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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Courtney Clyburn Pope, Circuit Judge

App. Case No. 2024-001206

Janice Meusel and Adam Meusel,..…….....…...Appellants,

v.

Woodside Plantation Property Owners' Association, Inc., Woodside Plantation Country Club, Inc. d/b/a Woodside Country Club, and Invited,……...……Defendants,

Of whom Woodside Plantation Country Club, Inc. d/b/a Woodside Country Club and Invited are the……...……...……..……. Respondents.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

This is an appeal of an order that dismissed with prejudice the complaint brought by Appellants Janice and Adam Meusel ("the Meusels") as against Respondents Woodside Plantation Country Club, Inc. d/b/a Woodside Country Club and Invited (collectively "the country club"). (R. pp. 1-8.)

The Meusels filed the complaint in this case against Woodside Plantation Property Owners' Association, Inc. ("the HOA") and the country club (the club corporation itself and the parent company that operates it). (R. pp. 12-18.) The complaint alleges that the country club operates a golf course for its members, and the golf course adjoins the Meusels' house property. (R. p. 14 ¶¶ 7-11.) The complaint alleges the following:

> The Plaintiffs' house and yard directly border the property operated as a golf course by the country club.
>
> Plaintiff Janice Meusel is of Hispanic descent.
>
> People golfing at the country club, usually club members who have usually also been co-members of the HOA with the Plaintiffs, started to walk often into the Plaintiffs' yard.
>
> The Plaintiffs quite politely noted to a few of these golfers that they should not be in the Plaintiffs' yard.
>
> The Plaintiffs were not prepared for the torrent of hostility with which they were met after saying something about the repeated trespasses in their yard.
>
> Members of the country club and the HOA (often the same people) began and have sustained a campaign of racist harassment against the Plaintiffs, such harassment including, but not being limited to, numerous deliberate and unwarranted trespasses on the Plaintiffs' property and the use of racial slurs and insults.
>
> The Plaintiffs brought their concerns about this behavior to the HOA and to the country club.

> The HOA expressly undertook a duty to stop the offending behavior and control the actions of those who have been doing it.
>
> The country club also expressly undertook a duty to stop the offending behavior and control the actions of those who have been doing it.
>
> The harassment has not stopped.
>
> The HOA has not taken reasonable action to stop the harassment.
>
> The country club has not taken reasonable action to stop the harassment.
>
> The Defendants have behaved in the matters subject of this case with a conscious disregard for the Plaintiffs' rights.
>
> The Plaintiffs have sustained damages as a result of the misconduct subject of this complaint, including anger, anxiety, depression, severe emotional distress, and diminished property value.

(R. pp. 14-15 ¶¶ 11-24.)

The complaint alleged three causes of action against the country club: negligence or recklessness, the Defendants' violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, and intentional infliction of emotional distress. (R. pp. 15-16, 17-18 ¶¶ 25-36, 43-48.)

The negligence cause of action contains an allegation that "the Defendants owed and undertook duties to the Plaintiffs to take and reasonably perform reasonable measures to address past the [sic] harassment and stop the ongoing harassment of the Plaintiffs." (R. p. 15 ¶ 26.)

The cause of action for intentional infliction of emotional distress pleads as follows:

> Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

> Each of the Defendants, separately, has taken responsibility for the conduct of the offending golfers involved in this case.
>
> The offending golfers intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from their conduct.
>
> The offending golfers' conduct was so extreme and outrageous that it exceeded all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community.
>
> As a proximate result of the offending golfers' conduct, the Plaintiffs did, in fact, experience emotional distress, which was severe and beyond what a reasonable person would be expected to endure.
>
> The Plaintiffs are entitled to judgment against the Defendants for actual and punitive damages.

(R. pp. 17-18 ¶¶ 43-48.)

The cause of action for unfair trade practices pleads as follows:

> Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.
>
> Acts committed by the Defendants in this matter, including, but not necessarily limited to, the Defendants' repeated failures to take reasonable measures to stop ongoing, repeated behavior by their members after acknowledging their duties to stop it, constitute violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, and are and were unfair and deceptive actions in trade or commerce.
>
> The Defendants knew or should have known that the said actions were violations of the Unfair Trade Practices Act and were unfair and deceptive actions in trade or commerce.
>
> These actions have had a negative impact on the public interest. Not only did they harm the Plaintiffs, they have also harmed those who live in the Plaintiffs' neighborhood and the public generally by allowing reprehensible racist conduct to go unaddressed, despite promises to address it.
>
> These actions were capable of repetition. The instances of harassment continue, as do the Defendants' failure to take reasonable measures to prevent or even address it.

> The Plaintiffs have sustained damages as a proximate result of these unfair trade practices.
>
> The Plaintiffs are entitled to a judgment against the Defendants for damages, treble damages, reasonable attorney's fees, and costs.

(R. p. 16 ¶¶ 30-36.)

The country club made a motion to dismiss the complaint. (R. pp. 19-20.) As the hearing on the motion approached, both the Meusels and the country club filed memoranda concerning the motion. (R. pp. 54-69.)

A hearing was held on the country club's motion. (R. pp. 26-53.) At the hearing, the Meusels argued that they had pled facts supportive of each element of their claims and that, if the court disagreed, they should be permitted to amend their complaint. (R. p. 43 ln. 5-8.) Following the hearing, the circuit court granted the motion to dismiss and did so with prejudice as to all causes of action, not allowing the Meusels an opportunity to amend their complaint. (R. pp. 1-8.)

The Meusels made a motion to reconsider. (R. pp. 21-25.) As well as noting the Meusels' substantive arguments, the motion to reconsider again asked the court to give the Meusels an opportunity to amend their complaint. (R. p. 22.) The circuit court denied that motion. (R. pp. 9-11.)

This appeal followed.

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citation omitted). The ruling on a motion to dismiss for failure to state facts sufficient to constitute a cause of action must be based solely upon the

allegations set forth in the pleading. Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601 (1995). "In evaluating a motion to dismiss pursuant to this rule, the circuit court must view the facts alleged in the complaint and any reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff." Benedict Coll. v. Natl. Credit Systems, Inc., 400 S.C. 538, 544, 735 S.E.2d 518, 521 (Ct. App. 2012). "The motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. The question is whether in the light most favorable to plaintiff, and with every doubt resolved in [his] behalf, the complaint states any valid claim for relief." Dye v. Gainey, 320 S.C. 65, 67-68, 463 S.E.2d 97, 98-99 (Ct. App. 1995). "If those facts and inferences would entitle the plaintiff to relief on any theory, then a dismissal for failure to state a claim is improper." Benedict Coll., 400 S.C. at 544.

Further, "[u]nder Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted." Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 189, 826 S.E.2d 585, 592 (2019).

ARGUMENT

I. Application of the standard on a motion to dismiss shows that the circuit court erred in dismissing the Meusels' negligence claim.

The circuit court ruled that the complaint failed to allege facts that constitute a negligence cause of action because the doctrine of voluntary undertaking does not apply unless there has been physical harm and because the complaint "fails to provide any evidence that Defendants' failure to uphold its duty to address the past harassment and stop the ongoing

harassment led to an increased risk of harm to Plaintiffs or that Plaintiffs suffered the harm because they relied on Defendants to stop the offending conduct." (R. pp. 6-7.)

Let us take the easiest of these to counter first. While complaints are not required to provide evidence at all, just the allegations of causes of action, the circuit court was being obtuse in its statement that the complaint "fails to provide any evidence that Defendants' failure to uphold its duty to address the past harassment and stop the ongoing harassment led to an increased risk of harm to Plaintiffs[.]" (R. p. 7.) The complaint pleads that the country club "expressly undertook a duty to stop the offending behavior and control the actions of those who have been doing it." (R. p. 15 ¶ 19.) It does not require explanation to see that, if the country club had done what it promised – stop the offending behavior – that would have eliminated the risk of harm to the Meusels altogether. The circuit court was wrong to so conclude.

The circuit court was also wrong to conclude that the Meusels had not alleged the existence of a duty owed to them by the country club. One who does not owe a duty may assume a duty by voluntarily undertaking to do something he is not already required to do.

> "While there is generally no duty to act under the common law, a duty to use due care may arise where an act is voluntarily undertaken." Vaughan v. Town of Lyman, 370 S.C. 436, 446, 635 S.E.2d 631, 637 (2006). "The question of whether such a duty arises in a given case may depend on the existence of particular facts. Where there are factual issues regarding whether the defendant was in fact a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder." Id. at 446-47, 635 S.E.2d at 637 (quoting Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997)).

Wright v. PRG Real Estate Mgmt., Inc., 426 S.C. 202, 212, 826 S.E.2d 285, 291 (2019); accord Hurst v. Sandy, 329 S.C. 471, 481, 494 S.E.2d 847 (Ct. App. 1997).

The complaint alleges that the country club "expressly undertook a duty to stop the offending behavior and control the actions of those who have been doing it." (R. p. 15 ¶ 19.) The circuit court "[found] that the Defendants did not voluntarily undertake a duty to Plaintiffs," but that is matter for the application of the law to the facts adduced later in the case, not a *pleadings* matter. (R. p. 7.) The existence of a duty, having been undertaken by the country club, was pled by the Meusels. (R. p. 15 ¶ 19.)

The circuit court seemed to have been swayed by discussion about the Restatement of Torts in Wright, 426 S.C. at 212, but neither that case or any other has adopted the Restatement as the law of South Carolina on the point of whether physical, as opposed to economic, harm is necessary for a duty to be undertaken. Indeed, the opinion in Hurst, 329 S.C. at 481, reveals that South Carolina does not limit the voluntary undertaking of a duty to situations in which physical harm has arisen – and there is no logical reason to so limit the recognition of a voluntarily assumed duty. The Hurst case, cited by the circuit court in its order, is one in which the harm for which redress was sought was purely economic, and the Hurst court concluded that summary judgment should not have been granted on the basis that there was no volunatary undertaking of a duty. Id.

The Restatement is at best secondary or persuasive authority. Hurst is the law. The Meusels' complaint met what the law requires and pled that the country club undertook a duty to do something, the country club failed to do what that duty requires, and damage to the Meusels was proximately caused as a result. (R. p. 15 ¶¶ 19, 22, 24, 25-29.)

The circuit court erred reversibly in dismissing the Meusels' negligence claim with prejudice.

II. The Meusels' complaint pled facts that made dismissal improper on their claim for intentional infliction of emotional distress.

The circuit court erred reversibly in dismissing with prejudice the Meusels' claim for intentional infliction of emotional distress.

> To recover for outrage—otherwise known as intentional infliction of emotional distress—a plaintiff must establish the following:
>
> (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his 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) the actions of the defendant caused plaintiff's emotional distress; and
>
> (4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could be expected to endure it."

Bass v. S.C. Dept. of Soc. Servs., 414 S.C. 558, 575, 780 S.E.2d 252, 260-61 (2015).

Without much analysis, the circuit court's order of dismissal states that the Meusels "have failed to establish a prima facie claim for damages from intentional infliction of emotional distress as is required in this specific claim" and that "the conduct provided in the Complaint did not meet the threshold of severe emotional distress that South Carolina courts have held is required[.]" (R. p. 5.)

As the Meusels put it in their motion to reconsider:

> The court concluded that the conduct alleged in the complaint – a sustained campaign of harassment, including racist harassment – did not meet the threshold to be outrageous enough for this cause of action to lie. Most respectfully, the undersigned cannot conceive of how the court could reach this conclusion in a way that comports with the law. The conduct alleged is quite

> outrageous. Maybe even more importantly, it is markedly more outrageous than other conduct our appellate courts have deemed sufficiently beyond the pale to support such a cause of action. See, e.g., Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981).

(R. pp. 23-24.)

In Ford, the Supreme Court of South Carolina recognized the cause of action of intentional infliction of emotional distress and found it lay where the defendant had yelled at the plaintiff a few times. Ford, 276 S.C. 157.

The conduct at issue – "a campaign of racist harassment against the Plaintiffs, such harassment including, but not being limited to, numerous deliberate and unwarranted trespasses on the Plaintiffs' property and the use of racial slurs and insults" (R. p. 14 ¶ 16) – is surely of the sort that at least has the potential to be "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[.]" Bass, 414 S.C. at 575. Viewed in the light most favorable to the Meusels, as the allegations are required to be, Benedict Coll., 400 S.C. at 544, they state a claim for intentional infliction of emotional distress.

If the circuit court's problem was with whether liability for the conduct could be attributed to the country club, it did not write that; however, the analysis above concerning undertaking of duty, along with the allegations of the complaint that the country club undertook responsibility for the golfers' actions (R. p. 17 ¶ 44), applies here and gets this complaint past the motion to dismiss line.

If the facts ultimately fail to show all the elements of this tort, summary judgment or a directed verdict will be proper. The Meusels do not believe that will happen; however, that is not the question on a motion to dismiss. The circuit court undertook to decide that the facts

the complaint pled were not correct. That is not the court's role on a motion to dismiss. E.g., Benedict Coll., 400 S.C. at 544.

III. In dismissing the Meusels' unfair trade practices claim, the circuit court failed to adhere to the standard on a motion to dismiss and committed reversible error.

The circuit court also erred reversibly in dismissing the Meusels' unfair trade practices claim.

The order issued below seems to rule that "trade" and "commerce" under the Unfair Trade Practices Act are limited to conduct occurring within business and consumer *transactions* and that the Meusels do not plead any conduct occurring within them. (R. p. 4.) Both these notions are incorrect.

A claimant under the Unfair Trade Practices Act must show: (1) the other party violated S.C. Code Ann. § 39-5-20 by engaging in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected public interest; and (3) the claimant suffered damages (an ascertainable loss of money or property) as a result. Wright v. Craft, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006).

The Unfair Trade Practices Act specifically defines by statute that, under the Act, "'[t]rade' and 'commerce' shall include the . . . distribution of *any services* and any property, tangible or intangible, . . . and *any* other article, commodity or *thing of value* wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39-5-10(b) (emphasis added). "The statute's use of the words 'shall include' clearly suggests the legislature did not intend to limit 'trade' and 'commerce' to only the listed transactions." Baker v. Chavis, 306 S.C. 203, 208-09, 410 S.E.2d 600, 603 (Ct. App. 1991). "[T]he UTPA 'should be given a liberal construction.'" McTeer v. Provident Life and

Accident Ins., 712 F. Supp. 512, 515 (D.S.C. 1989) (quoting Connolly v. People's Life Ins. Co., 294 S.C. 355, 359, 364 S.E.2d 475, 477 (Ct. App. 1988)).

The Supreme Court's decision in Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 743 S.E.2d 808 (2013), cited by the circuit court, does not support the circuit court's conclusion but is quite consistent with the country club's actions being within the definition of trade and commerce under the Unfair Trade Practices Act. 403 S.C. 623. Health Promotion Specialists reads, in pertinent part, as follows:

> As defined by the SCUTPA, "trade or commerce" includes "the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39–5–10(b) (1985). By these plain terms, it is clear the General Assembly intended for the SCUTPA to apply to business or consumer transactions.
>
> Furthermore, *by its very definition, "trade or commerce" involves "[e]very business occupation carried on for subsistence or profit and involving the elements of bargain and sale, barter, exchange, or traffic."* Black's Law Dictionary (9th ed.2009); see Bretton v. State Lottery Comm'n, 41 Mass. App. Ct. 736, 673 N.E.2d 76, 78–79 (1996) (recognizing that "the proscription in § 2 of 'unfair or deceptive acts or practices in the conduct of any trade or commerce' must be read to apply to those acts or practices which are perpetrated in a business context" (citations omitted)).

Health Promotion Specialists, 403 S.C. at 638-39 (emphasis added).

Trade and commerce are construed broadly under the Unfair Trade Practices Act. They certainly do include all business and consumer transactions, but they are not limited to those transactions. Id. The Unfair Trade Practices Act applies to behavior in trade and commerce. Id.; S.C. Code Ann. § 39–5–10(b).

The complaint pleads the county club was acting in trade or commerce. The complaint expressly alleges that the country club's actions "are and were unfair and deceptive actions in trade or commerce." (R. p. 16 ¶ 31.) Further, the country club is in business and committed the acts involved here, which included promising to stop harassment by its member golfers during the golfers' use of the golf course for which they pay the country club, in the course of that business. (R. pp. 14, 16 ¶¶ 7, 11, 31.) The acts and omissions about which the Meusels complaint were all done in the course of the country club's business operations in renting golf course usage to customers (club membership and its use and management) and concerned those operations. (R. pp. 14, 16 ¶¶ 7, 11, 31.) They were done in the course of the country club providing a service (golf course use and maintenance) in exchange for money. (R. pp. 14, 16 ¶¶ 7, 11, 31.) Indeed, none of the country club's acts involved in this case were committed *outside* the scope of trade or commerce.

For the circuit court's reasoning on this point to be affirmed would require a different, much narrower definition of trade and commerce than what is in the Unfair Trade Practices Act. S.C. Code Ann. § 39-5-10(b).

The Unfair Trade Practices Act requires a claimant to prove "adverse effect on the public interest" to prevail. Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21 (1998). As noted in the statement of the case above, the Meusels pled an adverse impact on the public interest. They alleged that "[t]hese actions have had a negative impact on the public interest. Not only did they harm the Plaintiffs, they have also harmed those who live in the Plaintiffs' neighborhood and the public generally by allowing reprehensible racist conduct to go unaddressed, despite promises to address it." (R. p. 16 ¶ 33.) The Meusels also alleged that "[t]hese actions were capable of repetition. The instances of harassment continue, as do the

Defendants' failure to take reasonable measures to prevent or even address it." (R. p. 16 ¶ 34.) Not only did the Meusels actually plead how the conduct adversely affected the public interest, they also pled that it is capable of repetition. The Supreme Court has held that demonstrating the potential for an unfair trade practice's repetition is a demonstration of the requisite "adverse effect on the public interest." Crary, 329 S.C. at 388. Facts were pled that satisfied that element.

The circuit court also ruled that the Meusels "failed to demonstrate any loss they incurred due to Defendants' deceptive acts." (R. p. 4.) The complaint pleads that, as a result of the country club's conduct, they suffered damages, including reduced property value. (R. p. 15 ¶ 24.)

The circuit court ruled as though the complaint says something other than it does.

IV. The circuit court did not view the allegations of the complaint and the inferences from them in the light most favorable to the Meusels.

In ruling on a motion to dismiss, "the circuit court must view the facts alleged in the complaint and any reasonable inferences to be drawn therefrom in the light most favorable to the plaintiff." Benedict Coll., 400 S.C. at 544. "The motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. The question is whether in the light most favorable to plaintiff, and with every doubt resolved in [his] behalf, the complaint states any valid claim for relief." Dye, 320 S.C. at 67-68. "If those facts and inferences would entitle the plaintiff to relief on any theory, then a dismissal for failure to state a claim is improper." Benedict Coll., 400 S.C. at 544.

The circuit court below declined to employ this standard. Its analysis sometimes ignored the content of the complaint and sometimes contradicted it. (R. pp. 1-8.) It seemed to rule, not based on what the complaint states, but on the court's own ideas about whether what

the complaint states is, in fact, true. (R. pp. 1-8.) A court ruling on a motion to dismiss does not get to do that. Id.

Properly analyzed, the Meusels' complaint did state a cause of action – against the country club, three of them. (R. pp. 13-18.) The appealed order is the product of a refusal to employ the correct analysis. (R. pp. 1-8.) It is error.

V. The circuit court disregarded law that required it to give the Meusels an opportunity to amend. Reversal to have that opportunity is required.

The circuit court ignored the Meusels' repeated requests for leave to amend if the court believed the complaint to be deficient. (R. p. 22, p. 43 ln. 5-8.) This was reversible error – even if the complaint did not actually state facts sufficient to constitute a cause of action.

It is the law of this state that, "[u]nder Rules 12(b)(6) and 15(a), the circuit court may not dismiss a claim with prejudice unless the plaintiff is given a meaningful chance to amend the complaint, and after considering the amended pleading, the court is certain there is no set of facts upon which relief can be granted." Skydive Myrtle Beach., 426 S.C. at 189. Even if this court believes that the Meusels' complaint, as pled, lacked something it needed to state the claims it brought, the Meusels are entitled to reversal to permit them an opportunity to amend. Id. The Supreme Court has been clear on this. Id.

The circuit court disregarded the law. Id. The law now requires reversal. Id.

CONCLUSION

The circuit court's dismissal of the Meusels' complaint with prejudice should be reversed, and this case should be remanded, either with a straight reversal or with the opportunity for the Meusels to amend their complaint.

Respectfully submitted,

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CERTIFICATE OF COUNSEL
REGARDING COMPLIANCE WITH RULE 211(b), SCACR

I certify that the foregoing final brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the foregoing final brief on the date given below by emailing it to the other counsel of record in this appeal at the address(es) noted below.

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