

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Marvin H. Dukes, Master-in-Equity

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SC Court of Appeals

Case No. 2014-001747

Joseph C. Sun,

Appellant,

v.

Marshall L. Horton and
Richard Ulbrich,

Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

The Master in Equity, Judge Marvin H. Dukes, III, dismissed Appellant's Complaint against the Respondents herein. Appellant has appealed that order. The issue at hand is whether or not Judge Dukes' order properly dismissed Appellant's claims against the Respondents including: allegations of fraud against Respondent Horton, allegations of criminal trespassing, invasion of privacy and destruction of personal property, as well as allegations of conspiracy as to both Respondents.

STATEMENT OF THE CASE

This case was filed by Appellant alleging fraud, criminal trespassing, invasion of privacy, destruction of personal property and conspiracy. Respondents filed a Motion to Dismiss on February 12, 2014, and that was heard by the Honorable Marvin H. Dukes, III, on April 23, 2014. Judge Dukes left the record open for the parties to file affidavits, converting the Motion to Dismiss into a Summary Judgment Motion. (R. p. 59, lines 22- p. 60, line 9; R. p. 63, lines 19-22). Judge Dukes granted the Defendants' Motion to Dismiss on July 11, 2014. (R. pp. 3-5). Appellant has appealed the Order dated July 11, 2014. Appellant has not filed any post-trial motions or Rule 59(e) motions in relation to this matter.

FACTS

Respondent Horton was the Guardian ad Litem (hereinafter Guardian) for a family court case involving Appellant. (R. p. 65). Respondent Horton was appointed by a consent order, in which Appellant himself signed. (R. pp. 65, 69, 72-76). During the course of the family court case, Appellant never moved to remove Respondent Horton as the Guardian nor did he contest the fees charged. (R. pp. 65-66, 69-70). Respondent Horton did not receive payment from Appellant for the fees charged in the family court matter, despite the family court order requiring Appellant's payment of fees. (R. pp. 66, 70, 78-91). Respondent Horton filed a Rule to Show Cause against Appellant for his failure to pay his Guardian fees and Appellant was found in contempt. (R. p. 66, 70, 106-111). Appellant never raised an objection to the fees charged by Respondent Horton or his actions as a Guardian during the entire family court case, including the Rule to Show Cause. (R. pp. 66, 70). Upon information and belief, to date, Appellant has not appealed the order of the family court regarding his custody case or the order on the Rule to Show Cause.

Respondent Horton enlisted Respondent Ulbrich as his agent for purposes of service of the Rule to Show Cause on Appellant. (R. p. 23). Respondent Ulbrich attempted to serve Appellant at his Bluffton address and his Ridgeland address. (R. pp. 23-24). Respondent Ulbrich effectuated service on Appellant at his Ridgeland address. (R. p. 24). Leslie Devine accompanied Respondent Ulbrich to Appellant's Ridgeland address and served as a witness to the service. (R. pp. 24, 29). After serving Appellant with the legal process both Respondent Ulbrich and Ms. Devine left Appellant's property. (R. pp. 23-31).

ARGUMENTS

STANDARD OF REVIEW: SUMMARY JUDGMENT

Summary Judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. City of Columbia v. American Civil Liberties Union, etc., et al., 323 S.C. 384 (1996). See Rule 56, SCRPC. In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. Id.; Manning v. Quinn, 294 S.C. 383 (1988). In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Hancock v. Mid-South Management Co. Inc., 381 S.C. 326, 330-331 (2009).

1. THE ISSUES RAISED IN APPELLANT'S APPEAL HAVE NOT BEEN PROPERLY PRESERVED FOR REVIEW BY THE COURT OF APPEALS AND AS SUCH THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED.

In Appellant's brief he alleges that the trial court failed to make any determination on his claims of fraud, criminal trespassing, invasion of privacy and destruction of property. Appellant failed to make a Rule 59(e) motion and thus these issues are not properly preserved for appellate review.

"When the circuit court does not specifically address an issue, and when an issue presented to the circuit court in a civil case is not explicitly ruled upon in the final order, the issue must be raised by an appropriate post-trial motion to be preserved for appellate review." Siau v. Kassel, 369 S.C. 631,642, 632 S.E.2d 888 (Ct.App. 2006). In order to preserve an issue for appellate review the appellant must file a Rule 59(e) motion when an issue has been raised but not ruled upon. Elam v. South Carolina Dept. of Transp., 361 S.C. 9,24, 602 S.E.2d 772, 780

(2004). SCRCP 59(e) states, “A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.” Rule 59(e), SCRCP.

Appellant has never served or filed a Rule 59(e) motion. By Appellant’s own admission he states in his brief that the Order failed to address the issues of trespass, invasion of privacy and destruction of property. (Brief of Appellant p. 12). The Appellant was required to file a Rule 59(e) motion and thus his appeal should be dismissed with regard to these claims. Appellant has failed to properly preserve these issues for appellate review and thus on these issues, his appeal should be dismissed accordingly as the issues raised are not properly before the Court.

2. RESPONDENT HORTON AND HIS PROCESS SERVER, RICHARD ULBRICH ARE IMMUNE AS A RESULT OF RESPONDENT HORTON’S POSITION AS A COURT APPOINTED GUARDIAN *AD LITEM*.

A. RESPONDENT HORTON IS IMMUNE FROM THE CLAIMS BROUGHT IN THIS SUIT AS A COURT APPOINTED GUARDIAN *AD LITEM*.

The allegations in this case arise solely from Respondent Horton’s serving as a court appointed Guardian *ad Litem* in the Beaufort County Family Court Action titled *Liling Xie Sun v. Joseph c. Sun*, Case No. 2011-DR-07-1823.

Both persuasive authority and the policy reasons set forth above convince us to hold today that private persons appointed as guardians ad litem in private custody proceedings are afforded immunity for acts performed within the scope of their appointment. Because one of the guardian's roles is to act as a representative of the court, and because this role can only be fulfilled if the guardian is not exposed to a constant threat of lawsuits from disgruntled parties, a finding of quasi-judicial immunity is necessary. Such a grant of immunity is crucial in order for guardians to properly discharge their duties. The immunity to which guardians ad litem are entitled is an absolute quasi-judicial immunity.

Flemming v. Asbill, 483 S.E.2d 751, 326 S.C. 49 (S.C. 1997).

Flemming also notes while absolute quasi-judicial immunity seems as though it would afford no remedy against any actions taken by a Guardian ad Litem that there are remedies for improper

actions taken by a Guardian ad Litem. Actions taken outside of their duties as Guardian ad Litem are not protected under quasi-judicial immunity. The accountability of the Guardian ad Litem in relation to their duties is protected by cross-examination of the Guardian ad Litem, the court's review of the Guardian ad Litem's actions taken in the course of his duties, the ability of the court to disregard the recommendations and testimony of a Guardian ad Litem, the right for the parties involved to motion the court to remove the Guardian ad Litem from the case, and appellate review of the family court's decision to the extent it has relied upon a Guardian ad Litem's testimony and recommendations. Id.

In Appellant's Complaint he alleges that Appellant Horton in his official duties as Guardian committed Fraud, Harassment and Criminal Trespassing. (R. pp. 6-16). Under South Carolina law, stated above, a Guardian cannot be charged with any civil liability stemming from his official duties as a Guardian in a family law action. All the allegations raised by Appellant concern recommendations and actions taken by Respondent Horton while acting as a Guardian in his child custody action. There are no allegations made that Respondent Horton acted outside of his duties as Guardian. Since all allegations against Respondent Horton were in the child custody action, the proper remedy for the Appellant was to: (1) appeal the family court order; (2) move to have Respondent Horton removed as Guardian; or (3) cross examine him during the trial of the divorce case. Further, the allegations involving fraud all involve the actions taken by Respondent Horton in the course of his family court appointment as Guardian ad Litem. It is also noted that the Appellant consented to Respondent Horton's service as a Guardian Ad Litem, despite his later claims that he objected to his appointment. (R. pp. 72-76). It is also noted that, the Appellant never moved for removal of Respondent Horton in the custody action. (R. pp. 65-67, 69-71). Appellant further alleges that the fees charged by Respondent Horton were

fraudulent. Again, this current action is not a proper vehicle to review the fees charged by Respondent Horton. It would have been proper for review by this Court had Appellant appealed the findings in the family court case, or objected to fees at the trial of the matter, neither action was taken. (R. pp. 65-67, 69-71). Appellant now seeks judicial review of issues that have not been properly appealed, were not proper in front of the lower court and as such are not in the purview of this Court. Appellant has not alleged any claim other than claims arising from Respondent Horton's duties as a court appointed Guardian and in that respect he is immune from such claims in this action and the Order should be affirmed.

The Family Court needs the full unfettered knowledge of all facts available to the Guardian in making its decision on the best interest of each and every child. Without immunity unflattering, but crucial facts may not be explained or mentioned to the Family Court in an attempt to limit the Guardian's later liability.

B. RESPONDENT ULBRICH SHOULD ENJOY IMMUNITY FROM THE CLAIM BROUGHT BY APPELLANT BECAUSE RESPONDENT ULBRICH WAS ACTING AS AN AGENT FOR RESPONDENT HORTON.

Appellant argues that Respondent Ulbrich, who's only action in this case was to serve a signed Court Order on Appellant on behalf of Respondent Horton, is somehow liable for some unknown damage. South Carolina law does not support any known theory for this lawsuit against Respondent Ulbrich.

Respondent Ulbrich should be immune from suit on the basis of serving as Respondent Horton's agent. "Agency is a question of fact. The relationship of agency need not depend upon express appointment and acceptance, but may be, and frequently is, implied from the words and conduct of the parties and the circumstances of the particular case." Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 317 S.E.2d 748 (S.C. App., 1984). "The modern doctrine of

respondent superior makes a master liable to a third party for injuries caused by the tort of his servant committed within the scope of the servant's employment.” South Carolina Ins. Co. v. James C. Greene and Co., 290 S.C. 171, 348 S.E.2d 617 (S.C. App., 1986). See also Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 317 S.E.2d 748 (S.C. App., 1984). “A person who delegates to an independent contractor an absolute duty owed to another person remains liable for the negligence of the independent contractor just as if the independent contractor were an employee.” Durkin v. Hansen, 313 S.C. 343, 437 S.E.2d 550 (S.C. App., 1993).

In this action the agency relationship of Respondents Horton and Ulbrich is not in question. Respondent Horton admits that Respondent Ulbrich was his agent for the purpose of serving a court order on Appellant. (R. p. 55). Appellant alleges in his own Complaint that the Respondents acting in concert and alleges that Respondent Horton is liable for the acts of Respondent Ulbrich while serving process on Appellant. (R. pp. 6, 8, 11, 14, 15). In this regard, Respondent Horton would be liable for any tortious conduct committed by Respondent Ulbrich during the service of process as Respondent Ulbrich was acting as Respondent Horton in his official capacity as a court appointed Guardian. (R. pp. 23-28, 65-67, 69-71). Respondent Ulbrich’s actions were the actions of Respondent Horton, which are actions taken in the course of court appointed duty as a Guardian and as such both Respondents are immune from the claims of Appellant. To find otherwise would create an untenable situation where the Guardian would be prevented from properly serving Court Orders, which is part of the Guardian’s duties in a family court case.

3. RESPONDENT ULBRICH IS NOT LIABLE FOR CRIMINAL TRESPASS OR HARASSMENT UNDER ANY SET OF FACTS INVOLVING HIM SERVING LEGAL PROCESS.

Appellant does not state any civil cause of action against Respondent Ulbrich, but instead

attempts to pursue a criminal cause of action. Respondent Ulbrich was serving legal process when entering the property of Appellant and as such is not liable for trespass. South Carolina law professes, “Any person who, without legal cause or good excuse, enters into the dwelling house, place of business, or on the premises of another person after having been warned not to do so or any person who, having entered into the dwelling house, place of business, or on the premises of another person without having been warned fails and refuses, without good cause or good excuse, to leave immediately upon being ordered or requested to do so by the person in possession or his agent or representative shall, on conviction, be fined not more than two hundred dollars or be imprisoned for not more than thirty days.” S.C. Code Ann. § 16-11-620 (a criminal statute).

Respondent Ulbrich was serving a Rule to Show Cause on Appellant when he entered Appellant’s property. (R. pp. 23-28, 107-111). Legal cause existed for Respondent Ulbrich to enter Appellant’s property for service of said Rule under Rule 4, SCRPC, which governs service requirements. Additionally, the Appellant pleads criminal trespass in his Complaint, which is a statute to be enforced by the State of South Carolina in criminal court. Appellant does not have standing to raise such a claim in the Court of Common Pleas as it is not a civil cause of action.

S.C. Code Ann. § 16-3-1700 is the statute concerning Harassment and Stalking laws in South Carolina. Of note, S. C. Code Ann. § 16-3-1700(G) states, “This section does not apply to work or conduct protected by the Constitution of this State or the United States, a law enforcement officer or a process server performing official duties, or a licensed private investigator performing services...”.

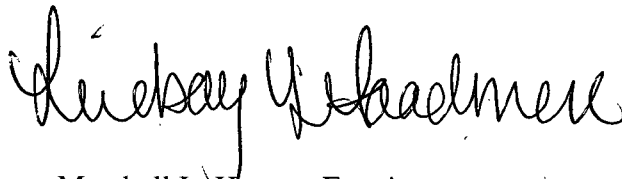
Again, there is no civil cause of action recognized in South Carolina for harassment and stalking as the Appellant pleads in his complaint, however, to be thorough Respondents will

address the criminal statute concerning harassment and stalking. Respondent Ulbrich's actions were within his duties as a process server serving legal process and as such his actions do not constitute harassment or stalking under South Carolina law. (R. pp. 23-31).

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the circuit court.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Marshall L. Horton".

November 5, 2015

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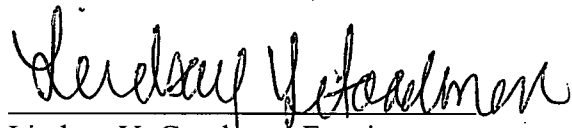
Respondents.

PROOF OF SERVICE

I certify that I have served the Brief of Respondents and Supplemental Record on Appeal on Joseph C. Sun by depositing a copy of it in the United States Mail, postage prepaid, on November 6, 2015, at Post Office Box 151, Bluffton, South Carolina 29910.

November 6, 2015

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