THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

Case No(s). 2013-CP-40-1469
Appellate Case No. 2014-000058

Hugh Allen Hoover, Appellant,

v.

L.A. Blue and Kem Dempsey, Respondents,

FINAL BRIEF OF THE RESPONDENTS

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November 17, 2014

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II. **DID THE CIRCUIT COURT ERR IN CONCLUDING THAT THE RESPONDENTS WERE ENTITLED TO AN ORDER GRANTING THEIR MOTION TO DISMISS APPELLANT'S COMPLAINT AS BARRED BY THE STATUTE OF LIMITATIONS?**

STATEMENT OF THE CASE

This is an appeal arising from the trial court's dismissal of Appellant's Complaint with prejudice via an Order Granting Motion to Dismiss, which was signed and filed on November 8, 2013 by The Honorable G. Thomas Cooper.

Appellant filed a Summons and Complaint on March 7, 2013 against Respondents seeking damages under three causes of action; malicious prosecution, abuse of process, and outrage. Respondents timely filed a Motion to Dismiss in response to Appellant's Summons and Complaint on May 23, 2013 requesting Appellant's Summons and Complaint be dismissed due to Appellant's failure to state a claim upon which relief can be granted, Appellant's failure to file his causes of actions for outrage and abuse of process as compulsory counterclaims in the 2006 action, and Appellant's causes of action for outrage and abuse of process being barred by the applicable statute of limitations. A hearing was held on October 8, 2013 on Respondents' Motion to Dismiss during which both sides presented arguments in support of their position. As detailed above, on November 18, 2013 Respondent's Motion to Dismiss was granted. Following the dismissal of his action, Appellant filed a Motion for Reconsideration on November 22, 2013 which was denied by The Honorable G. Thomas Cooper via an Order Denying Plaintiff's Motion

for Reconsideration signed on December 27, 2013 and filed on December 30, 2013. Appellant then filed a Notice of Appeal on January 8, 2014 to this Court.

FACTS

Appellant filed a Summons and Complaint on March 7, 2013 against Respondents seeking damages under three causes of action; malicious prosecution, abuse of process, and outrage. The basis for these three causes of actions were pled as resulting from Respondent's action for declaratory and injunctive relief against Appellant and Richland County which was filed on October 5, 2006 and came to a final conclusion of March 22, 2011.[1] No other grounds for Appellant's action appear to be alleged by Appellant in his Summons and Complaint aside from off-handed and unfounded comments about the Respondents. Respondents timely filed a Motion to Dismiss in response to Appellant's Summons and Complaint on May 23, 2013 requesting Appellant's Summons and Complaint be dismissed due to Appellant's failure to state a claim upon which relief can be granted, Appellant's failure to file his causes of actions for outrage and abuse of process as compulsory counterclaims in the 2006 action, and Appellant's causes of action for outrage and abuse of process being barred by the applicable statute of limitations. A hearing was held on October 8, 2013 on Respondents' Motion to Dismiss during which both sides presented arguments in support of their position. On November 18, 2013 Respondent's Motion to Dismiss was granted as detailed above and Appellant filed a Motion for Reconsideration which was denied on December 27, 2013.

[1] The circuit court granted summary judgment in favor of Appellant and Richland County on April 1, 2009 in regards to the 2006 action, and this Court affirmed the trial court's dismissal via an unpublished opinion on March 22, 2011. This Court based their affirmance of the trial court's dismissal of the 2006 action on the grounds of Respondents' claims for declaratory relief being non-justiciable and their inability to demonstrate damage in support of their requests for injunctive relief.

STANDARD OF REVIEW

The South Carolina Supreme Court has held that, "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) *citing* Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct.App.2001). The Supreme Court clarifies this standard by stating that, "in considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) *citing* Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006).

ARGUMENTS

I. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT RESPONDENTS WERE ENTITLED TO AN ORDER GRANTING THEIR MOTION TO DISMISS APPELLANT'S COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Appellant's complaint in this matter alleges three causes of action; malicious prosecution, abuse of process, and outrage. Considering Appellant's first cause of action, malicious prosecution, Appellant fails to allege facts that taken in a light most favorable to him would constitute a lack of probable cause and malice. Cisson v. Pickens Sav. & Loan Ass'n, 258 S.C. 37, 43, lays out the requirements in order to maintain a cause of action for malicious prosecution of a civil proceeding as "(1) defendant instituted a judicial proceeding; (2) want of probable cause; (3) malice in instituting the proceedings; and (4) resulting injury or damage." Respondents would concede that Plaintiff has satisfied the first element of malicious prosecution as Respondents did institute judicial proceedings against Appellant and Richland County via a Summons and Complaint for declaratory and injunctive relief in October 2006. However, Appellant fails to plead any facts in his Complaint to satisfy the remaining elements of malicious

prosecution, specifically lack of probable cause and malice, and therefore has not stated a claim upon which relief can be granted. In his complaint as well as in his Brief, Appellant appears to rely on the fact that the previous action between these parties resolved in Appellant's favor as satisfying the want of probable cause as well as malice in instituting the proceedings. However, this reliance is severely misplaced as South Carolina case law is clear that, "the mere fact that defendant was unsuccessful in its defense of the prior action and in its appeal has no bearing upon the issue of probable cause." Cisson v. Pickens Sav. & Loan Ass'n, 258 S.C. 37, 44. Cisson continues on to state that, "it is generally agreed that the termination of the proceeding in favor of the person against whom it is brought is no evidence that probable cause was lacking, since in a civil action there is no preliminary determination of the sufficient of the evidence to justify the suit." *Id.*, Prosser on Torts, (3d) Ed., Section 114, p. 874. Appellant also appears to believe that lack of probable cause and malice are the same element and can be satisfied by the same evidence. This belief finds no support in current case-law as South Carolina courts have specifically held that, "a want of probable cause cannot be inferred from any degree of malice." Parrot v. Plowden Motor Co., supra, 246 S.C. 318, 143 S.E.2d 607. In fact nowhere in the record, including Appellant's Complaint and Brief, does there even exist an allegation that the Respondents did not have probable cause in instituting their proceeding against Appellant and Richland County. Both at the hearing of this matter as well as in Appellant's Brief, the existence of probable cause by the Respondents in instituting the proceedings against Appellant has been ignored and thus abandoned. As South Carolina courts have held, "an issue raised on appeal but not argued in the brief is deemed abandoned and will not be considered by the appellate court," Respondents would respectfully request that this Court affirm the trial court's dismissal of Appellant's Complaint with prejudice as to the malicious prosecution cause of action. Wright v.

Craft, 372 S.C. 1, 20, 640 S.E.2d 486, 497 (Ct. App. 2006); Fields v. Melrose Ltd. P'ship, 312 S.C. 102, 106, 439 S.E.2d 283, 284 (Ct.App.1993); Bell v. Bennett, 307 S.C. 286, 294, 414 S.E.2d 786, 791 (Ct.App.1992).

Assuming *arguendo* that this Court finds that Appellant has plead a lack of probable cause, Appellant's cause of action for malicious prosecution also fails as a matter of law as Appellant has presented no facts to support the existence of malice on the part of Respondents. Appellant states in his Complaint and Brief that Respondents "wanted to force Appellant to develop his land in a manner consistent with the homes and properties owned by Respondents or force him to sell the property...," a statement that in essence provides the basis for zoning laws throughout South Carolina. [R. p. 5-6]. In fact the trial court correctly noted that, "nothing regarding these statements rises to the level of malice as these requests of the Defendants' have no malicious basis and cannot be pled as such." [R. p. 31-35]. Additionally as noted in the trial court's Order and argued by Respondents at the October 8, 2013 hearing, in Respondents' prior proceeding they requested only injunctive and declaratory relief from Appellant and Richland County in order to force the Appellant into following the required zoning and building requirements of the area. [R. p. 14, lines 18-19]. A review of the transcript of the October 8, 2013 hearing demonstrates that Appellant all but concedes that his main complaint against Respondents is that they sued him. It is precisely for this reason that South Carolina courts have criticized malicious prosecution actions stemming from civil proceedings and stated that these actions are "not to be applied so as to hamper the basic right of citizens to sue or defend when sued." Cisson v. Pickens Sav. & Loan Ass'n, 258 S.C. 37. However, this is exactly what the Appellant is requesting this Court do with his appeal; vacate the trial court's order and punish the Respondents for requesting the courts force Appellant to follow the zoning laws of Richland

County. To reverse the trial court's decision and support a malicious prosecution cause of action based on requiring a person to follow the laws of this State would create an onslaught of civil actions filed by persons who feel they have been wronged by governmental and state agencies, as well as their neighbors, for being forced to build and maintain their businesses and homes in accordance with the requirements of this State. Appellant states no other facts supporting an existence of malice either in his Complaint or in his Brief. Even at the hearing on Respondents' Motion to Dismiss, Appellant's counsel failed to present any facts that would support the presence of malice in the institution of judicial proceedings against Appellant. Counsel for the Appellant only states that "we did plead malice, and we pled evidence of malice." [R. p. 13, lines 11-12]. This cavalier and dismissive attitude of Appellant and his counsel demonstrate that the Appellant's main reason in bringing this suit and cause of action against Respondents is revenge for a prior suit, and not because they have any evidence of malicious intent on behalf of Respondents. As such, Respondents would respectfully request that this Court affirm the trial court's dismissal of Appellant's Complaint with prejudice as to the malicious prosecution cause of action.

In considering the Appellant's cause of action for abuse of process, Appellant fails to allege a cause of action for which he can recover based on his failure to allege either elements of abuse of process. Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967) details the essential elements of abuse of process as, "first, an ulterior purpose, and second, a willful act in the use of the process not proper in the regular conduct of the proceeding." The South Carolina Supreme Court continues in Huggins v. Winn-Dixie Greenville, Inc., to define a willful act as used in this cause of action as, "some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the

process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967). Appellant, both in his Complaint and in his Brief, fails to allege a willful act in the use of the process not proper in the regular conduct of the proceeding. While Appellant details the history of Respondents' prior action in his Complaint, he never alleges a specific act performed by either of the Respondents that would be improper in the regular conduct of the proceedings nor does he allege an ulterior purpose. Furthermore at the October 8, 2013 hearing, Appellant's counsel argued that, "the Court of Appeals' ruling is the basis of the process being unlawful which is a required element." [R. p. 12, lines. 21-22]. Appellant, based on his Complaint and the arguments at the hearing on this matter, thus appears to base his abuse of process claim on the Court of Appeals affirming the trial court's dismissal of Respondent's prior action. At no point does Appellant allege that Respondents performed any willful acts in the use of process that were improper, only that the Court of Appeals found that Respondents had not shown how they were harmed by Appellant's conduct. As Appellant ignores this element in his discussion regarding abuse of process in his Brief, this Court as well as Respondents are left without a basis as to what conduct the Appellant finds to be improper. As such, Respondents would respectfully request that this Court affirm the trial court's dismissal of Appellant's Complaint with prejudice as to the abuse of process cause of action.

In addition to Appellant's failure to state a willful act in the use of process not proper in the regular conduct of the proceeding, Appellant also fails to plead an ulterior purpose held by the Respondents in pursuing this action. Appellant simply weighs down his Summons and Complaint with off-handed and incorrect statements regarding Respondents for which he has never provided any support for whatsoever. Even assuming that this Court finds, based on the

totality of the Appellant's Complaint, an ulterior purpose has been plead, the Appellant's cause of action for abuse of process still fails as South Carolina case law holds that, "there must be an overt act, and an improper purpose alone is insufficient." Hiner v. Am. Med. Int'l, Inc., 328 S.C. 128, 138, 492 S.E.2d 103, 108 (1997) *citing* Sierra v. Skelton, 307 S.C. 217, 414 S.E.2d 169 (Ct. App. 1991).. *See also Huggins, supra;* W. Page Keeton, *Prosser and Keeton on The Law of Torts* 898 (5th Ed.1984). As such, Respondents would respectfully request that this Court affirm the trial court's dismissal of Appellant's Complaint with prejudice as to the abuse of process cause of action.

Appellant's final cause of action for outrage also fails to allege a valid claim for relief in that it fails to allege conduct that rises to the level of outrage, otherwise known as intentional infliction of emotional distress. The South Carolina Supreme Court explains the elements of the tort of outrage in Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981) in that:

> " in order to recover for the intentional infliction of emotional distress, a plaintiff must establish that (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' 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 the plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was 'severe' so that 'no reasonable man could be expected to endure it.' Restatement (Second) of Torts s 46

In the case at hand, Appellant relies solely on the actions of the Respondents in filing a lawsuit against the Appellant and Richland County for declaratory judgment and injunctive relief, as the "extreme and outrageous" conduct. No further support for Appellant's cause of action is presented neither in Appellant's brief nor in the record. Respondents would contend that based on the above detailed discussion of Cisson v. Pickens Sav. & Loan Ass'n, 258 S.C. 37, and the "basic right of citizens to sue or defend when sued," this complained of conduct cannot rise to the level of extreme and outrageous as it is clearly within the bounds of every

citizen's right to institute legal proceedings against a person "when he reasonably believes that he has a good chance of establishing it to the satisfaction of the court or jury." Cisson v. Pickens Sav. & Loan Ass'n, 258 S.C. 37, Prosser on Torts, (3d) Ed., p. 874. Furthermore, to classify the filing of a lawsuit as "atrocious, and utterly intolerable in a civilized community" is to condemn our civil justice system and allow every defendant sued a cause of action against their plaintiff. As Appellant has failed to properly articulate a cause of action for outrage upon which he can recover upon, the trial court's dismissal of his Complaint with prejudice as to the cause of action of outrage should be affirmed.

II. THE CIRCUIT COURT DID NOT ERR IN CONCLUDING THAT THE RESPONDENTS WERE ENTITLED TO AN ORDER GRANTING THEIR MOTION TO DISMISS APPELLANT'S COMPLAINT AS BARRED BY THE STATUTE OF LIMITATIONS

In addition to the above detailed arguments in support of the trial court's dismissal of Appellant's Summons and Complaint for failure to state a cause of action for which relief can be granted, Appellant's causes of action for abuse of process and outrage would also be barred due the statute of limitations applicable to this cause of action. South Carolina courts have previously held that abuse of process has a three year statute of limitations and outrage, if considered a tort independent of traditional torts, has a six year statute of limitations. Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 525 S.E.2d 888 (Ct. App. 1999); Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981); S.C. Code Ann. §15-3-530. In deciding when the statute of limitation begins to run, South Carolina courts have detailed the standard as, "when the facts and circumstances of the injury would put a person of common knowledge on notice that some right has been invaded or the claim against another party exists." Joubert v. S. Carolina Dep't of Soc. Servs., 341 S.C. 176, 192, 534 S.E.2d 1, 9 (Ct. App. 2000). The date on which

discovery should have been made is an objective, not a subjective question. Kruetner v. David, 320 S.C. 283, 465 S.C. 2d 88 (1995). Furthermore, courts have held that, "a cause of action accrues when the Plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action." Brooks v. City of Winston Salem, N.C., 85 F. 3d 178 (4th Cir. 1996) (quoting Nasim v. Warden, Md. House of Correction, 64 F. 3d 951 (4th Cir. 1995).

Although Appellant fails to lay out in his Complaint the willful act constituting the abuse of process as detailed above, Appellant appears to allege in his Complaint the basis for the abuse of process as being the Respondents' conduct in bringing and maintaining the prior matter from 2006. Appellant's Complaint. In using this standard as set out by South Carolina case-law, Appellant's cause of action for abuse of process would have accrued or arisen in October 2006, nearly six and a half years before Appellant decided to file a Summons and Complaint. Counsel for the Appellant argues in his brief that Appellant's cause of abuse of process did not begin to accrue until after the conclusion of all prior litigation, but presents no support for this contention. Abuse of process contains no elements or requirements whatsoever that a Plaintiff wait until the litigation containing the alleged unlawful process has concluded, and therefore an abuse of process cause of action would accrue as soon as a person was aware of the alleged willful act not proper in the process and the ulterior purpose. Appellant spends a significant amount of time in his Complaint as well as during his portion of the arguments at the October 8, 2013 hearing discussing the history of these parties, making it apparent that Appellant was actively involved in the prior action to the point that he would have been aware of acts not proper in the process. As it is undisputed that abuse of process has a three year statute of limitations, it is clear that even if Appellant succeeds on his arguments regarding properly pleading the abuse of process cause of action, this cause of action would be barred by the statute of limitations, and the trial court's

dismissal of his Complaint with prejudice as to the cause of action of abuse of process should be affirmed.

In regards to Appellant's cause of action for outrage, the same standard espoused above would apply as to when this cause of action arose. Similar to Appellant's cause of action for abuse of process as discussed in more detail above, Appellant does not outwardly state the actions of Respondents which would form the basis for his claim of outrage. A liberal reading of his pleadings as well as the arguments presented by Appellant's counsel at the October 8, 2013 hearing, would appear to suggest that the Appellant bases his claim for outrage on the Respondents' filing and maintaining the prior action again Appellant and Richland County. [R. p. 13, lines 3-5]. As already discussed in regards to the abuse of process cause of action, Appellant presents no evidence or support whatsoever that his claim for outrage did not accrue until after the prior litigation has ceased. Additionally, there exists no element of outrage which requires a plaintiff to wait until the conclusion of the outrageous conduct to file an action. Even taking the most favorable reading of the statute of limitations for a claim of outrage based on these circumstances as being six years, Appellant failed to file his Summons and Complaint until six and a half years after the October 2006 complained of date. Ford v. Hutson, 276 S.C. 157, 167, 276 S.E.2d 776, 781. As such, even if this Court finds Appellant has properly pled a cause of action stemming from the Respondents conduct in filing an action in court, Appellant's cause of action for outrage would be barred by the statute of limitations and the trial court's dismissal of his Complaint with prejudice as to the cause of action of outrage should be affirmed.

Respondents also find it important to note that in addition to the above detailed arguments in support of the trial court's dismissal of Appellant's Summons and Complaint as being barred by the statute of limitations, Respondents would also argue that Appellant's causes

of action for abuse of process and outrage should be barred as they are compulsory counterclaims pursuant to Rule 13 of the South Carolina Rules of Civil Procedure which were not filed in the previous action. Rule 13(a) of the South Carolina Rules of Civil Procedure defines compulsory counterclaims as, "any claim[s] which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the same transaction or occurrence that is the subject matter of the opposing party's claim." In determining whether a counterclaim is compulsory or permissive, South Carolina courts have stated, "the applicable test is whether there is any logical relationship between the claim and the counterclaim." North Carolina Federal Sav. & Loan Asso. v. DAV Corp., 298 SC 514, 381 S.E.2d 903; Beach Co. v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2d 863. The Respondents are the exact same parties who were the Plaintiffs in the prior action in which the Appellant was a named Defendant. As Appellant's claims for abuse of process and outrage seemingly stem from the filing and serving of the prior action[2], Appellant's current causes of action directly arose out of the transaction or occurrence that was the subject matter of the prior claim. Appellant's failure to raise these alleged causes of action as counterclaims in the previous action now precludes him from asserting these claims in this subsequent action. Beach Co. v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2d 863. As such, Appellant's causes of action for abuse of process and outrage would be barred and the trial court's dismissal of Plaintiff's Complaint in regards to the causes of action of abuse of process and outrage should be affirmed.

CONCLUSION

The lower court's decision in this matter is clearly supported by South Carolina case law and Code as well as reliable, probative, and substantial evidence on the record in support of

[2] Throughout his complaint, Plaintiff offers no other basis for his causes of action of abuse of process and outrage outside of the previous action.

Appellant's deficiencies. Appellant and his counsel have attempted to use this meritless action as "revenge" against the Respondents and even on appeal, Appellant has failed to bring forth arguments in support of his position. Therefore, the lower court decision must be affirmed and Appellant's Complaint dismissed with prejudice.

Respectfully Submitted,

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November 17, 2014

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CERTIFICATE OF COUNSEL FOR RESPONDENTS

Counsel for Respondents hereby certifies that the Final Brief of the Respondents complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the **Final Brief of Respondents** in the above matter on opposing counsel of record, by depositing a copy of the same in the United States Mail, postage prepaid, on November 17, 2014, addressed as follows:

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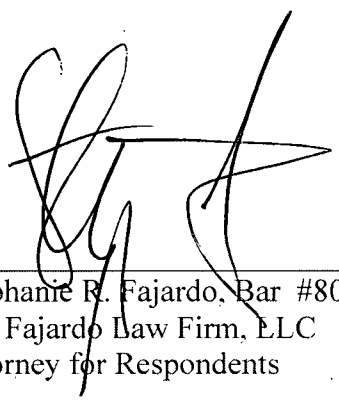

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