, IT IS ORDERED that the Complaint is dismissed under Rule 12(b)(6).

The counterclaims are not dismissed as that issue is not before the court.

AND IT IS SO ORDERED.

[Judge's electronic signature follows on separate page]



Lexington Common Pleas

**Case Caption:** Dennis Gallipeau VS Ryan McCabe

**Case Number:** 2023CP3200091

**Type:** Order/Dismissal

Circuit Judge (Code #2050)

s/ William P. Keesley

Electronically signed on 2023-04-28 19:47:14 page 7 of 7