THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

L. Casey Manning, Circuit Court Judge

Case No. 2012-CP-40-04857

Court of Appeals Tracking No. 2013-000340

Lawrence Terry, ... Appellant,

v.

Allen University, ... Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant Lawrence Terry ("Appellant") brought this action against Respondent Allen University ("Allen") on July 16, 2012 alleging Allen failed to include his fall semester 2003 grades on the transcript Allen sent to Midlands Technical College ("Midlands Tech") in early December 2003 but later added his fall semester 2003 grades to his transcript. (Summons and Complaint, 7/16/2012; A.R.14-30.)[1]

This is the fifth lawsuit Appellant has brought pertaining to his allegation that Allen somehow harmed him by not including his fall semester 2003 grades in the transcript sent to Midlands Tech His first lawsuit, filed in federal court, was dismissed for lack of jurisdiction. (Order Granting Allen University's Motion to Dismiss and Motion for Sanctions; A.R. 1-10.) Appellant voluntarily dismissed his second lawsuit after being informed by the court that his claims were barred by the statute of limitations. (*Id.*) His third lawsuit was dismissed for failure to show consideration. (*Id.*)

Appellant subsequently filed a fourth lawsuit alleging claims for intentional infliction of emotional distress, constructive fraud, breach of trust, negligent supervision, silent fraud, and libel. Allen moved to dismiss this lawsuit and asked the court to award sanctions, including an injunction prohibiting Appellant from bringing further actions based on these facts (*Id.*) The court subsequently dismissed this lawsuit

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[1] Appellant filed the Record on Appeal on February 21, 2013, prior to receiving Respondent's Designation of Matter to Be Included in the Record on Appeal. Upon receiving Respondent's designations, Appellant prepared an Appendix to the Record on Appeal and filed it on August 22, 2013. To distinguish between the two Records on Appeal, Respondent will refer to the February 21, 2013 Record as "R." and the August 22, 2013 Record as "A R."

and enjoined Appellant from bringing further actions based on these facts (*Id.*) When Appellant subsequently filed motions to alter or amend the judgment and for leave to amend the complaint, the court denied those motions and instructed Appellant that he could not file any further motions and must proceed to the appellate court level for any further disposition of the case. (July 9, 2012 Order; A.R. 13.)

Instead of filing an appeal of the dismissal and injunction issued in the fourth lawsuit, Appellant filed the current action, his fifth complaint, alleging claims of libel, negligence, intentional infliction of emotional distress, constructive fraud, and silent fraud. (Summons and Complaint, July 16, 2012; A R 14-30) In response, Allen filed Motions to Show Cause, for Sanctions, and to Dismiss requesting the court to: (1) hold Plaintiff in contempt for failing to adhere to the injunction; (2) assess sanctions in the form of fees and costs; and (3) dismiss on the basis of *res judicata* and for failure to allege facts sufficient to state a cause of action (Defendant's Motions to Show Cause, for Sanctions, and to Dismiss; A.R. 40-45)

Appellant subsequently filed an Amended Complaint alleging only claims for negligence and intentional infliction of emotional distress pertaining to the same facts as alleged in his original Complaint. (Plaintiff's Amended Complaint, A.R. 31-39.) In response, Allen renewed its motions to show cause, for sanctions, and to dismiss the Amended Complaint[2] On September 17, 2012, the court dismissed the lawsuit with prejudice. (Sept. 17, 2012 Order; R. 2.)

[2] Allen notes that apparently the clerk of court initially filed the renewed motions with Appellant's fourth lawsuit, rather than the present lawsuit When brought to the clerk's attention, the clerk refiled the motions with the present action.

Respondent subsequently filed motions after the dismissal for summary judgment and for entry of default. (Plaintiff's Motion for Summary Judgment; A.R. 55-57; Plaintiff's Entry for Default; A.R. 58-61.) Appellant filed a motion for reconsideration which the Court denied on February 11, 2013. (Plaintiff's Motion for Reconsideration; A.R 62-65; Feb 11, 2013 Order; R. 1)

FACTS

Appellant is a former student at Allen, having attending the college from August 24, 2002 through December 12, 2003. On December 9, 2003, at Appellant's request, Allen sent a copy of his transcript to Midlands Technical College ("Midlands Tech"). (Amended Complaint; R. 31-39.) At some later unspecified date, Appellant opened sealed envelopes he had from Allen and Midlands Tech containing his official transcripts and discovered that the transcript that Allen had sent to Midlands Tech on December 9, 2003, did not contain his fall semester 2003 grades, whereas subsequent transcripts did contain those grades. (*Id.)* According to Appellant, the addition of his fall semester 2003 grades in subsequent transcripts sent by Allen caused his GPA to drop (*Id.*) On December 14, 2009, Appellant went to Allen to dispute his fall semester 2003 grades and Allen agreed to investigate the issue. (*Id.*)

Allen's Registrar, Marilyn Young, reviewed Appellant's student file and found several documents Appellant had signed stating he had been a student at Allen during the 2003 fall semester. (*Id.)* Ms. Young also found several documents, signed by Appellant, showing that he had received veteran's benefits for his attendance during the fall 2003 semester. Ms. Young explained to Appellant that because he had requested his transcript be sent to Midlands Tech before the semester ended, his transcript was

necessarily sent without his fall semester 2003 semester grades. Once the fall semester 2003 grades were reported, Appellant's transcript was updated to reflect those grades. *(Id.)*

ARGUMENT

Appellant requests the Court to set aside the dismissal of his lawsuit on the grounds that the court (1) failed to give notice or hold a hearing prior to dismissal; (2) violated his due process rights; (3) erred in dismissing the case with prejudice; (4) erred in refusing to enter a default judgment; and (5) erred in failing to give a clear explanation for the reasons for the dismissal (Appellant's Brief p. 1.) These arguments lack merit for several reasons. First, Appellant cannot challenge the dismissal of this lawsuit because he was previously enjoined from filing the action and he did not appeal the injunction Second, Appellant had notice and many opportunities to be heard and thus the court did not violate his due process rights. Lastly, the court did not err in failing to enter a default judgment because Allen was never in default

I. APPELLANT HAS BEEN ENJOINED FROM BRINGING THIS ACTION.

Concurrent with dismissing Appellant's fourth lawsuit, the court also enjoined Appellant from bringing any further actions against Allen based on the same facts. Appellant did not appeal this order and therefore, the order enjoining him is the law of the case. *See Bone v. U.S. Food Serv.*, 399 S C 566, 576, 733 S.E.2d 200, 205 (2012) (holding that the law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so); *Ables v. Gladden*, 378

S C. 558, 569, 664 S.E.2d 442, 448 (2008) ("An unappealed order, right or wrong, is the law of the case").

Therefore, because Appellant had been previously enjoined from bringing this lawsuit, and he did not appeal the injunction, the court correctly dismissed this action.

II. APPELLANT'S CLAIMS OF NEGLIGENCE AND INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS ARE BARRED BY *RES JUDICATA* BECAUSE THESE CLAIMS WERE RAISED AND DISMISSED IN HIS PREVIOUS LAWSUIT.

Appellant's claims of negligence and intentional infliction of emotional distress were raised in his fourth lawsuit, which the court dismissed on *res judicata* grounds (June 20, 2012 Order; A.R 1-11.) Appellant did not appeal the dismissal of his fourth lawsuit and therefore the dismissal based on *res judicata* is likewise the law of the case. *See Ables v. Gladden*, 378 S.C 558, 569, 664 S.E.2d 442, 448 (2008).

Res judicata, or claim preclusion as it is sometimes called, bars plaintiffs from pursuing successive suits where the claim was litigated or could have been litigated. *Crestwood Gold Club v. Potter,* 328 S.C. 201, 216, 493 S.E.2d 826, 835 (1997). It is generally recognized that a dismissal with prejudice indicates an adjudication on the merits. *See Nunnery v. Brantley Constr. Co.,* 289 S C. 205, 209, 345 S.E.2d 740, 743 (Ct App 1986) (holding that where an action has been dismissed with prejudice, the judgment operates in a subsequent action involving the same subject matter, so as to conclusively settle not only all matters litigated in the earlier proceedings, but also all matter which might have been litigated therein); *Seel v. Home Dept USA, Inc.,* 2010 U S Dist. LEXIS 53131 (D.S.C. May 14, 2010) (holding a dismissal under Rule 12(b)(6) is a final determination on the merits and is accorded *res judicata* effect).

Because the causes of action alleged by Appellant in this lawsuit all arose from the same set of facts alleged in his fourth lawsuit, which was dismissed on *res judicata* grounds, the court appropriately dismissed the current lawsuit on *res judicata* grounds also.

III. THE COURT APPROPRIATELY DISMISSED THE LAWSUIT BECAUSE APPELLANT FAILED TO PLEAD FACTS SUFFICIENT TO STATE A CAUSE OF ACTION.

Appellant alleges Allen was negligent and intentionally caused him severe emotional distress by sending his transcript to Midlands Tech without his fall semester 2003 grades included. (Amended Complaint; A R. 31-39.) These claims were alleged and dismissed by the court in Appellant's fourth lawsuit. Because Appellant did not appeal the dismissal of his fourth lawsuit, the court's dismissal of these claims is the law of the case.

In addition, claims for negligence and intentional infliction of emotional distress are governed by the three-year statute of limitations found in S.C Code Ann § 15-3-530. Therefore, Appellant's claims are barred because the alleged acts occurred in December 2003 and he did not file this lawsuit until July 16, 2012.

To the extent Appellant's claims are not barred by the statute of limitations, he failed to plead facts sufficient to state a cause of action for either negligence or intentional infliction of emotional distress.

To state a claim for negligence, Appellant must show that Allen owed a duty of care to him, that Allen breached that duty by a negligent act or omission, and damages proximately resulting from the breach of duty. *Grier v. AMISUB of South Carolina, Inc.*, 397 S.C. 532, 537, 725 S.E.2d 693, 696 (2012). Proximate cause requires proof

beyond just the act or omission in question and concerns whether it is the "but for" cause of a plaintiff's injuries and whether the harm was foreseeable. *Bishop v. S.C. Dep't of Mental Health,* 331 S.C. 79, 88, 502 S.E.2d 78, 82 (1998).

Appellant has failed to show how Allen breached any duty to him. For example, he claims that even though he requested Allen send his transcript to Midlands Tech on December 8, 2003, Allen should have waited until the semester grades had been added before sending it (Amended Complaint; R 31-39.) Allen, however, had no duty to Appellant to wait to send his transcript. Allen was only doing as Appellant had requested and Appellant cannot request Allen perform an act, such as sending his transcript, and then claim negligence, when Allen performed as requested.

Furthermore, Appellant has not alleged that any such alleged breach of duty resulted in damages to him. In fact, his GPA on his transcript without the fall 2003 semester grades was higher than the subsequent transcripts that did include his fall 2003 grades Therefore, he suffered no damages as a result of Allen sending his transcript without the fall 2003 semester grades on it. Therefore, Appellant's claim for negligence was appropriately dismissed.

The court also appropriately dismissed his claim for intentional infliction of emotional distress To state a claim for intentional infliction of emotional distress, Appellant would need to show that: (1) Allen intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain that such distress would result from its conduct; (2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious and utterly intolerable in a civilized community; (3) Allen's actions caused him emotional distress;

and (4) the emotional distress suffered by him was "severe" such that "no reasonable man could be expected to endure it." *Argoe v. Three Rivers Behavioral Health, LLC,* 392 S C. 462, 710 S.E.2d 67 (2011).

It is unclear to Allen exactly what alleged act Appellant is claiming caused him emotional distress—Allen not including his fall 2003 semester grades in the transcript sent in December 2003, or Allen including his fall grades on subsequent transcripts. Neither alleged act, however, qualifies as conduct that was "extreme and outrageous" and "atrocious and utterly intolerable." Again, Allen was merely doing as Appellant requested and he has failed to show that Allen acted in any wrongful way that would have caused him severe emotional distress Therefore, the court appropriately dismissed his claim for the intentional infliction of emotional distress.

IV. APPELLANT'S DUE PROCESS RIGHTS WERE NOT VIOLATED.

Appellant also claims that the court violated his procedural due process rights by dismissing his lawsuit without giving notice or holding a hearing The court's dismissal of his lawsuit, however, did not affect Appellant's property or liberty interests and therefore does not implicate his procedural due process rights.

Furthermore, Appellant's claim that he was given no notice of the pending motion to dismiss is not correct Appellant responded to Allen's Motions to Show Cause, for Sanctions, and to Dismiss on August 17, 2012. (Plaintiff's Reply to Motions to Show Cause, for Sanctions, and to Dismiss; A R 40-45) Upon receipt of Appellant's Amended Complaint, Allen filed renewed motions to show cause, for sanctions, and to dismiss and served Appellant with a copy of the renewed motions Therefore, Appellants argument that he did not have notice is incorrect.

In addition, a court is not required to hold a hearing prior to ruling on a motion *See Simpson v. MSA of Myrtle Beach, Inc.*, 373 S C 14, 36-37, 644 S E.2d 663, 675 (2007) (finding the trial court's denial of the appellant's memoranda without a hearing did not deny the appellant reasonable opportunity to present its evidence to aid the court's determination) Appellant had multiple opportunities to be heard and to present evidence as demonstrated by the multiple motions and memoranda he filed.

Therefore, because Appellant had notice and the opportunity to present evidence, the court did not err in granting Allen's motion to dismiss without a hearing.

V. ALLEN WAS NOT IN DEFAULT.

As his final ground for appeal, Appellant argues that the court erred in not holding Allen in default, apparently based on his belief that Allen had failed to respond to his Amended Complaint or answer his discovery requests. (Appellant's Brief at 2) Allen, however, did respond to the Amended Complaint by filing renewed motions to show cause, for sanctions, and to dismiss. A copy of these renewed motions was served on Appellant by U.S. Mail on August 27, 2012.

Furthermore, even if Appellant for some reason did not receive Allen's renewed motions, he did receive and respond to Allen's Motions to Show Cause, for Sanctions, and to Dismiss. The only difference between his original Complaint and his Amended Complaint was his deletion of three causes of action; however, his claims for negligence and intentional infliction of emotional distress, plead in the original Complaint, remained in his Amended Complaint. Allen was not required to file a new motion to dismiss simply because Appellant filed an Amended Complaint. *See* 6 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and*

Procedure-Civil § 1476 (2010) ("If some of the defects raised in the original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading.").

Appellant further argues that the Court should hold Allen in default for not responding to his discovery requests. (Appellant's Brief 2-4.) A party's failure to respond to discovery requests, however, is not grounds for finding a party in default. Rule 55, S.C.R.C.P. Furthermore, at the time Appellant served discovery requests, he was in contempt of the court's injunction and therefore, Allen had no obligation or duty to respond to the discovery requests. Finally, upon receipt of Appellant's discovery requests, Allen filed a Motion for a Protective Order requesting that discovery not proceed in this case until the court ruled on Allen's Motions to Show Cause, for Sanctions, and to Dismiss.

CONCLUSION

The trial court did not err in dismissing Appellant's Amended Complaint because Plaintiff had been enjoined from bringing additional lawsuits based on the same facts as alleged in his four previous lawsuits. Appellant's claims are also barred by *res judicata*. Furthermore, Appellant failed to allege facts sufficient to support his claims for negligence and intentional infliction of emotional distress. In addition, the trial court did not violate Appellant's due process rights because he had notice and an opportunity to be heard prior to his lawsuit being dismissed. Finally, because Allen was not in default, the court did not err by not holding Allen in default

Therefore, the Court should affirm the trial court's dismissal of Appellant's lawsuit.

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR, with the exception of a footnote added to explain the references to the Record and the deletion of references in compliance with the Court's Order of August 9, 2013.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief complies with Supreme Court Order dated August 13, 2007 regarding personal identifiers and sensitive information.

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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Respondent, do hereby certify that I have served a copy of the pleading(s) hereinbelow specified by mailing a copy of the same (1) by United States Mail, postage prepaid, and (2) via Certified Mail, Return Receipt Requested, to the following address(es):

Pleadings:

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