

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Hon. William P. Keesley, Circuit Court Judge

Appellate Case No. 2022-001749

James John Todd Kincannon,

Appellant,

v.

Ashely Suzanne Griffith,

Respondent.

APPELLANT'S INITIAL BRIEF

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SC Court of Appeals

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STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court err by denying Appellant the opportunity to submit an amended complaint prior to dismissal where the denial was wholly based on the circuit court's erroneous finding that some other unspecified court concluded that Appellant had "engag[ed] in misuse of the legal process" in other litigation involving Appellant and Respondent. No other court has ever made such a finding, and nothing in the record of this case suggests otherwise.

2. Did the circuit court err by dismissing Appellant's Complaint on the basis of a family court consent divorce decree that Respondent was (and still is) indisputably in material breach of?

STATEMENT OF THE CASE

On May 30, 2019, Appellant filed the summons and complaint in this matter. See generally Complaint. Respondent filed an Answer on August 22, 2019. See generally Answer. The next day, Respondent filed a motion titled “Motion to Dismiss or for Summary Judgment.” See generally Motion to Dismiss or for Summary Judgment. The full text of Respondent’s motion is as follows:

You will please take notice that the Defendant Ashely Suzanne Griffith hereby moves to dismiss this Complaint with prejudice or for summary judgment as is deemed best by the Court.

In particular, this lawsuit alleges property disputes and oral agreements to distribute property which were made before the parties’ divorce. A copy of the parties’ divorce decree signed by The Honorable Peter Nuessle is attached as Exhibit A to this motion. The divorce decree resolves all property disputes and other disputes between the parties.

As a result, this lawsuit should be dismissed with prejudice pursuant to res judicata and collateral estoppel as the issues between the parties have already been resolved by way of a court order and agreement in domestic court.

Id.

Despite being a motion for summary judgment, Respondent’s motion was unaccompanied by an affidavit. See generally Record on Appeal.¹ Appellant timely filed an affidavit in opposition to the motion for summary judgment on November 19, 2019. See generally Affidavit of Plaintiff in Opposition to Defendant’s Motion for Summary Judgment. Respondent did not file a reply affidavit or any other materials in reply to Appellant’s affidavit. See generally Record on Appeal.

¹ The Record on Appeal in this matter contains the complete record of proceedings below: all filings made in the case plus the full transcript of the single hearing in the matter.

The circuit court heard Respondent's motion on November 19, 2019 and dismissed the Complaint, apparently pursuant to Rule 12(b)(6), SCRCF, by order filed December 13, 2019. See Order of December 13, 2019 at 14. The circuit court elected to treat Respondent's motion solely as a motion to dismiss, and not as a motion for summary judgment, per the "order" section of the Order of December 13, 2019: "THEREFORE, IT IS ORDERED that this Complaint is dismissed and the motion to dismiss the Counterclaim² is denied." Id.

Upon receiving notice of entry of the order, Appellant timely filed and served a motion for reconsideration on November 23, 2020.³ Respondent did not file any opposition to Appellant's motion for reconsideration. See generally Record on Appeal. The circuit court denied Appellant's motion for reconsideration by order filed November 17, 2022. See Order of November 22, 2022. The order is a general denial of the motion for reconsideration which does not specifically address any issues raised by Appellant in the motion for reconsideration. Id. Appellant timely filed and served a notice of appeal with this Court on December 13, 2022.

2 Respondent asserted a counterclaim against Appellant in the Answer. See generally Answer. Respondent's counterclaim is not part of this appeal.

3 The delay between the entry of the order dismissing the Complaint and Appellant's submission of the motion for reconsideration was caused by the fact that neither the Lexington County Clerk of Court nor Respondent's counsel timely notified Appellant of the entry of the order of dismissal, probably due to both erroneously believing that Appellant received electronic notice of the entry of the order. See Motion for Reconsideration at 1 n.1. Appellant is not a participant in the electronic filing system and did not receive notice of the entry of the order until November 11, 2020. Id. Upon receipt of the notice of entry of the order, Appellant immediately prepared, and timely filed and served, a motion for reconsideration on November 23, 2020, the tenth day after receipt of notice of entry of the order of dismissal (November 21 and 22, 2020 were a Saturday and Sunday). Id. Respondent did not challenge Appellant's (truthful) assertion regarding the date of receipt of notice (see generally Record on Appeal), and the circuit court found that Appellant timely filed and served the motion for reconsideration. See Order of November 22, 2022 at 1.

STANDARD OF REVIEW

This appeal involves a circuit court's refusal to permit Appellant to amend his Complaint at the outset of litigation solely based on an erroneous finding, wholly unsupported by the record below, that some other unspecified court had previously found Appellant to have engaged in "misuse of legal process." Appellant cannot locate a reported South Carolina case where this exact thing has happened, which makes it difficult to articulate a standard of review. Appellant respectfully submits that the standard of review should be de novo, since the question of whether a trial court can deny a party the opportunity to amend a complaint based on an erroneous belief that some other court has found that party to have misused legal processes in other litigation appears to be a question of law.

This appeal also involves a circuit court's use of a family court consent divorce decree to bar Appellant's claims. Appellant claims this was error because Respondent was (and still is) in material breach of the family court consent decree and, therefore, the circuit court should not have permitted Respondent to use the family court consent divorce decree to attack Appellant's claims in circuit court. The standard of review for this issue also appears to be de novo, and the closest South Carolina case on point that Appellant has been able to locate is Doe v. Bishop of Charleston, 407 S.C. 128, 134-35, 754 S.E.2d 494 (2014), where the South Carolina Supreme Court applied a de novo standard to interpretation of a court-approved class action settlement.

ARGUMENTS

I.

The circuit court erred by denying Appellant the opportunity to submit an amended complaint prior to dismissal. The denial was wholly based on the circuit court's erroneous finding that some other unspecified court concluded that Appellant had "engag[ed] in misuse of the legal process" in other litigation involving Appellant and Respondent. No other court has ever made such a finding, and nothing in the record of this case suggests otherwise.

The circuit court in this matter dismissed Appellant's Complaint for pleading errors. See Order of December 13, 2019 at 2, 14 ("THEREFORE, IT IS ORDERED that this Complaint is dismissed[.]") The circuit court judge that Appellant's Complaint was deficient in several different ways, but also found that ordinarily he would permit Appellant to amend the Complaint. Id. at 2. However, the circuit court judge ruled that Appellant should not be permitted an opportunity to submit an amended complaint in this matter for one and only one reason: the circuit court judge believed, erroneously, that some other unspecified court had previously found Appellant to be engaged in "misuse of the legal process" against Respondent. Id. at 2.

Specifically, the circuit court stated:

This case may present the most convoluted status of any this court has ever considered, and the Complaint is a hodgepodge of references to various potential legal theories of recovery. The ones specifically mentioned are contract, rescission of contract, and declaratory judgment, though there are also vague references to unnamed equitable remedies. In his Complaint, the plaintiff [Appellant] asserts that he is unable to specify all the causes of action that he might be using to seek recovery because he needs to know what the defendant's responses will be. In addition, the Complaint has a significant section where the plaintiff poses a series of questions rather than pleading proper assertions. This is not proper pleading. Normally, the court would allow amendment,

but this lawsuit is part of a pattern of repeated legal actions filed by the plaintiff against his former wife. In at least one of those actions, a judge has determined that the plaintiff is engaging in misuse of the legal process.

Id.

The circuit court's finding that some other unspecified court had "determined that [Appellant] is engaging in misuse of the legal process" against Respondent was plainly erroneous. The record in this case contains only one order from another judge, and that order contains absolutely no findings of any kind that Appellant has *ever* misused the legal process in litigation of engaged in any other type of litigation misconduct in matters involving Respondent.⁴ See generally Divorce Decree. That order is a consent divorce decree from the Hon. Peter Nuessle of the Lexington County Family Court, and there are absolutely no adverse findings of that nature against Appellant in that order. Id.

Quite frankly, Appellant has absolutely no idea why the circuit court in this matter came to believe that some other court ruled that Appellant engaged in what the circuit court termed "misuse of legal process" against Respondent. The order granting dismissal contains no citation to any such court order, either in the record below or outside of it. See generally Order of December 13, 2019. Appellant is entirely at a loss to explain this finding of the circuit court, except to say that it is plainly and obviously erroneous and must be corrected on appeal.

To correct this erroneous finding, this Court must vacate the circuit court's

⁴ Obviously, this Court's review is limited to what appears in the record below. That being said, Appellant also respectfully and truthfully represents to this Court that there are no court orders outside the record below that conclude that Appellant has in any way engaged in "misuse of legal process" in matters involving Respondent or any other sort of litigation misconduct in matters involving Respondent.

order dismissing Appellant's Complaint and remand the case with instructions to the circuit court to permit Appellant to file an amended complaint. The circuit court obviously and unambiguously concluded, correctly, that Appellant should be given an opportunity to amend the Complaint prior to dismissal. The only reason the circuit court did not give Appellant such an opportunity was the erroneous finding that some other unspecified court had previously found that Appellant engaged in "misuse of process" in litigation with Respondent. Because that finding is plainly and obviously erroneous, this Court must remand this case to the circuit court with instructions to permit Appellant to file an amended complaint and proceed from that point with further litigation.

The circuit court was correct to conclude that in ordinary circumstances, Appellant should be permitted an opportunity to file an amended complaint, in light of the circuit court's conclusion that Appellant's complaint was defective, see Order of December 13, 2019 at 2. Because this ruling came at the outset of litigation (Respondent filed the motion to dismiss one day after answering), Rule 15, SCRCP would obviously entitle Appellant, under normal circumstances, an opportunity to amend the Complaint. The circuit court found that Appellant should ordinarily be entitled to submit an amended complaint, but erroneously concluded that Appellant should be denied that opportunity based on an erroneous finding that some other unspecified court had ruled that Appellant engaged in "misuse of process" in other litigation involving Respondent.

Under these circumstances, this Court must remand the case to the circuit court with instructions to allow Appellant to submit an amended complaint. There

is simply no other alternative.

Finally, it bears noting that there is absolutely no South Carolina authority that permits a circuit court to forbid a party's effort to amend a pleading on the grounds that some other court has found that party to have "misused" legal process in other litigation. Rule 15, SCRCF, simply does not permit a court to bar a litigant from amending a pleading at the early stages of litigation on such grounds. South Carolina law certainly does provide remedies for certain types of misuse of legal process. South Carolina law recognizes the abuse of process and malicious prosecution torts along with Rule 11, SCRCF and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Section 15-36-10 et seq., all provide remedies to victims of misuse of legal process. None of these provisions of law permit a court to deny a litigant the opportunity to amend a pleading at the outset of litigation because that litigant has been found to have engaged in "misuse" of legal process in some other case. This Court need not delve into this particular point, as it is factually indisputable in this case that no other court has found Appellant to have misused legal processes in other litigation, but even if such a thing had happened, Rule 15, SCRCF would not permit the circuit court to deny Appellant an opportunity to amend the complaint in this case.

II.

The circuit court erred by dismissing Appellant's Complaint on the basis of a family court consent divorce decree that Respondent was (and still is) indisputably in material breach of.

This Court need not address any issues beyond the pleading amendment issue addressed in Section I. If the Court agrees with Appellant on that particular issue, the Court may remand the case to the circuit court with instructions to permit Appellant to submit an amended complaint and proceed with the litigation from that point. However, should the Court disagree with Appellant on the amendment issue, the Court should consider the following argument as to why the circuit court erred in dismissing Appellant's Complaint.

In considering Respondent's motion to dismiss, the circuit court considered a family court consent divorce decree that was outside the four corners of Appellant's Complaint. The circuit court made reference to this in the following portion of the Order of December 13, 2019: "Dismissal on the pleadings is an especially drastic remedy. It is generally limited to the four corners of the pleadings themselves. Here, the court agrees to look at matters beyond the pleadings, as seemingly requested by both parties." Order of December 13, 2019 at 2.

Appellant had no objection to the circuit court considering the family court consent decree in connection with Respondent's motion to dismiss, as court orders from other cases represent one of the traditional exceptions to the general rule that a court may not consider anything beyond the four corners of a complaint at the Rule 12(b)(6) dismissal stage.

The problem, however, was that the circuit court either failed to consider, or erroneously elected not to consider, Appellant's position as to why Respondent could not lawfully rely on the family court consent divorce decree in Respondent's effort to dismiss the complaint in this circuit court action. Appellant's position was that Respondent was in material and fundamental breach of the family court consent divorce decree and, therefore, could not rely on it in other litigation. Appellant articulated his argument on these points at the hearing, see Transcript of Hearing of November 19, 2019 at CITE, and Appellant also submitted an affidavit—unopposed by Respondent—establishing that Respondent was in material and fundamental breach of the family court consent divorce decree prior to the hearing in this matter. See generally Appellant's Affidavit.

In particular, the Affidavit established that Respondent was in breach of the family court consent divorce decree by failing to deliver title to Appellant of a Nissan Xterra automobile, as required by the consent divorce decree. See Appellant's Affidavit at 7-9:

**DEFENDANT'S UNCLEAN HANDS REGARDING THE
FAMILY COURT DIVORCE DECREE PROHIBIT HER
FROM USING IT IN THIS LITIGATION**

21. Defendant cannot rely on the final divorce decree in this litigation because she has materially violated the terms of the final divorce decree by failing to transfer marital property to Plaintiff that the order designates as Plaintiff's—in particular, a Nissan Xterra automobile that was indisputably marital property and that Plaintiff is indisputably awarded by the clear and unambiguous terms of the divorce decree.

22. Plaintiff has fully complied with all provisions of the divorce decree.

23. Accordingly, Defendant has unclean hands with respect to the divorce decree and, pursuant to the doctrine of unclean hands and related legal doctrines, cannot use the divorce decree to

advance her position in this litigation.

Id. at 7-8. Appellant's Affidavit goes to establish, in sufficient factual detail, that Respondent was in violation of the family court consent divorce decree by virtue of her failure to sign over the title of the Nissan Xterra to Appellant. Id. at 8-9.

Respondent and her counsel did not deny, refute, or challenge Appellant's allegations and argument on this matter in any way, either by way of a reply affidavit or by argument or testimony at the hearing. See generally Record on Appeal.

Despite the foregoing, the circuit court failed, or refused, to consider Appellant's unchallenged position that Respondent could not use the family court consent divorce decree in the circuit court litigation because Respondent was in material and fundamental breach of the consent divorce decree. The circuit court's order does not address Appellant's argument and factual submission (by affidavit) in any way. See generally Order of December 13, 2019.

This was error. While there is nothing inherently wrong with a trial court considering other courts' orders at the Rule 12(b)(6) stage, it is clear error for the court to ignore, or refuse to consider, parties' counter-submissions as to why a particular court order cannot be properly relied on—particularly where a party's counter-submission is unopposed and unchallenged by opposing parties who seek to rely on the challenged court order.

Appellant would like to cite authority on this point, but Appellant cannot find a single reported case where anything quite like this has happened. It is certainly uncommon for a party seeking a Rule 12(b)(6) dismissal to submit a

court order from another case in support of its motion, and Appellant cannot find any case where the plaintiff provided a counter-submission arguing that that court order could not be relied upon that the court then ignored or refused to consider.

Despite the paucity of authority on this point, basic and fundamental due process principles prohibit trial courts from doing what the circuit court did in this case. There are rare cases where a party moving to dismiss a complaint pursuant to Rule 12(b)(6) or a similar demurrer-type rule may ask the court to consider material outside the complaint, in particular a court order from other litigation. This is perfectly proper in ordinary cases. But a court that permits a defendant to use a different court's order as a sword at the Rule 12(b)(6) stage is also required—by fundamental principles of law and due process—to permit the plaintiff to submit any and all legal argument and evidence in opposition to the court's use of the other court's order in dismissal of the complaint.

This proposition of law is so basic and obvious that it does not appear to have generated any reported opinions, in South Carolina or elsewhere. There are cases where a court may properly permit a defendant to submit something outside the four corners of a complaint, including but not limited to a court order. In those cases, it is patently obvious that the court must also permit the plaintiff to challenge any such submissions for any potentially valid reason. This is plainly and obviously required by due process. Appellant regrets being unable to provide this Court with a citation to prior caselaw establishing this obvious principle of law, but it appears this particular proposition of law is so obvious that no party to a reported American case has ever challenged it in a reported case.

In this particular case, not only did Appellant challenge Respondent's claim that the family court consent divorce decree should be preclusive of Respondent's dismissal argument, Appellant explained why in detail and provided an unopposed affidavit explaining that Respondent was in material and fundamental breach of the family court consent divorce decree, and Appellant made clear reference to this at the hearing. CITE. Respondent and her counsel did not challenge Appellant's contentions in any way. Respondent did not file a counter-affidavit, nor did Respondent's counsel deny Appellant's claims regarding Respondent's breach of the consent divorce decree at the hearing. See generally Record on Appeal, in particular the Transcript of November 19, 2019.

In that particular context, the circuit court plainly erred. The circuit court erred by failing, or refusing, to consider Appellant's arguments and factual submission as to why Respondent could not rely on the family court consent divorce decree. The circuit court further erred by failing to rule for Appellant on that issue, since Appellant's argument and factual submission on that issue were completely and totally unopposed and unchallenged by Respondent.

There are rare situations where a court can reject an unopposed submission by a party, but this case does not fall within any of those rare situations. In this case, Respondent submitted a family court consent divorce decree in support of a circuit court motion to dismiss. Appellant responded by presented facts showing that Respondent was in material and fundamental breach of the family court consent divorce decree and argument that under those circumstances, the circuit court could not use the family court consent divorce

decree as a means to dismiss Appellant's complaint. Respondent did not challenge or respond to Appellant's factual submission or argument in any way. Accordingly, the circuit court plainly erred by ruling for Respondent on that issue. When a party submits a consent decree in support of an argument, and that party is indisputably in material breach of the terms of that consent decree, a court must refuse to consider the consent decree when ruling on the underlying issue. Again, Appellant has not found any caselaw on this unusual question, but that is almost certainly because very few defendants and defense counsel are brazen enough to suggest that a lawsuit should be dismissed on the basis of a consent decree in other litigation that the defendant has materially breached.

Accordingly, Appellant respectfully requests this Court, on remand, instruct the circuit court to disregard the family court consent divorce decree at the Rule 12(b)(6) stage and further instruct the circuit court to rule that, on the basis of Appellant's unopposed and unchallenged submissions, that Respondent is in material and fundamental breach of the family court consent divorce decree and is not permitted to use the family court consent divorce decree in any manner, as a sword or as a shield, in the circuit court litigation.

There does not appear to be a single reported American case involving res judicata, collateral estoppel, or any other preclusion doctrine that permits a litigant to use a consent decree that the litigant is in material breach of as a sword or a shield in other litigation. If such a case exists, Appellant invites Respondent's counsel to cite it in Respondent's Brief. In the absence of persuasive authority on that point, Appellant respectfully submits that this Court must rule for Appellant

on this issue, as the record below clearly indicates that Respondent is indisputably in material and fundamental breach of the family court consent divorce decree and, therefore, cannot under any circumstances use that divorce decree as a sword or a shield in the circuit court litigation.

ISSUE PRESERVATION


Appellant respectfully submits that all issues raised in this Appellant's Brief were properly raised by Appellant below in the initial argument on these matters and were again raised by way of a timely motion for reconsideration that was denied by the circuit court.

CONCLUSION

Appellant respectfully requests the Court vacate the circuit court's order granting judgment to Respondent and remand the case with instructions to the circuit court to permit Appellant to submit an amended complaint. Appellant further respectfully requests the Court instruct the circuit court to prohibit Respondent from utilizing the family court consent divorce decree, described above, in any way in the litigation due to Respondent's material and fundamental breach of the family court consent divorce decree, which was properly established by Appellant in litigation below by way of an affidavit and argument which was not disputed or challenged by Respondent in any way.

June 21, 2023

Respectfully submitted,


s/James John Todd Kincannon
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In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

JUN 26 2023

SC Court of Appeals

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001501

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v.

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Respondents.

CERTIFICATE OF SERVICE

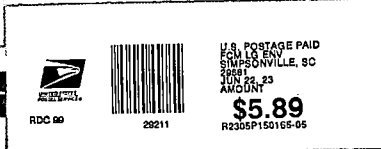
The undersigned Appellant hereby certifies that he has, on the date below,
properly served the foregoing on opposing counsel at the address submitted by
opposing counsel to the Court for service in this case.

June 21, 2023


s/James John Todd Kincannon
James John Todd Kincannon

11/6/20

117 Fern Springs Way
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Large handwritten scribble or signature

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