THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

CASE NO. 2014-001747

JOSEPH C. SUN .... Appellant

v.

MARSHALL L. HORTON and RICHARD ULBRICH .... Respondents

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INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

(1) It is error and abuse of discretion of the Circuit Court in overlooking and failure to make any ruling on Appellant's allegations of fraud committed by Respondent Horton, and the allegations of criminal trespassing, invasion of privacy and destruction of personal property committed in conspiracy by both Respondents Horton and Ulbrich.

(2) It is error of the Circuit Court to dismiss the within complaint against Respondent Marshall Horton.

(3) It is error of the Circuit Court to dismiss the within complaint against Respondent Richard Ulrich.

STATEMENT OF THE CASE

Appellent Joseph Sun (hereinafter Sun) filed his Summons and Complaint on February 3, 2014 against Respondents Marshall Horton and Richard Ulbrich initially on tortuous acts they had committed against him and his minor daughter. Respondents served their Answer and Counterclaim on about February 10, 2014. On March 6, 2014 and pursuant to Rule 15(a) SCRCP, Appellant filed and served his Amended Complaint deleting his daughter as Plaintiff in the case and clarified some allegations.

Apparently, Respondents filed their Notice of Motion and Motion to Dismiss under Rule 12(b)(6) and Motion for Sanction with their Answer and Counterclaim, but did not serve their motion on Appellant until March 7, 2014 after they obtained a hearing date of April 23, 2014. (See cover letter with their Motion) At the judge's chamber, after a brief hearing, Master in Equity and Circuit Judge Marvin Duke directed all parties to submit their affidavits prior to his

determination of Respondent's motion which would be treated as one for summary judgment.

After Respondents presented their affidavits, Appellant also filed his affidavits, to clarify his Complaint and Amended Complaint, and to conflict the Respondents affidavits pursuant to Rule 56, SCRCP. On July 11, 2014, Circuit Court entered an Order Granting Plaintiff's [sic] Motion to Dismiss. Appellant timely filed and served his Notice of Appeal on about August 23, 2014. Appellant filed and served his Amended Notice of Appeal after he was informed by the Court that the Respondents were represented by the two (2) counsels listed on the Caption page.

STATEMENT OF FACTS

Some time in early 2011, Appellant Sun visited Respondent Horton at his office in Bluffton, SC regarding a civil suit Sun intended to file. At the end of a brief interview, Appellant decided that Respondent Horton did not appear to have the experience in those matter therefore expressed his desire to find another lawyer. Respondent Horton was displeased and informed Appellant Sun that there was a consultation fee of $200.00. Appellant Sun refused to pay because there was no such understanding prior to the meeting and Respondent Horton had not done anything for Appellant. Respondent Horton was displeased and angry.

Near the end of 2011, Respondent Horton was assigned the position of Guardian ad Litem in a Beaufort County Family Court Case No. 2011-DR-07-1823 filed by Appellant's ex-wife LiLing Sun seeking change in custody condition in which case Appellant Sun was the Defendant. Appellant Sun initially raised his objection against the assignment of Marshall Horton as Guardian ad Litem in the Family Court based on his prior unpleasant encounter with Respondent Horton. Respondent Horton refused to disqualify himself and stayed on, falsely claiming he

would be fair and neutral. Appellant Sun relied on and was misled by Respondent Horton's false promises therefore did not file a motion to disqualify Respondent Horton as Guardian ad Litem.

Appellant alleged in his Amended Complaint that Respondent Horton is guilty of committing fraud against Appellant Sun in pretending that he would be a fair and impartial Guardian ad Litem when in fact he had already plotted a scheme to injure Appellant Sun and his minor daughter, and to defraud money from Appellant Sun. Respondent Horton's scheme of fraud was to pretend and make false impression and promise to the court and Appellant that he would do a truthful, fair and impartial investigation, evaluation and report regarding the two parties - Appellant Sun and his ex-wife, when he had actually worked for Appellant's opponent - his ex-wife and her new husband, then use hyperbole and unverified facts to paint a favorable picture for them, while on the other hand, fabricate and/or use unfounded false statements to degrade Appellant Sun in his Guardian report as his pay-back against Appellant, and to defraud money from Appellant with his fabricated Guardian fees.

Respondent Horton testified under oath in the custody trial on his total Guardian fee to be about $7,000.00, Respondent Horton surreptitiously increased his total fees to about $9,000.00 after the trial and the case was closed, without any basis or justification, and required Appellant to pay the difference. Respondent Horton had not justified his fee or the increase after the trial.

Based on the numerous lies and false statements made by Respondent Horton in his Guardian Report, Appellant Sun's minor daughter was moved to Virginia away from all her friends, toys, a home and neighborhood that she loved and most of all, her father with whom she was very close to. Appellant Sun believed in Respondent Horton's calculated false promise and statement of fairness and neutrality, in the end, suffered monetary damages. Appellant is also put

in distress because his daughter has been deprived of a comfortable and happy home. Appellant is entitled to recover the portion of the fabricated and unjustified charges he paid to Respondent Horton, and the damages and injury he has suffered.

As shown in the Complaint and Amended Complaint, after the Family Court trial, Respondents Horton and Ulrich as their attempt to get money from Appellant, began their harassment by conspiring to stalk Appellant and criminally trespass his residence and private working site, and repeatedly peep into Appellant's home and take numerous photographs with the pretense of service of certain paper regarding the fee after the Family Court case was closed. Respondents Horton and Ulbrich's outrageous acts had caused Appellant and his family in fear and distress, and their privacy invaded by them.

Respopndents Horton and Ulbrich conspired to commit their criminal trespassing by ignoring numerous clearly posted "No Trespassing" sign posted on many large trees and a metal gate across the driveway and Appellant's repeated warning that they stop their trespassing and invasion of his privacy. (See copies of photographs attached with Affidavits of Joseph Sun and Richard Ulbrich.) After committing their criminal trespasses and invasion of Appellant's privacy at a house in Knowles Island Plantation and taking numerous photographs, Respondents Horton and Ulbrich left a gate unlocked by damaging the latch. Appellant Sun lost several expensive power tools on the property because the metal gate was damaged by Respondents' trespass causing it to be malfunctioned and could not be locked for several days.

Appellant Sun is entitled to recover from Respondents Horton and Ulbrich, jointly and severally actual damages of $200.00 in the repair of the metal gate and $1,500.00 in the loss of tools and equipments. Appellant Sun is entitled to recover monetary damages from Respondent

Horton for the charges he fabricated after the Family Court case was already closed.

After all parties submitted their affidavits and other Exhibits[1], Circuit Court entered an Order Granting Plaintiff's Motion to Dismiss on July 11, 2014.

ARGUMENTS

Respondents Horton and Ulrich filed their motion to dismiss, relying on Rule 12(b)(6), SCRCP. (Page 2 Notice and Motion to Dismiss) At the Judge's chamber, on April 23, 2014, Appellant joined the hearing just as it had started because he was blocked at the courthouse parking lot by a construction truck for a long time when he was entering from the back way to the courthouse. The Honorable Marvin Dukes indicated he had no record or the file of the case and would hold off the ruling until the Defendants would file and serve their affidavit on the case.

Respondents filed a motion under Rule 12(b)(6) which is a defense by motion "for failure to state facts sufficient to constitute a cause of action." In his Complaint and Amended Complaint which was filed and served within 30 days after Respondent served their Answer and Counterclaim, Appellant stated several causes of action, to wit,

(1) Respondent Horton had misled Appellant that he would be fair and impartial, that his fees would be truthful and accurate knowing he would not keep that promise, Appellant relied on Horton's false promise and withheld his motion to remove Horton as the Guardian, and in the end suffered damages and injury.

In Hansen v. DHL Laboratories, Inc., 316 S.C. 505, 450 S.E.2d 624 (S.C.App.,1994) The

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[1] The Order of Dismissal of July 11, 2014 (Page 1) referred to certain court orders in Case No. 2011-DR-07-1823. But Appellant has never been served with any of those orders, therefore, has no knowledge of what they were or if they were indeed submitted to the court.

South Carolina Court of Appeals held that,

> "Elements of fraud are: a representation; falsity of representation; materiality of representation; defendant's knowledge of falsity of representation, or reckless disregard for its truth or falsity; defendant's intent that representation be acted upon; plaintiff's ignorance of the falsity; plaintiff's reliance on truth of representtation; plaintiff's right to so rely; and consequent and proximate injury to plaintiff."

Appellant has made all the requisite allegations in his complaint and amended complaint - that Respondent Horton falsely represented he would be fair and impartial when he knew he was prejudiced against Appellant and angry at him for not paying him the consultation fee; Appellant believed Mr. Horton's lies and withheld his motion to remove Horton and resulting in damages and injury he has suffered. He should be allowed to prove it to the jury.

(2) Respondent Horton has not justified his surreptitious increase of his fee from $7,000.00 to $9,000.00 and he knew he made false pretense on the final amount.

(3) Respondents Horton and Ulrich conspired to harass Appellant, criminally trespass his property after being warned to leave or stay out, taking numerous photographs and damaging Appellant's property causing losses by theft.

The South Carolina Supreme Court in Brazell v. Windsor, 384 S.C. 512, 682 S.E.2d 824 (2009) held that, "If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a moton to dismiss for failure to state a claim is improper. *Gentry v. Yonce,* 337 S.C. 1,5, 522 S.E.2d 137,139 (1999)." A motion to dismiss for failure to state a claim should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. Rule 12(b)(6), SCRCP. Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (2003) The complaint should not be dismissed merely

because the court doubts the plaintiff will prevail in the action. Id.

Circuit Court's conversion of Respondents' motion to dismiss by simply asking the parties to submit their affidavit without following the guidelines set by Rule 56, SCRCP is improper. After a brief hearing, Master-in-Equity told the parties to submit their affidavits in 20 days. Appellants filed and served his affidavit on May 12, 2014 and later found out that Respondents obtained an extension to file by email to the court. Appellant filed his objection to Respondents affidavits on the ground that they were filing their affidavits after Appellant, the non-movant to their motion for summary judgment had already filed his affidavit. (See Plaintiff's Objection to Defendants' Affidavits filed at the Circuit Court.) Appellant finally received the service copies of Respondents' affidavits on about May 20, 2014 from the two counsels apparently were in the hearing but did not identify themselves nor had they filed any notice of appearance. The respondents were originally represented by Mr. Horton who signed the Certificate of Service on the Answer and Motion to Dismiss.

Appellant filed a "Plaintiff's Response in Opposition to Defendants' Motion for Summary Judgment" on May 27, 2014. But on May 29, 2014, only by email, Circuit Judge Dukes told all parties that he was granting Respondent Horton' Motion to Dismiss and granting Respondent Ulbrich's motion for summary judgment stating that he was clarified from the affidavit. The judge's email referred to only one affidavit. There was no mention regarding any affidavits Appellant had filed and served. According to the emails from the Circuit Court and the Order of Dismissal, it is clear that the issue of fraud committed by Respondent Horton, the issues of conspiracy, trespass, invasion of privacy and destruction of property by the Respondents against the Appellant have not been ruled on as they were not even mentioned.

There were only two (2) affidavits filed by the Respondents. It is clear that they have not negated any genuine issues of material facts alleged in the complaint and amended complaint, or stated why they are entitled to a summary judgment as a matter of law. Appellant filed and served his amended complaint, pursuant to SCRCP, Rule 15(a), within 30 days after he was served with Defendants Answer and Counterclaim. It is unclear if the Circuit Court had considered it.

Supreme Court of South Carolina in Baughman v. American Telephone and Telegraph, 306 S.C. 101, 410 S.E.2d 537 (1991) held that, "Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. Watson v. Southern Ry. Co., 420 F.Supp. 483, 486 (D.S.C.1975); see also Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986)("an extreme remedy to be cautiously invoked"). This means, among other things,that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. 10A Wright & Miller, Federal Practice and Procedure s 2741, p. 543 (1983); 6 Moore's Federal Practice P 56.02[6], p.56-39 (2d ed. 1990); see, e.g., First Chicago Int'l v. United Exchange Co., 836 F.2d 1375 (D.C.Cir.1988); Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce,Fenner & Smith, Inc., 756 F.2d 230 (2d Cir.1985); Tyler v. City of Enterprise,521 So.2d 951 (Ala.1988); Gangadean v. Leumi Fin. Corp., 13 Ariz.App. 534, 478 P.2d 532 (1970); Commercial Bank of Kendall v. Heiman, 322 So.2d 564 (Fla.Dist.Ct.App.1975); Board of Education v. Van Buren & Firestone, Architects, Inc., 165 W.Va. 140, 267 S.E.2d 440 (1980)"

Circuit Court is erroneous in finding that Appellant's case is equivalent to a review of the judgment of the Beaufort County Family Court, and cited in reliance of the case of Fleming v.

Asbill, 326 S.C. 49, 483 S.E.2d 751 (1996). But all the tortuous acts allegedly committed by the Respondents are outside of the scope of Respondent Horton's appointment, such as Respondent Horton lying to the Appellant that he would be fair and honest on his charges, and the Respondents conspired to trespass Appellant's property, invading Appellant's right to privacy and destroying Appellant's property all committed after the Family Court case was closed.

Similarly, South Carolina Court of Appeals in Falk v. Sadler, 341 S.C. 281,288, 533 S.E.2d 350 (2000) explained that, "In Fleming, our supreme court held individuals appointed as guardians ad litem in private custody proceeddings are entitled to absolute quasi-judicial immunity for acts performed within the scope of their appointment." Court of Appeals further states that "the immunity would not protect guardians ad litem for actions beyond the scope of their duties. Thus, for example, if a guardian abuses a child, she would be liable because her action would fall outside her duties as guardian .... the immunity available to guardian ad litem is not a blanket immunity for any and all actions taken by the guardian. Rather, the guardian remains liable for actions beyond the scope of her duties. It is the nature of the acts, not simply the status of the Respondent as a guardian ad litem, that determines the availability of immunity for the challenged acts and the extent of protection afforded by the immunity. See *Collins v. Tabet*, 111 N.M. 391, 806 P.2d 40,52 (1991)."

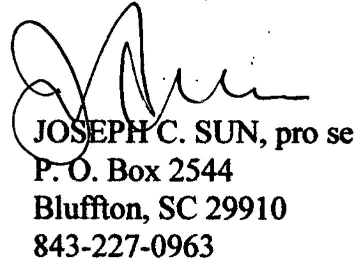
Therefore, it is error of the Circuit Court to give Respondent Horton a blanket immnuty. Respondent Ulrich enjoyed no immunity of any kind. It is error of the Circuit Court to rule that just because Ulrich was acting as Mr. Horton's agent and granted summary judgment as to claims against him. Circuit Court simply ignored all allegations of trespass, invasion of privacy and destruction of property against respondent Ulbrich.

CONCLUSION

For the foregoing reasons, it is error and abuse of discretion of the circuit court for overlooking and ignoring Appellants allegations of fraud committed by Respondent Horton and the allegations of criminal trespassing, invasion of privacy and destruction of property against the Appellant. This court should reverse the judgment of the Court of Common Pleas and remand the case for further proceeding.

September 17, 2014

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have this date served the Appellant's Initial Brief and Designation of Matters on Respondents Horton and Ulbrich by depositing a copy of same in the U.S. Mail postage prepaid, on September 17, 2014, addressed to their attorneys on record at:

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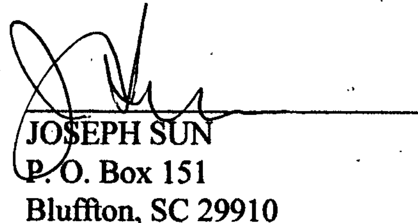
This 17th day of September 2014



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