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**Aug 31 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM SUMTER COUNTY  
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

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Appellate Case No. 2023-000246

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Larry R. Hoffman and Allen Jackson Barnes, of whom  
Allen Jackson Barnes is  
Respondent, Respondent,

v.

James E. Fender, Appellant.

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INITIAL BRIEF OF RESPONDENT ALLEN JACKSON BARNES

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**STATEMENT OF ISSUES ON APPEAL**

1. DID THE AMENDED COMPLAINT AND THE INFERENCES DRAWN THEREFROM SET FORTH FACTS OF DAMAGES AND ACTS SUFFICIENT TO OVERCOME A MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)?
2. WAS THE CIRCUIT COURT'S RULING BASED ON MATERIAL OUTSIDE THE AMENDED COMPLAINT?

## STATEMENT OF THE CASE

Appellant James E. Fender (“Fender”) brought this case against Larry R. Hoffman (“Hoffman”) and Allen Jackson Barnes (“Barnes”) by the filing of a Summons and Complaint on March 22, 2022. Fender pleaded causes of action against Barnes for breach of contract and conspiracy. On April 11, 2022, Barnes filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

On September 8, 2022, Circuit Court Judge Benjamin H. Culbertson granted Barnes’ Motion to Dismiss as to the breach of contract cause of action finding Barnes was neither a party to the Settlement Agreement nor an agent of Hoffman for purposes of the Settlement Agreement and that Fender had failed to plead these facts. Judge Culbertson did give Fender fifteen (15) days to amend his Complaint to clarify the civil conspiracy claim against Barnes. Fender filed the Amended Complaint on September 22, 2022, with the addition of three new exhibits to the Amended Complaint.

On October 4, 2022, Barnes filed a Motion to Dismiss the Amended Complaint pursuant to Rule 12(b)(6). On November 7, 2022, Judge R. Ferrell Cothran heard the Motion to Dismiss. Following the hearing, Judge Cothran asked for a copy of the Settlement Agreement with the confidentiality provision which is at issue. He also asked Barnes for some additional information regarding his representation of Hoffman and when that representation ended. Judge Cothran issued his order granting Barnes’ Motion to Dismiss the Amended Complaint on January 3, 2023. His ruling was confined to the four corners of the Amended Complaint. While he may have had additional information at his disposal his order specifically excluded

those materials. His ruling referred only to the Amended Complaint. Judge Cothran did not base his ruling on anything outside of the Amended Complaint. Judge Cothran denied Fender's Motion to Reconsider on January 18, 2023.

### **FACTS**

The facts that are applicable to Judge Cothran's ruling are really very simple. The Amended Complaint in this matter alleges the following: Barnes withdrew as counsel for Hoffman on or about September 4, 2019. (Amended Complaint ¶ 15). Barnes later contacted William Johnson ("Johnson") and told him of the litigation, the settlement, and that it was his "understanding" that Fender was getting money. (Amended Complaint Exhibit B) Johnson then researched public information available to him, including the name of Fender's Counsel of Record, and contacted them. *Id.* Johnson then wrote counsel of record and told them that he understood they "may be" in possession of funds "owned by James E. Fender." (Amended Complaint Exhibit C). These facts all form the basis of Judge Cothran's Order Dismissing the Amended Complaint.

In his Order, Judge Cothran makes the following facts as a prelude to his ruling, and all of the facts are gleaned from the Amended Complaint, and its Exhibits set forth in the foregoing paragraph:

Fender and Hoffman had previously been involved in litigation and reached a Settlement Agreement in 2021 resolving that case. The Settlement Agreement contained a confidentiality provision. Barnes had no involvement in any way with the Settlement Agreement nor did he know of the confidentiality provision. Barnes did learn the case had settled an informed counsel for the Bank of Greeleyville. William Johnson ("Johnson") of the same. Johnson then inquired about the details of the settlement with Fender's then attorney Nekki Shutt. As a result of this conversation, Fender was required to pay some money to the Bank of Greeleyville from the settlement proceeds.

(Order Granting Defendant Allen Jackson Barnes' Motion to Dismiss the Amended Complaint) Every single fact here can be found in the Amended Complaint and its Exhibits. Furthermore, Judge Culbertson had previously dismissed the Breach of Contract from the original Complaint because Barnes was not a part of the settlement.

Judge Cothran goes on to rule that “[n]owhere does Fender plead he did not receive all of the money agreed to under the prior litigation. He only plead he did not get to maintain it, although he admits it was a legitimate debt.” (Order Granting Defendant Allen Jackson Barnes' Motion to Dismiss the Amended Complaint) Fender pleads that the funds rightfully belonging to him were diverted to the Bank of Greeleyville. (Amended Complaint ¶). The Amended Complaint is devoid of any facts which show the debt to Bank of Greeleyville was not legitimate or that the funds were not owned by James E. Fender. Likewise, Fender fails to plead what law, rule, obligation, or duty Barnes violated or breached in revealing information to Johnson.

### **THE STANDARD OF REVIEW**

In Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247–48 (2007) the Supreme Court of South Carolina said the following with regard to the standard of review: “In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCPP, the appellate court applies the same standard of review as the trial court.” Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct.App.2001). “In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in

the complaint.” Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). “If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper.” Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995). “The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).

## ARGUMENT

### **I. THE TRIAL COURT PROPERLY RULED ON THE MOTION TO DISMISS SINCE NO FACTS COULD SUPPORT A FINDING OF DAMAGES OR ACTS NECESSARY TO PROVE A CONSPIRACY**

The elements for a civil conspiracy claim must establish (1) the combination or agreement of two or more persons, (2) to commit an unlawful act or a lawful act by unlawful means, (3) together with the commission of an overt act in furtherance of the agreement, and (4) damages proximately resulting to the plaintiff. Paradis v. Charleston Cnty. Sch. Dist., 433 S.C. 562, 861 S.E.2d 774, 781 (S.C. 2021).

Fender has not plead that he was damaged. He very carefully pleaded that the money he was to be paid as part of the settlement was “diverted” to a third party. By diversion he means that the money was paid to him and then he was required to pay a legitimate debt to the Bank of Greeleyville. There are no inferences that can be drawn from the pleadings that will support a theory that he was damaged. Indeed, in his letter to Fender’s Counsel of Record (Exhibit B to Amended

Complaint), Johnson says it is his understanding that counsel has possession of funds “owned by James E. Fender. If counsel did not have possession of funds “owned” by James E. Fender then they would not have been obligated to pay the Bank of Greeleyville. Clearly Fender does not like the fact that he had to pay a legitimate debt owing by him, but he cannot dispute he got the money. Being required to pay a legitimate debt is not the same as not receiving damages paid to you. No theory of liability will support the fact that he was damaged. It did not happen.

Likewise, Barnes did not commit an unlawful act or a lawful act unlawfully and Fender has not plead it. In his initial brief Fender boils down these allegations as follows: “Fender set forth factual allegations to support an inference that Barnes and Hoffman committed an unlawful act against him, specifically fraud, by entering into the settlement agreement with a plan to divert some or all of the funds that Fender was due to receive for the purposes of denying him the benefit thereof. (Initial Brief of Appellant p. 8). By his own pleading, Fender admitted that Barnes was not a party to the Settlement Agreement. (Amended Complaint ¶ 15). No inference can be drawn, therefore, that Barnes “entered into the settlement.” He entered into nothing. This is further supported by the fact that Judge Culbertson dismissed the breach of contract claim against Barnes.

Fender goes on to state: “Hoffman furthered this scheme by breaching the confidentiality provision in the settlement agreement when he revealed the terms of the settlement agreement to Barnes, who then disclosed that information to a third party.” (Initial Brief of Appellant, p.8). Although he admits that this is not an unlawful act. Id. at p. 9. He seems to somehow then assert that while it wasn’t

unlawful to tell Johnson of the settlement because Hoffman intentionally breached the contract by telling Barnes the “means” are somehow unlawful. That does not even make sense. If it’s not unlawful to tell Johnson the inquiry stops there. How Barnes got the information is irrelevant if using the information is not unlawful.

“[A]n attorney is [generally] immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client Gaar v. N. Myrtle Beach Realty Co., 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct.App.1986)). However, the South Carolina Supreme Court cautions that “an attorney may be held liable for conspiracy where, in addition to representing his client, he breaches some independent duty to a third person....” Stiles v. Onorato, 318 S.C. 297,300, 457 S.E.2d 601, 602 (1995). It is well established that Barnes had no duty to Fender.

**II. THE TRIAL COURT’S DECISION DID NOT RELY ON OR REFER TO ANYTHING OUTSIDE OF THE PLEADINGS.**

It is no coincidence that there is no discussion in Appellant’s Brief as to how Judge Cothran’s ruling relied on the Settlement Agreement and the information from Barnes after the hearing on the Motion to Dismiss because they did not enter the decision. Just because a judge may look to information outside the pleadings when ruling on a Motion to Dismiss does not automatically turn the motion into one for summary judgment. Rule 12 of the South Carolina Rules of Civil Procedure specifically states that if the information is excluded then the judge need not treat the motion as one for summary judgment nor does he have to give the non-moving party the ability to respond. Only if his ruling relies on the

information outside of the pleadings does the motion convert to summary judgment.

Judge Cothran's ruling is confined to the allegations set forth in the Amended Complaint. Judge Cothran's ruling is "bottomed and premised solely on" the allegations set forth by Fender as required by Williams v. Condon, 347 S.C. at 233, 533 S.E.2d at 499. The order says it relies solely on the pleadings and it never references the alleged extraneous material Fender argues he reviewed.

### CONCLUSION

Judge Cothran rightfully found that no inference from the Amended Complaint can establish damages or an act supporting a civil conspiracy. Judge Cothran did not rely on anything outside of the pleadings even if he was given such information. It did not form the basis for his ruling or factor into the decision in any way. The Order Granting Allen Jackson Barnes' Motion to Dismiss the Amended Complaint should be affirmed.

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s/ Allen Jackson Barnes

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v.

James E. Fender, Appellant.

PROOF OF SERVICE

I certify that I have served this 31<sup>st</sup> day of August 2023, a copy of Respondent's Initial Brief by electronic mail to the addresses set forth in the Attorney Information System:

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SC Court of Appeals

August 31, 2023

**VIA EMAIL ONLY**

Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
Post Office Box 11629  
Columbia, South Carolina 29211

Re: *James E. Fender v. Larry R. Hoffman, et al.*  
Appellate Case No.: 2023-000246

Dear Ms. Kitchings:

Attached please find Initial Brief of Respondent and Proof of Service. While the documents were due yesterday, I was required to evacuate my office at 3:30 p.m. and was not able to get them scanned and ready for service by that time. This morning my office was hampered by technology issues which were only just remedied by Herald Office Supply.

I am not filing a Designation of Matter as I do not have any additional matters to designate beyond that which Appellant designated.

*s/ Allen Jackson Barnes*

Allen Jackson Barnes

cc: ALL BY EMAIL  
Desa Ballard, Esquire  
Harvey Watson, Esquire  
Haley Hubbard, Esquire