

The State of South Carolina
In The Supreme Court

Appeal From Berkeley County
Court of Common Pleas

R. Markley Dennis, Jr. Circuit Court Judge

Case No. 2014-CP-08-00395

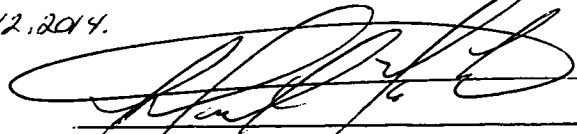
Herbert McDowell, Appellant,

v.

Alissa R. Collins et. al. Respondent.

Notice of Appeal

Herbert McDowell appeals the order of R. Markley Dennis, Jr. dated November 5, 2014, which affirmed his Rule 39(a) SCRCiv.P. Appellant received written notice of the order on November 12, 2014.



Herbert McDowell #145167
Lieber Coll. Inst.
Post Office Box 205
Ridgewille, S.C. 29472

other Counsel of Record
Drew Hamilton Butler
James A. Stuckey, Jr.

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SC SUPREME COURT

The State of South Carolina

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APPEAL FROM Berkeley County's
Court of Common Pleas

R. Mark Hay Dennis, Jr. Circuit Court Judge

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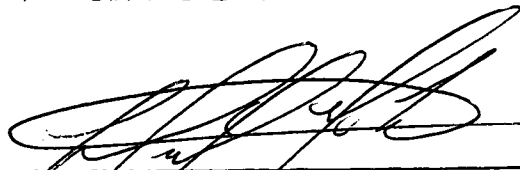
Herbert McDowell, Appellant,

vs.

Alissa R. Collins, et al. Respondent.

Proof of Service

I certify that I have served the Notice of Appeal on James A. Stuckel, Jr. at 123 Meeting St. Charleston, S.C. 29401 and Drew Hamilton Butler at 40 Calhoun St. suite 220 Charleston, S.C. 29401, by depositing it in the United States Mail, Postage Prepaid, on December 10, 2014.



Herbert McDowell #145167
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December 10, 2014

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

IN THE COURT OF COMMON PLEAS
Case No. 2014-CP-08-0395

HERBERT McDOWELL, #145167,)

Plaintiff,)

-versus-)

ALISSA R. COLLINS, ATTORNEY AT LAW,)
DAVID TATARSKY, GENERAL COUNSEL)
FOR SO. CAR. DEPT. OF CORR.,)

Defendants.)

ORDER

This is a *pro se* action brought by inmate Herbert McDowell against attorney Alissa R. Collins and SCDC General Counsel David Tatarsky alleging attorney Collins “committed fraud upon the court” in her representation and defense of the South Carolina Department of Corrections in another action filed by plaintiff Herbert McDowell.

Defendant Alissa R. Collins is now before the Court on her Motion to Dismiss. Also before the Court was defendant Tatarsky’s Motion to Dismiss and Plaintiff’s Motion for Summary Judgment. The parties appeared and presented argument on July 29, 2014. James A. Stuckey, Esquire, appeared for defendant Collins. Plaintiff appeared and argued his cause *pro se*.

The Court has carefully considered Plaintiff’s handwritten Complaint, the pleadings and motions, and the presentations of the parties. Other Motions were outstanding and pending so the Court considered the Motion of Attorney Collins first, as being dispositive of her case.

Plaintiff alleges that he was a state inmate incarcerated in SCDC at all times mentioned, and that Defendant Collins was an attorney employed by the SCDC at the time. (Complaint, Parties and Jurisdiction). Plaintiff alleges that Attorney Collins “violated the plaintiff right to due process and equal protection of law, in a gross negligence manner, by failing to carry out court orders and committing fraud upon the court.” (Complaint, Legal Claims, quotes verbatim).

Plaintiff fails to sustain his Complaint in two particulars. As to the averment that Attorney Collins “committed fraud upon the Court” Rule 9, SCRPC, provides:

(b) **Fraud, Mistake, Condition of Mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.

Rule 9(b), SCRPC.

To establish a cause of action for fraud there are nine elements which must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer’s ignorance of its falsity; (7) the hearer’s reliance of its truth; (8) the hearer’s right to rely thereon; and (9) the hearer’s consequent and proximate injury. *Kahn Const. Co. v. S.C. Nat’l Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414 (1980). The Plaintiff must set forth sufficient facts to show that each of these nine elements is present in the complaint or the complaint will be “fatally defective.” *Mutual Savings & Loan Ass’n v. McKenzie*, 274 S.C. 630, 633, 266 S.E.2d 423 (1980). Failure to prove any one of the foregoing elements is fatal to recovery. *Kahn*, 275 S.C. 381.

Other than Plaintiff's general allegation that, "The Defendants knowingly committed fraud upon the court by intentionally giving false information" there is no particularity to constitute the fraud and the essential elements are neither provided nor proved. The transcripts supplied by Plaintiff do not show or constitute fraud.

Additionally, Defendant Collins asserts that as the attorney for the South Carolina Department of Corrections, opposing Plaintiff in the underlying action, that she owed no legal duty to Plaintiff.

Generally, an attorney owes a duty only to her client, and not to third persons. *Gaar v. N. Myrtle Beach Realty Co.*, 339 S.E.2d 887, 889 (S.C. Ct. App. 1986); *see also Rydde v. Morris*, 675 S.E.2d 431, 433 (S.C. 2009) (holding that an attorney owes no duty to prospective beneficiaries for alleged negligent failure to draft a will). South Carolina has a strict privity requirement, and thus an attorney's liability to a third party may arise only when the attorney acts outside the scope of his professional capacity. *Gaar*, 339 S.E.2d at 889.

[T]he better rule is that an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client The attorney normally conducts the litigation solely in his professional capacity. He has no personal interest in the suit. In his professional capacity the attorney is not liable, except to his client and those in privity with his client, for injury allegedly arising out of the performance of his professional activities.

Gaar, 339 S.E.2d at 889.

Attorney Collins represented the SCDC, not plaintiff McDowell. Accordingly, she owed no legal duty to plaintiff McDowell, who was an opposing party.

Accordingly, having carefully considered the pleadings, the evidence, and the presentations of Plaintiff and counsel, it is the considered judgment of the Court that Plaintiff's

action against Attorney Collins should be dismissed for the reasons stated. It is hereby

ORDERED that the Motion to Dmiss of Defendant Alissa R. Collins is GRANTED,
and this case is DISMISSED as to her.

AND IT IS SO ORDERED.

R. MARKLEY DENNIS, JR.
Circuit Judge, Ninth Judicial Circuit

August ____, 2014

Moncks Corner, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

IN THE COURT OF COMMON PLEAS
Case No. 2014-CP-08-00395

HERBERT McDOWELL (SCDC No. 145167),

PLAINTIFF,

ALISSA R, COLLINS and DAVID
TATARSKY,

DEFENDANTS.

ORDER

J.E.
FILED

NOV - 6 2014

CASE _____ NO _____
MARY P. BROWN CLERK OF COURT
BERKELEY COUNTY, SC

This matter comes before me upon Motion for Reconsideration filed by Plaintiff, HERBERT McDOWELL. After fully considering said Motion, this Court finds no need for oral argument in this matter and therefore the Motion for Reconsideration is denied;

AND IT IS SO ORDERED!

R. Markley Dennis, Jr.

R. MARKLEY DENNIS, JR.
Presiding Judge

Moncks Corner, South Carolina

November 5, 2014

Herbert M. Dewell #145167
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DEC 12 2014

MAIL ROOM
LIEBER CJ

Daniel E. Shears, Clerk
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SCDC

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