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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
Daniel Coble, Circuit Court Judge

Appellate Case No. 2026-000736

Kenneth B. Loveless, ... Appellant,

v.

Kevin Scully, Edward K. White, Flora E. "Beth" Hutchison,
Michael Montogmery and Beatrice Dennis-White, ... Respondents.

INITIAL REPLY BRIEF AS TO RESPONDENT KEVIN SCULLY

Desa Ballard (S.C. Bar No. 498)
Law Offices of Desa Ballard
226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
Facsimile 803.796.1066
desab@desaballard.com

ATTORNEY FOR APPELLANT

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ARGUMENT

In Reply to Respondent Scully, Appellant Loveless makes the following points.

I. That some co-conspirators may have immunity is no defense for Scully.

At page 7 of his brief, Scully contends that the court should affirm the conspiracy claim having been dismissed as to him because Loveless has "misread the appealed order" in two respects. First, because Judge Coble's order does not refer to "any idea about joint tortfeasors being parties or not" (Scully brief at p. 7). Second, because the order dismissed some of the other alleged co-conspirator[1] parties not only due to the statute of limitations but also due to legislative immunity.

Scully's claimed distinctions are of no legal significance. Nor is there any authority cited in support of his contention.

Loveless agrees that Judge Coble's order did not articulate the established South Carolina law that every member of a conspiracy is a joint tortfeasor, each responsible for the damage caused by the conspiracy,[2] and that a plaintiff need not sue all members of a conspiracy.[3] The omission from Judge Coble's order reflects one of the three errors of law embodied in Judge Coble's order: the order failed to correctly apply the law that Scully can be held responsible for the entire

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[1] Meaning those few co-conspirators who were made parties through the second amended complaint (White, Hutchison, Montgomery, and Dennis-White), as opposed to the various other "unnamed co-conspirators" (e.g., second amended complaint ¶¶ 27, 26) as well as still other named co-conspirators (e.g., second amended complaint ¶¶ 17, 18, 19, 21, 22, 23) not named as parties. See also, footnote 4, below.

[2] *Exchange Bank of Meggett v. Bennett*, 193 S.C. 320, ___, 8 S.E.2d 515, 518 (1940) (It "is well settled that where two or more persons enter into a conspiracy, any act done by either in furtherance of the common design and in accordance with the general plan becomes the act of all, and each conspirator is responsible for such act.")

[3] *Exchange Bank of Meggett v. Bennett*, 193 S.C. 320, ___, 8 S.E.2d 515, 518 (1940) ("We conclude, therefore, that defendant had a right to sue only one of the conspirators….")

conspiracy, with or without any other co-conspirator as a party defendant. The party status of some of the other alleged co-conspirators are part of this appeal, but Scully's liability for conspiracy does not depend on any other co-conspirator's party's status.

Judge Coble erred in concluding that there is any connection between Scully's status as a defendant to a conspiracy cause of action and any other party's status as a defendant. *Exchange Bank of Meggett v. Bennett*, 193 S.C. 320, ___, 8 S.E.2d 515, 518 (1940). That is the first error of law in the order.

The second error of law in Judge Coble's order dismissing the conspiracy claim as to Scully relates to the same principal from *Exchange Bank of Meggett v. Bennett*, 193 S.C. 320, ___, 8 S.E.2d 515, 518 (1940): Scully is alleged to have worked with many other co-conspirators, besides those dismissed by Judge Coble's order, none of whom need be parties to the civil claim to sustain the conspiracy claim against Scully. The order ignores entirely the many other co-conspirators referred to in the second amended complaint[4] who were not named as parties to the action.

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[4] The second amended complaint refers to not fewer than the following non-party co-conspirators:

April Alsup (¶ 30),
Kim Ibrascio Benson (¶¶ 56, 68, 69, 70, 71),
Michael Cates (¶¶ 30, 36, 42, 47, 57, 63, 102),
Arlene DiNicola (¶¶ 22, 23, 28, 29, 37, 40, 51),
Robert Gantt (¶ 47),
Greg Hughes (¶¶ 47, 57),
Ashley Hunter (¶ 60),
Christina Melton (¶¶ 19, 21, 45, 94, 95, 97, 99, 103),
Jim Mensch (¶¶ 23, 28, 29, 37, 40, 51),
Laurene Mensch (¶¶ 22, 23, 28, 29, 37, 40, 51),
Dan Neal (¶¶ 19, 42, 47, 57, 94),
Douglas Quackenbush (¶ 57),
Lesley Anne Stiles (¶¶ 17, 18, 66, 68, 69),
Tige Watts (¶¶ 34, 35),
Sheena Wilson (¶ 51),

as well as other unnamed co-conspirators (e.g., ¶¶ 18, 24, 26, 27, 41, 45, 50, 53, 54, 55, 56, 58, 80, 98).

A conspiracy claim against Scully is properly alleged without other co-conspirators being party to the action. *Exchange Bank of Meggett v. Bennett*, 193 S.C. 320, ___, 8 S.E.2d 515, 518 (1940) (not all co-conspirators need to be sued).

Finally, the third error in Judge Coble's order, and the error with Scully's argument about the meaning of Judge Coble's order of dismissal, is that a co-conspirator removed due to the statute of limitations, or legislative immunity, is not the equivalent of a universal exoneration ***on the merits*** of the conspiracy claim such that every co-conspirator other than Scully (meaning those co-conspirators who were made parties defendant, those who were named but not made parties defendant, and those who were unnamed as alleged in the complaint as noted above), have been determined on the merits not to have entered with Scully the agreement to damage Mr. Loveless that underlies this alleged conspiracy. Nor would such an exoneration be possible without each of the numerous co-conspirators having been made a party to an action which reached the merits of the alleged conspiracy.

Scully's argument proves too much, as does Judge Coble's order in this regard, and is incorrect as a matter of law. Each of Scully's co-conspirators who has not been made a party to the action prevents an exoneration on the merits of all possible co-conspirators other than Scully, as does the absence of each unnamed co-conspirator. Under *Exchange Bank of Meggett,* Scully could be the lone defendant to a conspiracy cause of action or he can be joined as a party with other co-conspirators.

Judge Coble erred by using a motion to dismiss to address, and grant dismissal on, two affirmative defenses (statute of limitations and legislative immunity), which had not even been pleaded pursuant to SCRCP 8(c). Even if it had been proper for Judge Coble to consider affirmative

defenses which had not been pleaded in deciding a motion to dismiss, neither of those affirmative defenses goes to the merits. So, no grant of dismissal on either basis as to ***some*** of the co-conspirators eliminates ***as a matter of law***, the possibility that Scully could have joined with all other possible fellow co-conspirators. Only a decision on the merits ***as to every co-conspirator other than Scully*** could eliminate all persons with whom Scully might have conspired. And only such a finding on the merits would leave Scully without any co-conspirator.

In short, the elements of conspiracy alleged as to Scully do not depend on the outcome of the appeal over whether those few affected parties to this appeal were, or were not, properly dismissed by Judge Coble's orders.

II. Scully's claim concerning damages, and Judge Coble's order as to damages for conspiracy, are contrary to *Paradis*.

Starting at page eight of his brief, Scully supports the erroneous rationale in Judge Coble's order that the conspiracy claim against Scully should be dismissed because the second amended complaint fails to allege damages from the conspiracy.

The short response, to both Scully's contention and the error in Judge Coble's order as to the damages alleged to support the conspiracy allegations, is that their rationale is directly contrary to *Paradis v. Charleston County School District*, 433 S.C. 562, 861 S.E.2d 774 (2021). Paradis pleaded ***only*** a defamation claim and a conspiracy claim. 433 S.C. at 564, 861 S.E.2d at 775. In its decision the South Carolina Supreme Court described, first as a hypothetical, and then also as a description of Paradis's claim, the *exact* type of action that has been brought by Mr. Loveless:

> If one defendant who did not personally commit defamatory acts conspired with another who did defame the plaintiff, the legal elements the plaintiff must establish in a defamation case—along

> with the legal requirements for conspiracy—guide the court and the jury in deciding whether the conspirator should also be liable for defamation.

Paradis, 433 S.C. 562, 579, 861 S.E.2d 774, 783 (2021) (concurrence by Justice Few).[5]

As with Loveless, the conspiracy alleged was, as Judge Few put it in his concurrence, "a conspiracy to commit defamation." 433 S.C. at 580, 861 S.E.2d at 783. The conspiracy claim had been dismissed for lack of "special damages" alleged as distinct from the defamation claim.[6]

The Supreme Court granted *certiorari* to review only whether the conspiracy cause of action required some unique special damage distinct from the defamation damages. 433 S.C. at 565, 861 S.E.2d at 775. The Supreme Court decided the conspiracy cause of action did *not* require unique special damages, and remanded. 433 S.C. at 574, 861 S.E.2d at 780.

In short, a "conspiracy to defame" does not require unique, special damage, separate from the defamation damages. What Judge Coble has done, and what Scully urges this court to do, is reinstate under some other guise the very special damages requirement that *Paradis* explicitly overruled: damages separate from those of other causes of action. This confuses possibly having to elect at trial from among the remedies to various causes of action with pleading damages for different causes of action, an error of law.

Judge Coble's order did not dismiss the defamation claim or the intentional infliction of emotional distress claim against Scully. Order at p. 4. After *Paradis*, defamation damages are

[5] Justice Few concurred in part and dissented in part. At the same citation, Justice Few tied the parallel directly to Paradis's claim: "We need not imagine how a defamation claim could unfold; we can turn to the plaintiff's allegations in this case."

[6] The trial court in *Paradis* dismissed both causes of action, conspiracy being dismissed for having failed to allege special damages, a result which the Court of Appeals affirmed. *Paradis*, 433 S.C. at 565, 861 S.E.2d at 775.

sufficient to support a "conspiracy to defame" cause of action. In that regard, Judge Coble erred in being (a) internally inconsistent as well as (b) inconsistent with *Paradis*.

And finally, the order erroneously overlooks and misinterprets aspects of the damages alleged. For example, at p. 4 the order discusses that Scully and other defendants sent "the press release to media outlets," but faults the complaint for not alleging "that any media outlet published the press release or used anything from it in any article, news story, editorial, or anything else." This is an error of law that ignores important things.

First, sending the defamatory press release to media outlets is itself "publication of the [defamatory content] to a third party." *Kennedy v. Richland County School District*, 428 S.C. 98, 114, 833 S.E.2d 414, 423 (Ct. App. 2019). As was sending the press release to the "social media consultant," as alleged in the second amended complaint at ¶ 60. The order errs in requiring *additional* publications. Defamation requires only a single publication.

Second, the order overlooks, and discounts (when it is required to accept as true) the other facts alleged as to forms of defamatory publication. Such as how the social media group OneD5 had as its purpose to disparage Mr. Loveless (second amended complaint at ¶ 24); that social media posts implied Loveless was a racist (second amended complaint at ¶ 29); that social media posts included other defamatory posts (second amended complaint at ¶ 54). Social media itself, specifically two Facebook groups, were alleged to be "key platforms for disseminating false and misleading information" about Mr. Loveless (second amended complaint at ¶ 55) that after publication generated "like" reactions from members of the public (second amended complaint at ¶ 56). Paragraph 59 alleged that "hundreds" of social media posts accused Mr. Loveless of the false claim Scully and others had spread that Mr. Loveless had abused his public position to obtain

for his company a construction contract with the school district of which he was a board member. Paragraph 112 alleges that the lie about Mr. Loveless taking money from the school district of which he was trustee was "repeated many times on social media." Each of these is an alleged *fact* about publication, which must be accepted as true.

III. Judge Coble abused discretion in refusing to enter an unopposed order deeming matters admitted.

Scully concedes he made no response to requests to admit and did so as a "cost-effective" way to admit the requests. To establish the admissions irrevocably for this action, as provided in SCRCP 36(a), Mr. Loveless sought an order deeming the requests admitted.[7] Mr. Scully did not object. Judge Coble refused to deem the requests admitted. Order at p. 2, finding no "bad faith" by Scully.

Discovery orders are within the discretion of the trial judge, but a "clear abuse of discretion" is reviewable. *Hollman v. Woolfson*, 384 S.C. 571, 577, 683 S.E.2d 495, 498 (2009) (*citing*, *Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989) ("A trial judge's rulings on discovery matters will not be disturbed by an appellate court absent a clear abuse of discretion.")

Scully contends, brief at p. 12, that Mr. Loveless "asked the trial court to deem already-admitted matters admitted," so there was "nothing for the court to address." Since the admission was by means of Scully having failed to respond, the request, had it been granted would have created a writing reflecting the admissions for purposes of this action. Loveless asserts it was an abuse of discretion to refuse to enter an order under these circumstances, when no party objected,

[7] Doing so would foreclose the option in SCRCP 36(b), which permits a party to move to be relieved from his or her admissions.

a reversal which an appellate court is empowered to do. E.g., *Oncology & Hematology Assocs. of S.C., LLC v. S.C. Dep't of Health & Env't Control*, 387 S.C. 380, 389, 692 S.E.2d 920, 925 (2010) ("We vacate all discovery orders and remand for further proceedings consistent with this opinion.")

IV. Judge Coble abused discretion in denying the request to depose Scully on issues raised by his late production of documents.

SCRCP 30(a)(2) establishes a good cause standard for deposing a party a second time. Scully opposes having his deposition reopened, but on this issue, he lacks clean hands, as reopening his deposition was sought only because he delayed (for two years) producing documents which expanded the litigation. Scully claims (brief at p. 13), no prejudice to Mr. Loveless and that Mr. Loveless had "chosen to change the issues" after Scully's original deposition.

The "changed" issues, of course, were entirely a function of Scully having withheld documents from his original production, a withholding that preceded his initial deposition.

> The good cause standard exists to ensure the interests of justice are protected even when a party missteps, so a harmless procedural foot fault does not spring a trap door that mindlessly jettisons innocent parties out of court, regardless of the circumstances.

Jordan v. Hartford Fin. Grp., Inc., 435 S.C. 501, 505, 868 S.E.2d 400, 402 (Ct. App. 2021) (appeal reinstated after Hartford's calendaring mistake).

> We have held that an Administrative Law Judge acted arbitrarily by dismissing an appeal when a party's lawyer did not appear for court due to a calendar mishap. *See Mictronics, Inc. v. S.C. Dep't of Rev.*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001) ("We find no evidence in the record that the mistake was anything but a good faith error, as shown by [counsel's] explanation coupled with his speed in asking the ALJ for rehearing."). We have also held good cause exists to set aside a default granted because the answer was received one day late. *Columbia Pools, Inc. v. Galvin*, 288 S.C. 59,

> 61, 339 S.E.2d 524, 525 (Ct. App. 1986) ("[W]here there is a good faith mistake of fact, and, no attempt to thwart the judicial system, there is basis for relief."). These cases recognize, as we do again today, that the practice of law is challenging enough without having to endure the overbearing enforcement of technicalities when prejudice is absent from the scene.

Jordan v. Hartford Fin. Grp., Inc., 435 S.C. 501, 506, 868 S.E.2d 400, 402–03 (Ct. App. 2021).

This is "no attempt to thwart the judicial system" by Mr. Loveless. The request is a function of Scully having withheld documents from his original production. Loveless contends it was an abuse of discretion to deny the request, given its relation to Scully's own behavior.

V. Arguments are preserved for review.

At pages 13 to 15 of his brief, Scully contends that on appeal Mr. Loveless has not preserved for appeal reopening Mr. Scully's deposition because he had not argued below "that Scully had made the issues in the case change" (Brief at p. 14). Actually, it was explicitly argued, at pp. 49 and 50 of the Transcript, that new issues were discovered "when Mr. Scully produced his discovery in November 2024," precisely the two-year production delay argued in this appeal.

VI. The "two-issue rule" does not apply.

At page 15 of his brief, Scully contradicts his brief at page 7. At page 15 he contends that the "two issue rule" requires the order as to the conspiracy cause of action be upheld because Mr. Loveless's appeal did ***not*** challenge the "legal inability of the other defendants to be in a civil conspiracy." At page 7 he had argued that Mr. Loveless had misunderstood Judge Coble's order because the order does not refer to "any idea about joint tortfeasors being parties or not."

Scully does not appear to grasp that the discussion above (under issue 1 in this Reply) is entirely about the supposed "legal inability of the other defendants to be in a civil conspiracy."

That Scully does not grasp that both issues were addressed is not a basis to apply the "two issue" rule. The appeal challenges both grounds on which the dismissal of the conspiracy cause of action as to Mr. Scully was based: the immunity ruling and the damages ruling.

CONCLUSION

Judge Coble's order as to Mr. Scully should be reversed on each ground claimed by Mr. Loveless. The conspiracy cause of action should be remanded for further proceedings, with instructions to the trial court to (a) issue the order deeming that the requests to admit have been admitted and (b) to permit the deposition of Mr. Scully to be reopened as to any issue contained in the documents he failed until November 2024 to produce. Dilatory tactics in discovery should not be rewarded.

Respectfully submitted,

s/ Desa Ballard
Desa Ballard (S.C. Bar No. 498)
Law Offices of Desa Ballard
226 State Street
West Columbia, South Carolina 29169
Telephone 803.796.9299
desab@desaballard.com

ATTORNEY FOR APPELLANT

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