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**Oct 30 2023**

**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM SUMTER COUNTY  
R. FERRELL COTHRAN, JR., CIRCUIT COURT JUDGE

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Appellate Case No. 2023-000246

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James E. Fender, .....Appellant,

v.

Larry R. Hoffman and Allen Jackson Barnes, Defendants,  
Of Whom Allen Jackson Barnes is the .....Respondent.

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**FINAL REPLY BRIEF**

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## **STATEMENT OF ISSUES ON APPEAL**

- I. Did the Amended Complaint and the inferences drawn therefrom set forth sufficient facts of damages and acts to overcome a motion to dismiss pursuant to Rule 12(b)(6), SCRPC?
  
- II. Was the Court's ruling and order dismissing the Amended Complaint based on material outside the Amended Complaint?

## ARGUMENT

### **I. THE TRIAL COURT ERRED IN DISMISSING THE AMENDED COMPLAINT WHEN THERE WERE SUFFICIENT FACTS TO SUPPORT A FINDING OF DAMAGES OR ACTS NECESSARY TO ASSERT A CLAIM FOR CONSPIRACY.**

To maintain a claim for civil conspiracy, “a Plaintiff 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 (S.C. 2021) (Emphasis added).

It is clearly set forth in Fender’s Amended Complaint that the combined actions of Hoffman and Barnes, followed by Barnes’ overt act of disclosing the settlement agreement, proximately resulted in the forfeiture of Fender’s funds that were secured by the settlement agreement. In his Initial Brief, Barnes asserts that Fender failed to establish the commission of an unlawful act or lawful act by unlawful means and failed to plead sufficient facts to support a finding of damages for purposes of maintaining a claim against him for civil conspiracy. Regarding the second element of civil conspiracy, this is fully addressed in the Initial Brief of Appellant, therefore this argument focuses specifically on the element of damages. Fender alleges several times in the Amended Complaint that he suffered damages as a result of the conspiracy between Barnes and Hoffman. The following paragraphs within the Amended Complaint set forth facts which support damages in this case:

28. As a direct and proximate result of the breach of confidentiality by Defendant Hoffman, by and through his agent Barnes, the damages money due to Fender from Hoffman was diverted to a third party, which caused the settlement funds paid by Hoffman to Fender to deprive Fender of the benefit of the settlement funds Fender had agreed to received to resolve his dispute with Hoffman.

38. The result of the conspiracy between Hoffman and Barnes were unlawful conspiracy to commit fraud against Fender which did in fact damage Fender and defraud him. Fender has been damaged as a result of the conspiracy between Barnes and Hoffman.

39. On information and belief, the conspiracy between Hoffman and Barnes as intended to and did, in fact, cause substantial financial harm to Fender, whose settlement proceeds from the 2018 settlement had to be diverted to the Bank of Greeleyville after Hoffman by and through Barnes breached the confidentiality agreement in the settlement agreement.

41. As a direct and proximate result of the intention [sic] conspiracy between Barnes and Hoffman, Fender sustained substantial financial loss.

(R. p. 63; pp. 64-66 ¶¶ 28, 33-39, 41).

Fender and Hoffman entered into a settlement agreement in which Hoffman agreed to pay Fender in order to resolve the prior lawsuit between them. While Hoffman made payments to Fender pursuant to the settlement agreement, Hoffman and Barnes deprived Fender from receiving a significant portion of these funds by successfully conspiring to have the expected settlement proceeds diverted to the Bank of Greeleyville. Simply stated, Fender received less money than he otherwise would have received had Barnes and Hoffman not interfered, thus he was damaged. When properly considered in a light most favorable to Fender, the Amended Complaint sets forth facts supporting damages sufficient to survive a Motion to Dismiss pursuant to 12(b)(6), SCRPC. Accordingly, the trial court erred in finding that Fender failed to plead damages.

## **II. THE TRIAL COURT ERRED IN CONSIDERING INFORMATION OUTSIDE OF THE PLEADINGS AND RELYING ON THAT INFORMATION IN DISMISSING THE AMENDED COMPLAINT PURSUANT TO RULE 12(B)(6), SCRPC.**

At the conclusion of the hearing on Barnes's Motion to Dismiss the Amended Complaint, Judge Cothran did not issue a ruling, and instead took the matter under advisement and informed the parties that he would read the file and get back with the parties. (R. p. 103, lines 2-3). On November 21, 2022, Judge Cothran requested additional information from Barnes regarding the status of Barnes's representation of Hoffman at the time the settlement agreement was entered into, and the

origin of Barnes's knowledge of the settlement and its terms. (R. p. 107). Barnes then provided Judge Cothran with a detailed response explaining how he came to learn of the settlement, which he claimed was through Mr. Hoffman's attorney. (R. p. 108).

On January 3, 2023, the trial court issued an order granting Barnes's Motion to Dismiss, specifically finding that "Barnes was not involved in any way with the Settlement Agreement, nor did he know of the confidentiality provision contained within." (R. p. 7). The Order further states that "Barnes had no knowledge of the Settlement Agreement or its terms, including the confidentiality provision..." (*Id.*). Compare these excerpts from the trial court's Order with Barnes's email to Judge Cothran in which Barnes states "I never had knowledge of a confidential settlement agreement. I never saw it or knew of any terms and conditions...I never talked to Mr. Hoffman about it. I passed Mr. Mercer in the hall in the courthouse one day in 2021 and he told me the case had settled but no details." (R. p. 108).

It is clear that the trial court improperly relied on the information contained in Barnes's email following the hearing in ruling on the Motion to Dismiss. Proper consideration of a motion to dismiss pursuant to Rule 12(b)(6) precludes consideration of material and information outside of the pleadings. *See Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (S.C. 1995). None of the information that was provided to Judge Cothran by Barnes regarding his knowledge of the settlement agreement is found within the four corners of the Amended Complaint. In deciding a motion to dismiss pursuant to Rule 12(b)(6), SCRCF, "the trial court's ruling...must be bottomed and premised solely upon the allegations set forth by the plaintiff." *Williams v. Condon*, 347 S.C. 227, 233, 533 S.E.2d 496, 499 (Ct. App. 2001); *citing Holy Loch Distribs. v. Hitchcock*, 332 S.C. 247, 503 S.E.2d 787 (Ct. App. 1998), *rev'd on other grounds*, 340 S.C. 20, 531 S.E.2d 282 (2000); *Berry v. McLeod*, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997).

In fact, the Amended Complaint alleges that “Hoffman revealed to Barnes the details of the confidential settlement agreement,” and that “Hoffman intentionally disclosed the settlement agreement to Barnes with the expectation that Barnes would inform an interested third party.” (R. p. 64, ¶ 33). This is completely contradictory to the information provided in Barnes’s email to Judge Cothran. As such, the trial court erred by considering and relying on material outside of the pleadings in ruling on the motion to dismiss the amended complaint under Rule 12(b)(6), SCRPC.

### CONCLUSION

For the reasons set forth above, Appellant Ed Fender respectfully requests an order from this Honorable Court reversing the order of the trial court issued on January 3, 2023, and remanding this case to the Circuit Court to proceed on the merits.

Respectfully submitted,

s/ Haley Hubbard

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**CERTIFICATE OF COUNSEL**

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The undersigned hereby certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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