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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

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.

RESPONDENTS' RETURN TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Respondents submit this Return in Opposition to the Petition for Writ of Certiorari. The Petition should be denied.

A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons. *See generally Ellison v. State*, 382 S.C. 189, 676 S.E.2d 671 (2009); *In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases,* 321 S.C. 563, 564, 471 S.E.2d 454 (1990) (holding that this Court reviews decisions of the court of appeals by way of writ of certiorari only where special reasons justify exercise of that power). In determining whether special reasons for review exist, this Court considers the following five criteria: (1) where there are novel questions of law; (2) where there is a dissent in the decision of the court of appeals; (3) where the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court; (4) where substantial constitutional issues are directly involved; and (5) where a federal question is included and the decision of the court of appeals conflicts with a decision of the United States Supreme Court. *Haggins v. State*, 377 S.C. 135, 137 n.2, 659 S.E.2d 170, 170 n.2 (2008); Rule 242(b), SCACR.

Furthermore, the Supreme Court will only review errors of law, and factual findings will not be reviewed "unless wholly unsupported by the evidence." *Hollman v. Woolfson,* 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009); *Lewis v. Lewis*, 392 S.C. 381, 400, 709 S.E.2d 650, 660 (2001) (Pleicones, J., dissenting); *City of Columbia v. S.C. Pub. Serv. Comm'n*, 242 S.C. 528, 532, 131 S.E.2d 705, 707 (1963) ("The superior court, in considering the record of the inferior tribunal, must confine its review to the correction of errors of law only and not review findings of fact except when such findings are wholly unsupported by the evidence").

Kincannon does not identify any specific misapprehension of fact or law by the court of appeals. Instead, the Petition is a re-argument of the same points from: (a) the Petition for Rehearing, and (b) his original Brief. None of the criteria of Rule 242(b) for special review are met.

Kincannon seeks to reargue a case in which his Complaint was dismissed by the trial court, the underlying decision was affirmed by the court of appeals without the need for oral arguments and his petition for rehearing of the decision was denied.

The Opinion of the Court of Appeals does not contain any error of law nor include any unsupportable evidence. This Petition does not address a novel question of law. Furthermore, the Opinion did not contain a dissent, it did not conflict with a prior decision of this Court, and it did not include a federal question. This Court has not been presented with any ground that would justify a decision to grant the Petition.

COUNTER-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, Ashely 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 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

[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.

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, 2019, Moore Taylor filed a Memorandum in Support of its Motion to Dismiss. On July 2, 2019, Judge Stilwell granted Respondents' Motion to Dismiss with Prejudice. 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 and the Order denying Kincannon's motion for reconsideration of the dismissal order.

The Court of Appeals affirmed Judge Strickland by unpublished opinion 2023-UP-70 on February 22, 2023. Mr. Kincannon petitioned for Certiorari with this Court. This memorandum is submitted in response to that petition.

ARGUMENT

I. INTRODUCTION

On Page 4 of his Petition for Certiorari, Mr. Kincannon includes the following statement:

> 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.

As a result, Kincannon has abandoned all claims except for his abuse of process claim against his ex-wife Ashely Griffith. With that in mind, Respondents will only respond as to Ashely Griffith. And, the response will only address Mr. Kincannon's claim for abuse of process.

II. 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 the Motion to Dismiss with Prejudice. Judge Stilwell had the discretion to dismiss a complaint with or without prejudice. He properly decided to grant the 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 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 regarding 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 Court stated 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 would 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.

Similar to *Spence*, Kincannon failed to present any additional factual allegations or theories of recovery which would give rise to a valid Complaint and compel the Court to allow him leave to amend. Kincannon listed eleven ways in which he would "cure" the pleading defects. However, he listed no additional facts and no additional theories of recovery. Additionally, Kincannon states he "would include substantially more facts," but he does not list or include any. 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.

In his Petition for Certiorari, Kincannon has now included what appears to be new allegations he would like to assert against Ms. Griffith. These allegations were not presented to the trial court or the Court of Appeals and should not be considered in this Petition for that reason.

III. JUDGE STILWELL CORRECTLY DISMISSED KINCANNON'S CLAIM FOR ABUSE OF PROCESS.

Kincannon contends that Judge Stilwell "dismissed a complaint that Appellant did not file." 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.

Kincannon's first alleged misapprehension was the Court's understanding of "process." According to Kincannon, the process allegedly abused was the plea bargaining process itself, not the original charge brought against him for criminal domestic violence. 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." Ms. Griffith did not enlist the Solicitor in a scheme to condition the dismissal of a criminal charge against Kincannon, and she does not have the ability to make the Solicitor's office prosecute or not prosecute a crime. Because Ms. Griffith does not have the power to control the Solicitor, she 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*, this Court 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 declined 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 this Court reversed. *Id.* The Court reasoned that it has always looked with favor upon restitution and reconciliation. *Id.* It 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.

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. 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. There is no allegation that Ms. Griffith had control of the Solicitor's decision to offer Kincannon a plea bargain. This duty resides entirely with the solicitor.

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 Ms. Griffith suggested that the Solicitor drop charges in exchange for the return of her dog, this is allowed by the *Johnson* case which encourages 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 Ms. Griffith 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. 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." (App. p. 5). 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.[2] 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. 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.

(App. p. 10).

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.

Kincannon next alleges Judge Stilwell relied on knowledge of proceedings outside of the record. 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,

[2] "It is also curious to note that there is no contest from any party but that probable cause existed to initiate the prosecution." (App. p. 5).

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. 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. 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.[3] This was proper and within Judge Stilwell's discretion.

CONCLUSION

The Circuit Court properly granted Ms. Griffith's Motion to Dismiss with Prejudice against Mr. Kincannon based on the facts and the pleadings. The Court of Appeals correctly affirmed this order. This Court should deny his Petition for Certiorari.

Respectfully submitted,

[Signature block to follow]

[3] "It is simply contrary to sound public policy to allow this lawsuit, given all attendant and obvious circumstances, to proceed against faultless third parties." (App. p. 10)

s/James Edward Bradley _____
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