

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Carmen T. Mullen, Circuit Court Judge  
Marvin H. Dukes, III, Master-In-Equity

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Supreme Court Case No.: 2015-001168  
Unpublished Opinion No. 2015-UP-146  
(S.C. Ct. App. filed March 18, 2015)

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**RECEIVED**

JUN 29 2015

**S.C. SUPREME COURT**

Joseph C. Sun,

Petitioner.

v.

Olesya Matyushevsky,  
Citizens Opposed to Domestic Abuse,  
Christine Varg, and Liling Sun,

Respondents.

AND

Joseph C. Sun,

Petitioner.

v.

Olesya Matyushevsky,  
Citizens Opposed to Domestic Abuse,  
and Christine Varg,

Respondents.

AND

Joseph C. Sun,

Petitioner.

v.

Olesya Matyushevsky,  
Citizens Opposed to Domestic Abuse,  
and Christine Varg,

Respondents.

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**RESPONDENTS' RETURN TO PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE DISMISSAL OF PETITIONER'S CLAIMS AGAINST MATUSHEVSKY, CODA AND VARG?
- II. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE CIRCUIT COURT'S REFUSAL TO ALLOW PETITIONER LEAVE TO AMEND HIS COMPLAINT?
- III. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE GRANT OF VARG'S SUMMARY JUDGMENT MOTION?
- IV. DID THE COURT OF APPEALS CORRECTLY AFFIRM THE DENIAL OF PETITIONER'S MOTION FOR A CONTINUANCE OF THE SUMMARY JUDGMENT HEARING?

## STATEMENT OF THE CASE

On June 15, 2011, the Petitioner, Joseph Sun ("Petitioner"), filed his *pro se* Complaint containing claims arising out of a divorce proceeding in which his wife, Respondent Liling Sun, had been represented by Olesya Matyushevsky ("Matyushevsky"), a staff attorney employed by Citizens Opposed to Domestic Abuse ("CODA"), and her paralegal Christine Varg ("Varg"), also an employee of CODA.

Matyushevsky, CODA and Varg answered the Complaint on July 19, 2011, and subsequently filed a Motion to Dismiss on December 12, 2011. On December 15, 2011, Petitioner filed a Motion to Amend along with a proposed Amended Complaint. The circuit court held a hearing on March 13, 2012, and issued an Order filed April 6, 2012, dismissing all claims with the exception of one claim against Varg. Additionally, the circuit court determined that all but one of the allegations in Petitioner's proposed Amended Complaint were substantively the same as those raised in the initial Complaint and therefore denied the motion to amend. However, in the same order, the circuit court concluded that it was premature to dismiss

one cause of action pertaining solely to Varg. As such, the circuit court granted leave for Petitioner to amend the complaint to set forth additional facts to support a claim against Varg involving her alleged involvement in a purported break-in and conversion. Sun timely appealed this Order on April 16, 2012.

Petitioner filed an Amended Complaint on March 26, 2012, containing revised allegations against Varg. On June 5, 2012, Varg filed a Motion for Summary Judgment as to this remaining claim along with affidavits from her and from Liling Sun. After being notified of the hearing scheduled for July 12, 2012, Petitioner filed a Motion for Continuance on June 25, 2012. Following the hearing, the circuit court issued an Order filed July 18, 2012, denying Petitioner's request to continue the hearing and granting Varg's motion for summary judgment. Petitioner timely appealed this Order on July 30, 2012.

By order dated June 6, 2013, the Court of Appeals consolidated the appeals of the three circuit court orders dated November 9, 2011 (dismissal of Liling), April 6, 2012 (dismissal of Matyushevsky, CODA and Varg), and July 30, 2012 (summary judgment for Varg). On March 18, 2015, the Court of Appeals, without oral argument and pursuant to Rule 220(b), SCACR, affirmed all three circuit court orders. Petitioner timely filed his petition for a Writ of Certiorari on June 2, 2015.

### **FACTS**

Citizens Opposed to Domestic Abuse ("CODA"), a non-profit organization with offices in Beaufort County, South Carolina, provides support for victims of domestic violence. (Ans. Of Matyushevsky, CODA, and Varg, p. 2, ¶ 2) (R. p. 72, ¶ 2). Olesya Matyushevsky ("Matyushevsky") is a licensed South Carolina attorney and employed by CODA as a staff

attorney. (Compl., p. 1, ¶ 1). (R. p. 60 ¶ 1). Christine Varg (“Varg”) is also an employee of CODA. She is not a lawyer but her duties include assisting Matyushevsky in legal matters involving persons who have sought help from CODA. (Compl., p. 1., ¶ 3; Affidavit of Christine Varg, p. 1) (R. p. 60 ¶ 3; R. p. 119).

As lawyer for Liling Sun (“Liling”), Matyushevsky filed an action for divorce on April 21, 2009, against Liling’s husband, Petitioner Joseph Sun. (Compl., p. 4, ¶ 14) (R. p. 65, ¶ 14). Varg assisted Matyushevsky in her representation of Liling in the divorce proceedings, acting in effect as a paralegal. (Affidavit of Christine Varg, p. 1) (R. p. 119).

The family court held a temporary hearing on June 25, 2009, at which time the court made various rulings, including granting Liling possession of the marital home and ordering Petitioner to leave the home immediately. (Pendente Lite Order, p. 3) (R. p. 3). On January 12, 2010, Matyushevsky filed a Motion for Contempt on behalf of Liling based on Petitioner’s violation of the temporary order. (Order filed March 12, 2010) (R. pp. 30-35). The family court held a hearing on March 2, 2010, and issued an Order on March 12, 2010, finding that Petitioner had willfully violated several provisions of the temporary order, including the order he leave the marital home. The family court ordered, among other things, that Petitioner would serve six months in the Beaufort County Detention Center if he entered the marital home again for any reason after March 2. (Order filed March 12, 2010, pp. 3 and 5) (R. p. 32 and 34).

On March 30, 2010, Matyushevsky, on behalf of Liling, filed another contempt motion, which the family court heard on May 18, 2010. In an order filed June 21, 2010, the family court found that Petitioner had admittedly violated its previous order by entering the marital home at least two times since March 2. The family court sentenced Petitioner to six months in jail for criminal contempt of court. (Order filed June 21, 2010, pp. 2-3) (R. pp. 37-38).

An important issue in the divorce was whether two houses, one at 18 6<sup>th</sup> Avenue, Bluffton, South Carolina, and the other at 43 Broad View Drive, Knowles Island Plantation, Ridgeland, South Carolina, constituted marital property or whether they were non-marital property owned by Petitioner's mother. Because of this dispute, the family court made his mother a party to the divorce action. (Decree of Divorce, p. 1, and incorporated Settlement Agreement, p. 3) (R. p. 40, and p. 53).

The family court held a final hearing over two days on September 1 and September 29, 2010. On September 18, during the period between hearing dates, Petitioner reported to the Jasper County Sheriff's Office that he believed Liling and an accomplice had entered the house at Knowles Island Plantation and taken various items of personal property, including keys, cash, jewelry, coins and assorted documents. The investigating deputy spoke to Liling, who said she would have her lawyer call him. Varg then called the deputy on Liling's behalf and told him that Liling did have papers from the Knowles Island house. (Report of Jasper County Sheriff's Office dated September 24, 2010, pp. 1-2; Affidavit of Christine Varg, pp. 1-2) (R. pp. 108-109 and R. pp. 119-120).

The family court issued a decree of divorce on October 13, 2010. In addition to resolving issues between Petitioner and Liling, the Decree also confirmed and adopted a settlement agreement between Liling and Petitioner's mother, which fairly and equitably determined issues related to the marital home which was titled in the name of his mother but which Liling claimed to be marital property. (Decree of Divorce, pp. 1-3). In approving the property settlement, the family court relied, in part, on the mother's affidavit in which she stated she understood the terms of the agreement, believed it to be fair and equitable, was not under the influence of undue stress and was satisfied with the services of her attorney. (Decree of Divorce, pp. 2-3) (R. pp.

41-42). The family court granted a divorce on the grounds of continuous separation without cohabitation for a period in excess of one year.

### ARGUMENT

- I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISMISSAL OF PETITIONER’S CLAIMS AGAINST MATUSHEVSKY, CODA AND VARG BECAUSE THE ALLEGED WRONGFUL ACTS WERE PERFORMED IN THE COURSE OF THEIR LEGAL REPRESENTATION OF LILING SUN IN THE DIVORCE PROCEEDING.

Rule 12(b)(6), SCRPC provides that a circuit court may dismiss a complaint when the defendant demonstrates the plaintiff’s complaint, viewed in the light most favorable to the plaintiff, fails to allege facts sufficient to constitute a cause of action in the pleadings filed with the court. *Dawkins v. Union Hosp. Dist.*, 408 S.C. 171, 176, 758 S.E.2d 501, 503 (2014). When reviewing a motion to dismiss, an appellate court applies the same standard of review as the circuit court. *Id.* Pursuant to Rule 201(f), SCRE, a circuit court may take judicial notice at any stage of the proceeding of adjudicative facts, including previously entered, related court orders and records of other courts of record. *Doe v. Bishop of Charleston*, 407 S.C. 128, 134 n.2, 754 S.E.2d 494, 497 n.2 (2014).

Under South Carolina law, “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.” *Gaar v. N. Myrtle Beach Realty Co.*, 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (Ct. App. 1986). “Even if the attorney who initiates civil proceedings for his client has no probable cause to do so, he is still not liable if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of the client’s claim.” *Id.* In order to be successful on a claim against an attorney acting in her professional capacity, the petitioner must allege the

attorney “breache[d] some independent duty to a third person or act[ed] in [her] own personal interest outside the scope of [her] representation of the client[.]” *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995) (affirming dismissal when the only reasonable inference to be taken from the face of the complaint was that the attorney had been sued by a third party for actions taken in his capacity as attorney).

A liberal reading of Petitioner’s allegations demonstrates that his claims against Matyushevsky and Varg are for activities such as the following: initiating litigation for the client’s claims, making factual claims about abuse, notifying parties of legal proceedings, presenting testimony and evidence, contacting the police to enforce family court orders, and coordinating and making arguments for property division and child custody. These activities are all fundamental endeavors for an attorney involved in family court litigation. Petitioner has also failed to make any substantive allegations that Matyushevsky and Varg violated any duty independent from the one owed to their client, Liling.

The circuit court dismissed Petitioner’s claims in its order of April 6, 2012, finding no allegations that Matyushevsky and Varg acted outside the scope of representation or breached an independent duty owed to Petitioner. The Court of Appeals correctly affirmed based on these same principles. (March 18, 2015 Ct. App. Op., p. 2). In his Petition for Writ of Certiorari, Petitioner simply rehashes arguments rejected by the circuit court and the Court of Appeals and presents no compelling reason for this Court to accept certiorari.

II. THE COURT OF APPEALS CORRECTLY AFFIRMED THE CIRCUIT COURT’S DENIAL OF PETITIONER’S MOTION TO AMEND AS THE ONLY NEW FACTUAL ALLEGATION IN THE PROPOSED AMENDED COMPLAINT WAS FRIVOLOUS AND WITHOUT SUBSTANTIVE MERIT.

Petitioner filed a motion to amend his complaint and submitted a proposed Amended Complaint with his motion on December 15, 2011. (Plt.'s Motion to Am. and Proposed Am. Compl.) (R. pp. 81-97). At the hearing on the motion to dismiss held on March 13, 2012, the circuit court considered both Petitioner's Complaint and his proposed Amended Complaint. The circuit court properly denied the request to amend and the Court of Appeals affirmed on appeal, finding that the circuit court correctly exercised its discretion. (Ct. App. March 18, 2015 Mem. Op. p. 2-3).

South Carolina Rule of Civil Procedure 15(a) provides, in pertinent part, that "a party may amend his pleading . . . by leave of court . . . and leave shall be freely given when justice so requires and does not prejudice any other party." S.C. R. Civ. Pro. 15(a) (Supp. 2003). A motion to amend may be denied if it is clear that the proposed amendment is obviously frivolous and without substantive merit. *Collins, et. al. v. Sigmon*, 299 S.C. 464, 467, 385 S.E.2d 835, 836, n.1 (1989). The decision to grant leave to amend pleadings lies within the sound discretion of the circuit court. *Lee v. Bunch*, 373 S.C. 654, 660, 647 S.E.2d 197, 200 (2007).

The only distinction between Petitioner's original Complaint and his proposed amended complaint was the addition of allegations that Matyushevsky and Varg "stole" or conspired with his ex-wife to "cover up" a prenuptial agreement between Petitioner and Liling. (Proposed Am. Compl., pp. 11-12, ¶ 33-34) (R. pp. 94-95, ¶ 33-34). This claim is patently without merit because, as Petitioner conceded in his pleadings and at the motions hearing, the prenuptial agreement was presented in the divorce proceeding and considered by the family court. (Proposed Am. Compl. ¶ 34; March 13, 2012 Hearing Tran., p. 39, lines 1-24 and p. 48, line 2-p. 49, line 25) (R. p. 95, ¶ 34; R. p. 188, lines 1-24 and p. 197, line 2-p. 198, line 25). The Court of Appeals correctly affirmed the denial of Petitioner's Motion to Amend as the proposed

amendment was patently frivolous. As such, there is no compelling reason for this Court to review once again this standard discretionary ruling.

III. THE COURT OF APPEALS CORRECTLY AFFIRMED THE GRANT OF SUMMARY JUDGMENT FOR VARG AS THERE WAS NO EVIDENCE THAT SHE PERSONALLY PARTICIPATED IN THE ALLEGED BREAK-IN AND CONVERSION OF PETITIONER'S PERSONAL PROPERTY.

“An appellate court reviews the granting of summary judgment under the same standard applied by the trial court[.]” *Bovain v. Canal Ins.*, 383 S.C. 100, 105, 678 S.E.2d 422, 424 (2009). Rule 56(c) of the South Carolina Rules of Civil Procedure provides that judgment shall be rendered when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Smith v. TH Snipes & Sons, Inc.*, 306 S.C. 289, 411 S.E.2d 439 (1991). To avoid summary judgment, the non-moving party must submit a scintilla of evidence to demonstrate that there is a genuine issue of material fact. *Hancock v. Mid-South Management Co.*, 381 S.C. 326, 673 S.E.2d 801 (2009). However, summary judgment “should be granted when plain, palpable and indisputable facts exist on which reasonable minds cannot differ.” *Bishop for Robertson v. S.C. Dep't of Mental Health*, 323 S.C. 158, 161, 473 S.E.2d 814, 816 (Ct. App. 1996), *affirmed as modified*, *Bishop v. S.C. Dep't of Mental Health*, 331 S.C. 79, 502 S.E.2d 78 (1998). The proper purpose of summary judgment is to dispose of cases which do not require a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001).

The affidavits of Varg and Liling submitted in support of Varg's motion for summary judgment established the undisputed fact that Varg had not personally participated in the alleged break-in and conversion of Petitioner's personal property. The affidavits confirmed the following: (1) Liling went to the Knowles Island house on September 16, 2010, without Varg; (2) Varg had never physically been on the property or entered the house; (3) Varg did not know

that Liling was going to the house until after Liling went to the property and removed certain items, which Liling believed belonged to her; (4) Liling received a call from the Jasper County Sheriff's Office and told the deputy she would have her lawyer call him; and (5) at Liling's request, Varg called the sheriff's deputy and, based on information from Liling, told the deputy that Liling did have papers from the Knowles Island house. (Affidavits of Liling Sun and Christine Varg) (R. pp. 117-120).

Upon review of these affidavits, the circuit court concluded that Petitioner had no evidence Varg had unlawfully entered the Knowles Island house and that his allegations were "nothing more than mere suspicions backed up by nothing[.]" (July 12, 2012 Hearing Tran., p. 38, lines 20-22). The circuit court granted summary judgment in favor of Varg, and the Court of Appeals properly affirmed.

V. THE COURT OF APPEALS CORRECTLY AFFIRMED THE CIRCUIT COURT'S REFUSAL TO CONTINUE THE SUMMARY JUDGMENT HEARING SINCE PETITIONER FAILED TO DEMONSTRATE THAT FURTHER DISCOVERY WAS LIKELY TO UNCOVER ADDITIONAL RELEVANT EVIDENCE.

Varg filed her motion for summary judgment on June 5, 2013, and a hearing was scheduled for July 12, 2012. After being notified of the hearing but prior thereto, Petitioner filed a Motion for Continuance on June 25, 2012, on the basis that he had not yet taken the depositions of Varg and Liling. Generally, the party opposing summary judgment should have a full and fair opportunity to conduct discovery before summary judgment is granted. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). "Nonetheless, the nonmoving party must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is 'not merely engaged in a fishing expedition.'" *Id.*

Upon questioning by the circuit court, Petitioner was unable to state what additional evidence he might uncover which would be relevant to the narrow issue of whether Varg personally participated in the alleged break-in and conversion. (July 12, 2012 Hearing Tran., p.12, line 11 – p. 13, line 1) (R. p. 242, line 11-p. 243, line 1). Therefore, the circuit court correctly concluded that Petitioner “ha[d] not identified what specific discovery he might conduct . . . other than his desire to depose Varg and Liling and cross-examine them” and that “[t]here [was] no reason to believe that these witnesses [would] recant their prior sworn testimony upon cross-examination.” (Order filed July 18, 2012) (R. pp. 20-23). The Court of Appeals affirmed the denial, citing the *Plyler* decision which holds that “the denial of a motion for a continuance on the ground that [a party seeking a continuance] has not had time to prepare is rarely disturbed on appeal.” *Plyler v. Burns*, 373 S.C. 637, 650, 647 S.E.2d 188, 195 (2007).

The circuit court also denied the request for a continuance because Petitioner had not diligently pursued discovery in the year since the case was filed. (July 12, 2012 Hearing Tran., p.29, line 9 – p. 33, line 11, and p. 36, line 10 – p. 38, line 8) (R. p. 259, line 9 – p. 263, line 11, and p. 266, line 10 – p.268, line 8). Petitioner had not served any written discovery requests and had not noticed any depositions. (Order filed July 18, 2012 o. 2) (R. pp. 20-23).

The decision to grant or deny a motion for a continuance is within the sound discretion of the circuit court and should not be disturbed on appeal absent a showing of a clear abuse of discretion from the record. *See Trotter v. Trane Coal Facility*, 393 S.C. 637, 714 S.E.2d 289 (2011) (affirming refusal to continue workers’ compensation hearing to allow further depositions to be taken).

After a year of litigation and almost two years after the purported break-in and conversion, Petitioner could not produce or identify any potential evidence to dispute the

following: (1) Varg never entered the house where the alleged break-in occurred, (2) Varg did not take or convert any of Sun's property, and (3) Varg actually contacted law enforcement to provide them with information and her client's account of the alleged break-in and conversion (that did not directly involve her). Granting a continuance or allowing for additional discovery would not have altered these operative facts. As such, the Court of Appeals correctly upheld the circuit court's decision regarding Petitioner's request for a continuance. (Ct. App. Op. March 18, p. 3)

### CONCLUSION

The Petition for a Writ of Certiorari presents no questions of the kind generally considered for review under Rule 242(b), SCACR. Petitioner simply reasserts his arguments presented to and carefully considered by the circuit court and the Court of Appeals, and these Respondents respectfully request that the Supreme Court this Court exercise its discretion to deny the Petition for a Writ of Certiorari in all respects.

Respectfully submitted,

June 26, 2015

  
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THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM BEAUFORT COUNTY  
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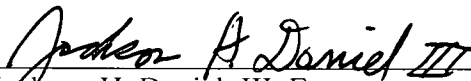
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I certify that I have served **RESPONDENTS OLESYA MATYUSHEVSKY, CITIZENS OPPOSED TO DOMESTIC ABUSE, AND CHRISTINE VARG'S RETURN TO PETITION FOR A WRIT OF CERTIORARI** upon the parties below by depositing a copy of it in the United States Mail, postage prepaid, on June 26, 2015, addressed as follows:

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