THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

Eugene C. Griffith, Jr., Circuit Court Judge

Case No. 2024-CP-36-00087
Appellate Case No. 2024-001360

Abdellah El Farissi..... Appellant,

v.

Newberry College..... Respondent.

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INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On February 8, 2024, Appellant Abdellah El Farissi ("Appellant") initiated this action by filing a Magistrate's Court form Summons and Complaint in the Court of Common Pleas for Newberry County. (Compl.) Appellant then filed an Amended Complaint (the "Complaint") on February 22, 2024. (Am. Compl.). Respondent Newberry College ("Respondent" or "the College") filed a Motion to Dismiss the Complaint on March 7, 2024. (Mot. to Dismiss.). On March 15, 2024, Appellant filed an Opposition to Respondent's Motion to Dismiss. (Opp'n to Mot. to Dismiss). Respondent filed a Memorandum in Support of its Motion to Dismiss on May 15, 2024. (Mem. in Supp. of Mot. to Dismiss). A hearing was held on Respondent's Motion to Dismiss on July 8, 2024, before the Honorable Eugene C. Griffith, Jr. At the conclusion of the hearing, Judge Griffith granted Respondent's Motion to Dismiss, dismissing Appellant's Complaint with prejudice. A formal Order outlining Judge Griffith's decision was entered on July 30, 2024. (Order). Thereafter, on August 15, 2024, Appellant filed his Notice of Appeal with this Court.

FACTS

Appellant is a former Assistant Tennis Coach for Respondent. (Compl p. 2) Appellant alleges that former student of Respondent, Nastassia Chamoun ("Chamoun"), improperly recorded a verbal conversation between Appellant and herself that took place in Appellant's vehicle. (*See id.*) Appellant further alleges that Chamoun shared this recording with three agents of the College—former Head Tennis Coach, Elias Fernandez, Associate Athletic Director, Wayne Alexander, and Athletic Director, Sean Johnson (Compl. p. 2; Am. Compl. p. 2). Appellant lastly contends that Fernandez and Alexander terminated his employment without consulting with the College's Human Resources department, and that when he inquired as to the reason for his termination, he was told "No Reason." (Compl. p. 2). Based on these facts, Appellant appears to

allege a violation of his privacy rights under the Federal Wiretap Act of 1968 ("FWA") and the South Carolina Homeland Security Act ("SCHSA"), S.C. Code Ann. § 17-30-20, and S.C. Code Ann. § 17-30-135.

STANDARD OF REVIEW

This Court applies the same standard of review as the trial court when reviewing a motion to dismiss. *Carolina Park Assocs., LLC v. Marino*, 400 S.C. 1, 6, 732 S.E.2d 876, 878 (2012). Under Rule 12 of the South Carolina Rules of Civil Procedure, a Circuit Court must dismiss a complaint when the defendant demonstrates the plaintiff's complaint fails to allege facts sufficient to constitute a cause of action. *See* Rule 12(b), SCRCP; *see also Doe v. Greenville Cty. Sch. Dist.*, 375 S.C. 63, 66, 651 S.E.2d 305, 307 (2007) ("Generally, in considering a Rule 12(b)(6), SCRCP, motion to dismiss, the trial court must base its ruling solely upon allegations set forth on the face of the Complaint."); *Flateau v. Harrelson*, 355 S.C. 197, 201, 584 S.E.2d 413, 415 (Ct. App. 2003) (recognizing that a motion to dismiss may be granted when "the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court."). "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to any relief on any theory of the case." *Chewning v. Ford Motor Co.*, 346 S.C. 28, 32-33, 550 S.E.2d 584, 586 (Ct. App. 2001) (internal citations omitted).

ARGUMENT

I. Appellant has raised new arguments for the first time on appeal which cannot be considered by this Court.

As an initial matter, this Court must disregard new arguments raised by Appellant for the first time on appeal. Specifically, Appellant, for the first time, has raised issues regarding Fourth Amendment violations, a purported "failure to promote" claim, and the Trial Court's alleged bias

and impartiality in the lower court proceedings. These arguments, however, have not been preserved for appellate review and are, therefore, not proper for adjudication on their alleged merits.

"A great number of reported cases in South Carolina . . . and more recently the appellate court rules and rules of civil procedure have emphasized the importance and *absolute necessity* of ensuring that all issues and arguments are presented to the lower court for its consideration." *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779 (2004) (emphasis added). "Issues and arguments are preserved for appellate review *only when they are raised to and ruled on by the lower court.*" *Id.* at 23, 602 S.E.2d at 779-780 (emphasis added); *see also Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) ("It is 'axiomatic that an issue cannot be raised for the first time on appeal.'") (quoting *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998)); *Kennedy v. S.C. Ret. Sys.*, 345 S.C. 531, 533, 564 S.E.2d 322, 323 (2001) ("South Carolina cases clearly hold that one cannot present and try a case on one theory and then attack the result below by presenting another theory on appeal."); *State v. Bailey*, 298 S.C. 1, 5, 377 S.E.2d 581, 584 (1989) (finding that a party cannot argue one theory at trial and a different theory on appeal); Rule 210(c), SCACR (record on appeal *shall not include matter which was not presented to the lower court*) (emphasis added). "If the [appellant] has raised an issue in the lower court, but the court fails to rule upon it, the appellant *must* file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *Palmetto Wildlife Extractors, LLC v. Ludy*, 435 S.C. 690, 704, 869 S.E.2d 859, 867 (Ct. App. 2022) (quoting *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) (emphasis added).

Here, Appellant failed to raise claims for violation of his Fourth Amendment rights or failure to promote[1] in the lower court. Appellant further failed to file a motion to alter or amend the Trial Court's judgment following the issuance of the Order on appeal before this Court. Thus, these issues are clearly unpreserved for appellate review and cannot be considered.

Appellant also alleges that the Trial Court failed to act neutrally and impartially, and instead acted with bias and favoritism toward Respondent despite the level of deference afforded to *pro se* litigants. "Generally, where bias and prejudice of a trial judge is claimed, the issue must be raised when the facts first become known and, in any event, before the matter is submitted for decision." *State v. Thompson*, 355 S.C. 278, 288-89, 584 S.E.2d 143, 148-49 (Ct. App. 2003) (holding that the appellant's argument of bias and prejudice by the lower court was not preserved for appellate review because the appellant neither objected to the lower court's decision nor moved to alter or amend the lower court's judgment). "For an appellate court to review an issue, a contemporaneous objection at the trial level is required." *Id.* at 288, 584 S.E.2d at 148 (citing *State v. Hoffman*, 312 S.C. 386, 393, 440 S.E.2d 869, 873 (1994)). "[A]n objection should be sufficiently specific to bring into focus the precise nature of the alleged error so it can be reasonably understood by the trial judge." *Id.* (quoting *State v. Prioleau*, 345 S.C. 404, 411, 548 S.E.2d 213, 216 (2001)).

The issue of bias or impartiality has not been preserved for appellate review because: (i) it was never raised before or ruled upon by the lower court; (ii) Appellant failed to make a contemporaneous objection at the trial level; and (iii) Appellant failed to file a motion to alter or amend the lower court's judgment following issuance of the Order. Indeed, the transcript contains not the slightest hint of a challenge to Judge Griffith or the lower court's authority or impartiality.

[1]Indeed, Appellant, by his own admission, stated that the nature of this litigation does not involve an employment dispute. (Tr. p. 7, lines 11-15) ("*[M]y lawsuit is based on the fundamental violation of my privacy right and is not an employment dispute*.") (emphasis added). Appellant, therefore, contradicts his own arguments by attempting to bring a new employment theory before this Court.

(Tr.). The foregoing therefore clearly demonstrates that, at the trial level, Appellant never took exception to Judge Griffith or the lower court's handling of this case. *See Gaddy v. Douglass*, 359 S.C. 329, 349-50, 597 S.E.2d 12, 23 (Ct. App. 2004) (ruling that this Court would not address the appellant's impartiality argument as that argument was not raised and ruled upon by the trial court). Accordingly, as this issue has not been preserved for appellate review, it is deemed waived and cannot be considered.

II. Regarding the issues ripe for appellate review, the Trial Court properly concluded that Appellant failed to state a cause of action against Respondent.

It is important to note that Appellant's first mention of Respondent's alleged violations of the Federal Wiretap Act and the South Carolina Homeland Security Act were not raised until Appellant filed his Opposition to Respondent's Motion to Dismiss. (Opp'n to Mot. to Dismiss). Indeed, Appellant's Complaint and Amended Complaint fail to lay out any claims against Respondent generally, nor do they cite to these particular statutes. (Compl.; Am. Compl.). The Trial Court, therefore, properly dismissed the Complaint by finding that: (i) "Plaintiff has not alleged a *violation of any law – federal or state[;]*" and (ii) the allegations contained therein failed to "indicate a cause of action against Defendant, even construed liberally." (Order p. 2, 3) (emphasis added). Accordingly, this Court should therefore affirm the Trial Court's dismissal of the Complaint for this reason alone.

III. Even if this matter had been properly pled, the Trial Court properly dismissed Appellant's claim under the Federal Wiretap Act of 1968.

The Trial Court properly held that Appellant failed to plead a claim for violation of the Federal Wiretap Act of 1968 against Respondent. In his Complaint, Appellant alleges that:

> "On 03/03/2023, after the practice session, Nastassia Chamoun (Former Newberry College student-athlete) asked me to give her a ride from the tennis courts to the campus dorms where she lived at Newberry College. Nastassia Chamoun, and per the Newberry College Former Head Tennis Coach's request (Elias Fernandez) took

> this opportunity to record our conversation. . . . On Monday 03/06/2023, I attended the meeting, and to my surprise, I was fired from my job. When I asked for this decision, I was told 'No Reason.' I strongly believe that Nastassia Chamoun recorded our private conversation that occurred in a private setting, in my car, using her cell phone, which is a clear violation of my privacy rights. Moreover, Nastassia Chamoun shared the private conversation she recorded with the former Newberry College Head Tennis Coach (Elias Fernandez) who is an agent of the college. The Former Head Tennis Coach (Elias Fernandez) also shared the same private conversation with the Associate Athletic Director (Wayne Alexander), also an agent of the College, and they both decided to fire me without even consulting with the HR department."

(Compl. p. 2).

Appellant's Amended Complaint contends that the recording was later also shared with Athletic Director, Sean Johnson, another agent of Respondent. (Am. Compl. p. 2).

As stated *infra*, Appellant only raised claims regarding the FWA in his response to Respondent's Motion to Dismiss, so it is unclear what specific allegations Appellant initially raised against Respondent in his Complaint—a fact which further supports affirmation of the Trial Court's decision. Nevertheless, it appears that Appellant alleges that Chamoun improperly recorded the oral conversation that took place in Appellant's vehicle and improperly disclosed that recording to Respondent in violation of the FWA. Appellant's initial brief contends that Respondent then improperly used and further disclosed the recording in violation of Sections 2511(1)(c) and 2511(1)(d) of the FWA.

The Trial Court properly dismissed the Complaint, holding that "[b]ecause the former student-athlete of Defendant was a party to the allegedly recorded conversation, her action was not unlawful." (Order p. 3). Accordingly, any subsequent "use" or "disclosure" of the recording by Respondent—if true, and if any such recording actually exists—was not unlawful, as the recording would not have been obtained through improper means in violation of the FWA. *See State v. Whitner*, 399 S.C. 547, 554, 732 S.E.2d 861, 865 n.3 (2012) ("[P]rior to the adoption of the

[SCHSA], this Court's jurisprudence relied on federal courts' interpretations of the Federal [Wiretap] Act in permitting the recording of a telephone conversation where only one party to the conversation consented."); *see also Mays v. Mays*, 267 S.C. 490, 494, 229 S.E.2d 725, 726 (1976) (holding that one party to a telephone conversation may lawfully record the conversation without the other party's knowledge or consent, and subsequently disclose it).

The FWA states that "any person whose wire or oral communication is intercepted, disclosed or used in violation of [the FWA] may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate." 18 U.S.C. § 2520(a). The FWA defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). The FWA further defines "intercept" to mean "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. § 2510(4). However, the FWA additionally maintains that "[i]t shall not be unlawful . . . for a person not acting under color of law to intercept a wire, oral or electronic communication *where such person is a party to the communication* . . . unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or law of the United States or of any State." 18 U.S.C. § 2511(2)(d) (2018) (emphasis added).

The FWA further provides that "[a]ny person who intentionally *discloses*, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication *in violation of this subsection* shall be punished . . . or subject to suit" as provided therein. 18 U.S.C. § 2511(1)(c) (2018) (emphasis added). Section 2511(1)(d)

maintains a similar provision for the *use* of any wire, oral, or electronic communication. *See id.* at 2511(1)(d) (emphasis added).

The Trial Court, therefore, correctly found that:

> Not only did Plaintiff fail to allege facts sufficient to demonstrate that any party created a cause of action, but liberally construing the Complaint, *the laws upon which Plaintiff relies explicitly allow for the type of conduct Plaintiff alleges occurred*.

(Order p. 3) (emphasis added).

Thus, the Trial Court correctly dismissed the Complaint, and this Court should affirm its ruling.[2]

IV. Even if this matter had been properly pled, the Trial Court properly dismissed Appellant's claims under the South Carolina Homeland Security Act.[3]

The Trial Court properly held that Appellant failed to plead a claim for violation of the SCHSA, §§ 17-30-20 and 17-30-135. In support of this cause of action, Appellant relies on the same facts, as stated above, regarding the alleged improper recording by Chamoun and purported use and disclosure of the recording by Respondent.

The SCHSA parallels the Federal Wiretap Act, and prohibits the intentional interception, use, and disclosure of any wire, oral, or electronic communication. *See* S.C. Code Ann. § 17-30-20; *see also State v. Whitner*, 399 S.C. 547, 553, 732 S.E.2d 861, 864 (2012) ("[T]he Federal

[2]Appellant's Opposition to Respondent's Motion to Dismiss asserts that it is illegal to record communications in which involved parties have a reasonable expectation of privacy. (Opp'n to Mot. to Dismiss p. 2). The only fact contained in Appellant's Complaint and Amended Complaint demonstrating that Appellant maintained a reasonable expectation of privacy in his conversation with Chamoun is that the communication took place in Appellant's vehicle. (Compl. p. 2). This is wildly insufficient to establish a reasonable or justifiable expectation of privacy, especially considering the fact that Appellant was in his vehicle with a student of Respondent, on Respondent's property, and acting in his role as Respondent's Assistant Tennis Coach at the time the communication occurred. (Comp. p. 2.); *see also U.S. v. Castellanos*, 716 F.3d 828, 832 (4th Cir. 2013) (holding that in order to demonstrate a reasonable expectation of privacy, both an objective *and* subjective expectation of privacy must be shown) (emphasis added).

[Wiretap] Act is substantively the same as South Carolina's Wiretap Act."). Like the Federal Wiretap Act, the SCHSA provides for an exception to this rule where the individual "intercepting" the communication is also a party to the communication. *See* S.C. Code Ann. § 17-30-30. Accordingly, South Carolina is a one-party consent state. *See id.*

The Trial Court properly held that "[b]ecause the former student-athlete of Defendant was a party to the allegedly recorded conversation, her alleged action was not unlawful." (Order p. 3). Therefore, as stated above, it is evident that any subsequent "use" or "disclosure" of the recording by Respondent was not unlawful under the SCHSA, as the recording would not have been originally obtained through improper means. *See State v. Whitner*, 399 S.C. 547, 554, 732 S.E.2d 861, 865 n.3 (2012); *see also Mays v. Mays*, 267 S.C. 490, 494, 229 S.E.2d 725, 726 (1976). The Trial Court, therefore, correctly dismissed the Complaint by finding that the laws relied upon by Appellant explicitly allow for the conduct alleged, and that the Complaint failed to indicate a cause of action against Respondent. (Order p. 2). Accordingly, this Court should affirm the Trial Court's ruling.

CONCLUSION

For the reasons stated above, this Court should affirm the Circuit Court's Order dismissing Appellant's Complaint and Amended Complaint, with prejudice.

Respectfully Submitted,

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Eugene C. Griffith, Jr., Circuit Court Judge

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Appellate Case No. 2019-000754

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CERTIFICATE OF SERVICE

It is hereby certified that the foregoing **Initial Brief of Respondent** in the above-captioned case has been served upon *pro se* Appellant, via electronic mail and First Class U.S. Mail, postage prepaid, as follows:

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Dated this 7th day of March, 2025.