

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Eugene C. Griffith, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2015-000553

Meridian Films, Inc., Video Group, LLC, Bodylab, LLC, Firm Direct, LLC and Firm Media,
LLC,.....Appellants,

v.

Everrett C. Davis, Barbara J. Mooneyham, Carl S. Copeland, and
James L. Leslie, Jr.....Respondents.

[INITIAL] BRIEF OF RESPONDENTS

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STATEMENT OF ISSUE ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT WHEN THE RECORD BELOW CONTAINED NO FACTUAL EVIDENCE WHATSOEVER CREATING ANY GENUINE ISSUE OF MATERIAL FACT, ENTITLING THE RESPONDENTS TO JUDGMENT AS A MATTER OF LAW?

STATEMENT OF THE CASE

On October 27, 2006, the Appellants brought a malicious prosecution case against the Respondents and other defendants. (Complaint) The Respondents answered the Complaint, denying all allegations. (Answer)

All defendants, except the Respondents, were dismissed from the case via earlier Summary Judgment orders. The Respondents filed a Motion for Summary Judgment on January 13, 2014. (Motion for Summary Judgment) On March 3, 2014, a hearing was held in the trial court on the Respondents' Motion for Summary Judgment. (Transcript of Summary Judgment Hearing) On January 27, 2015, the trial court granted the Respondents' Motion for Summary Judgment. (Summary Judgment Order) On March 2, 2015, the Appellants filed a Notice of Appeal. (Notice of Appeal)

FACTS

The Appellants' recitation of the facts in this case is incomplete and, in itself, could lead this Court to misconceptions. It is interesting to note that the Appellants, in their entire recitation of facts, do not give even one citation or reference to the record in this case.

The trial court below gave, perhaps, the best and most appropriate and applicable summary of the pertinent facts in its Order Granting Summary Judgment:

This case has somewhat of a tortured history. There have been many hearings and many orders issued in this case.

Most of the causes of action have been dismissed in one form or another by various judges.

This case revolves around various workout videos which were produced under the name "The Firm." The parties engaged in significant litigation which ultimately resulted in a large federal jury verdict against the owners and operators of "The Firm." [the Appellants]

The Plaintiff [Appellants] basically...alleges numerous causes of action related to lawsuits which were filed and allegations which were made.

(Order Granting Summary Judgment)

To support their allegations of malicious prosecution, the Appellants, in their recitation of facts, mention only one of the many previous claims brought by the Respondents. This is to support their incorrect allegation that the earlier proceedings brought by the Respondents were terminated in the Appellants' favor. Although one particular claim was dismissed (without prejudice), the Respondents were, generally, very successful in the "significant litigation." The Appellants received not only a jury verdict in their favor, but a validation of their copyrights, and a settlement paid to them by the Appellants' insurance company as well. (Federal District Court Verdict Form, Case Number 3: 01-3852-10/24/25) These facts were admitted by the Appellants' own attorney at the Summary Judgment hearing in the Court below. After the Respondents' attorney described these facts, the Appellants' own attorney admitted:

Thank you, Your Honor. I think that Mr. Moore and I are pretty much in agreement over the facts of what has happened in this case.

...

I think Mr. Moore is correct, that this case probably was properly disposed of when the insurance company settled with these plaintiffs...and that is correct. And then that case was carried forward to the Fourth Circuit Appellate Court in Richmond and the ruling of the Federal Court was upheld.

...

And I think by and large the settlement with the insurance company disposed of this case.

(Transcript of Summary Judgment Hearing)

After the Summary Judgment hearing, after considering all statements and arguments, and after reviewing all pleadings and submissions of the parties, the trial judge, below, found and ruled as follows:

The Court has reviewed the file at length. There is simply nothing in the record which would justify the maintenance of any of the remaining causes of action in this case.

At a motion for summary judgment, the non-moving party is required to place into the record sufficient factual allegations which would give rise to at least a colorable claim. In this case, the record is without any factual basis which would support any of the remaining causes of action.

(Order Granting Summary Judgment)

In short, as described in the Summary Judgment hearing above, and admitted as being true by the Appellants' own attorney, and also as stated by the trial court judge in his Order Granting Summary Judgment, the pertinent facts are: the Respondents sued the Appellants in several previous proceedings, won a jury verdict, received a settlement, had their copyrights upheld, and were, generally, successful and justified in their actions at almost every step against the Appellants. (Transcript of Summary Judgment Hearing) (Order Granting Summary Judgment)

ARGUMENTS

I. THE TRIAL COURT DID NOT ERR IN GRANTING THE RESPONDENTS' MOTION FOR SUMMARY JUDGMENT WHEN THE RECORD BELOW CONTAINED NO FACTUAL EVIDENCE WHATSOEVER CREATING ANY GENUINE ISSUE OF MATERIAL FACT, ENTITLING THE RESPONDENTS TO JUDGMENT AS A MATTER OF LAW.

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (2008); *Austin v. Beaufort County Sheriff's Office*, 377 S.C. 31, 659 S.E.2d 22, (2008), *rehearing denied*. A summary judgment must be rendered if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRPC. In reviewing the grant of a summary judgment motion, the appellate court applies the same standard that governs the trial court under Rule 56 SCRPC. *Boyd v. Bellsouth Telephone and Telegraph Co., Inc.*, 369 S.C. 410, 633 S.E.2d 136 (2006). When reviewing the grant of summary judgment, and appellate court applies the same standard which governs the trial court: summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Wogan v. Kunze*, 379 S.C. 581, 666 S.E.2d 901 (2008), *rehearing denied*; *Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224 (2008).

A. The Appellants presented no evidence that the original proceedings were terminated in the Appellants' favor.

As with most of the Appellants' factual assertions and arguments, they have presented no citations or references to facts whatsoever to support this element of their malicious prosecution claim. They simply make the bald assertion that the federal court granted

summary judgment on one of many of the Respondents' claims and that the appellate court affirmed. This is an incomplete and misleading statement.

As discussed in the Facts section, above, although one particular claim was dismissed (without prejudice), the Respondents were, generally, very successful in, what the trial judge referred to as, "significant litigation." The Appellants received not only a jury verdict in their favor, but a validation of their copyrights and a settlement paid to them by the Appellants' insurance company. As discussed above, these facts were admitted by the Appellants' own attorney at the Summary Judgment hearing in the Court below. He admitted: "[T]his case probably was properly disposed of when the insurance company settled with these plaintiffs...and that is correct." He also agreed and admitted that the Fourth Circuit Court of Appeals affirmed the District Court's ruling in the Respondents' favor. (Transcript of Summary Judgment Hearing)

Bald allegations are insufficient to create a genuine issue of fact necessary to defeat a motion for summary judgment. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991), *see also, Kippel v. Mid-Carolina Oil, Inc.*, 303 S.C. 127, 399 S.E.2d 163 (Ct. App. 1990) (Mere assertions did not constitute a genuine issue of material fact.)

The record in this case shows that the Respondents were generally successful in the prior "significant litigation" preceding this case. As stated in the Facts section, above, the Appellants' own attorney admitted this to be true. In the hearing on the Respondents' summary judgment motion, after the Respondents' attorney described the facts of the case, the Appellants' own attorney admitted: "Thank you, Your Honor. I think that Mr. Moore and I are pretty much in agreement over the facts of what has happened in this case." (Transcript of Summary Judgment Hearing) When reasonable minds cannot differ on plain, palpable, and indisputable facts, summary judgment should be granted. *Singleton, supra*. The

Appellants' bald assertion that the underlying cases were terminated in the Appellants' favor is unsupported and incorrect.

B. The Appellants presented no evidence that the Respondents acted without probable cause and with malice.

In arguing their malice and lack of probable cause claims, the Appellants have put forth a string of assertions concerning copyrights, their definition, and the timing of who knew what and when. Once again, these assertions are completely unsupported by any admissible, factual evidence in the record. In fact, their only citation in this entire section is one reference to their own Complaint.

An adverse party may not rely on the mere allegations of his pleadings to withstand a summary judgment motion, but set forth specific facts showing there is a genuine issue for trial. *Strickland v Madden*, 323 S.C. 63, 448 S.E.2d 581 (Ct. App. 1994), *rehearing denied*. Under Rule 56, the adverse party may not rest upon the allegations of his or her pleadings but must respond by affidavit or other evidence demonstrating a genuine issue of material fact. *Kippel, supra*. If a plaintiff has relied solely upon pleadings and files no counter-affidavits and makes no factual showing in opposition to a motion for summary judgment, the trial court is required to grant summary judgment if, under the facts presented by the defendant, he was entitled to judgment as a matter of law. *Higgins v. Medical University of South Carolina*, 326 S.C. 592, 480 S.E.2d 69 (Ct. App. 1997). On a motion for summary judgment, a plaintiff cannot simply introduce a portion of its pleading which makes an assertion as sufficient evidence of a genuine issue of material fact. *Hanson v. DHL Laboratories, Inc.*, 319 S.C. 79, 459, S.E.2d 28 50 (1995).

The Appellants assert that the bald assertions of their Complaint are sufficient for

summary judgment because it is a verified complaint. However, as they themselves admit, this requires a showing that: (1) the assertions are based upon personal knowledge; (2) the assertions set forth facts which would be ruled admissible as evidence at trial; and (3) the assertions show that the verifying party is competent to testify to the matters stated in the Complaint. *Dawkins v. Fields*, 345 S.C. 23, 545 S.E.2d 515 (2001). Neither the Complaint itself, nor anything submitted or presented to the court by the Appellants, show any of these three requirements. The Appellants have presented only assertions. There has been no showing that the assertions of the Complaint would be admissible. There has been no showing that the verifying party would be ruled competent to testify to all of the required elements of a malicious prosecution claim. The Appellants, in their brief to this Court, do not even attempt to state otherwise. They state only that, as a verified complaint, the document is sufficient to support their position.

For the purposes of summary judgment, the complaint itself cannot be relied upon to create sufficient genuine issues of fact, even if verified, when the complaint contains an abundance of conclusory allegations. *Dawkins, supra*. An affidavit will not be sufficient to create genuine issues of material fact for the purposes of summary judgment when the affidavit does not state the basis for the affiant's knowledge or belief. *Englert v. Netherlands Ins. Co.*, 315 S.C. 300, 433 S.E.2d 871 (Ct. App. 1993). Any evidence in the record which would be inadmissible in court is not sufficient to create the genuine issue of material fact required under Rule 56. *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002).

Even if the Appellants' unsupported assertion that some previous proceeding was terminated in the Appellants' favor were true, (which the Respondents strongly deny, in general, as discussed above) it is not sufficient to establish lack of probable cause. "The mere fact that [a party] was unsuccessful in [a] prior action has no bearing upon the issue of

probable cause...[I]t 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..." *Cisson v. Pickens Savings and Loan Assn.*, 258 S.C. 37, 40, 186 S.E.2d 822, 825 (1972), citing, *Prosser on Torts*, (3d) Ed., Section 114, p. 874. No factual, admissible evidence whatsoever has been produced by the Appellants to show lack of probable cause on behalf of the Respondents.

In addition, the Appellants attempt to support their assertion of malice, which is a required showing, based only upon an assertion of no probable cause. As with the other elements of their cause of action, the Appellants have made no factual assertion to support the presence of malice. They argue only that it can be inferred from lack of probable cause.

If the opposing party cannot present affidavits, depositions, or other documentary evidence proving actual malice, a grant of summary judgment for the defendant is appropriate. *George v. Fabri*, 345 S.C. 440, 548 S.E.2d 68 (2001) In this case, the Appellants have put forth no factual support for either lack of probable cause or malice.

C. The Appellants presented no admissible evidence concerning damages.

Evidence of damages is also an essential element of the Appellants' cause of action. In this case, there has been no such evidence produced. On this element, once again, the Appellants rely only upon the assertions of their Complaint. As discussed above, this is insufficient without showing: (1) personal knowledge; (2) admissibility as evidence; and (3) competency to testify. In their argument concerning damages, based solely upon their Complaint, none of these are met. In fact, the Appellants actually admit in this section that some of the assertions in their Complaint are not based upon personal knowledge, but are only alleged "on information and belief." (Appellants' Brief, page 10) In addition, there has

been no showing, or even an assertion, by the Appellants that the signer of the verification of the Complaint is competent to testify concerning the specialized type of damages present in this type of copyright case. With that failure, there is also a failure to show, or even allege, such evidence's admissibility. Without showing any of these requirements, the Appellants' reliance on their Complaint is insufficient to defeat summary judgment on this element.

Bald allegations are insufficient to create a genuine issue of fact necessary to defeat a motion for summary judgment where there was a total absence of competent evidence showing either the existence or amount of the damage or proximate cause between any damage in the acts of the moving party. The moving party need only show the absence of such evidence, not itself negate the claims. *Baughman, supra, see also, Kippel, supra* (Mere assertions did not constitute a genuine issue of material fact.). In this case, the Appellants have put forth no competent, admissible, factual support for damages.

D. The Appellants presented no admissible evidence of proximate cause.

With regard to proximate cause, the Appellants have simply stated that: "There is record evidence of proximate cause in this case." (Appellants' Brief, page 11) There is no identification or explanation of such evidence. It is simply another bald assertion by the Appellants. As cited above, from *Baughman*, bald assertions and a total absence of competent evidence regarding proximate cause are insufficient to create a genuine issue of fact. *Baughman, supra*. In this case, the Appellants have put forth no competent, admissible, factual support for proximate cause.

On a motion for summary judgment, a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *Gauld v. O'Shaughnessy Realty Co.*, 380 S.C. 548, 671 S.E.2d 79 (Ct. App. 2008), *rehearing denied*.

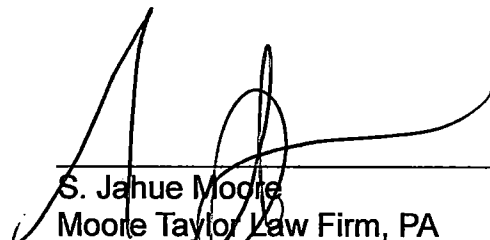
On a motion for summary judgment, a court cannot properly deny the motion after only finding that a genuine issue of material fact exists as to one element of the plaintiff's claim; rather, the court must determine that a genuine issue of material fact exists for each essential element of the claim. *Hansson v. Scalise Builders of South Carolina*, 374 S.C. 352, 650 S.E.2d 268 (2007).

In this case, as shown above, the Appellants have failed to show that there is a genuine issue of material fact for each essential element of their claim. The trial court's granting of summary judgment was proper.

CONCLUSION

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

12/31/15
Date



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THE STATE OF SOUTH CAROLINA
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APPEAL FROM RICHLAND COUNTY
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Eugene C. Griffith, Circuit Court Judge

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v.

Everrett C. Davis, Barbara J. Mooneyham, Carl S. Copeland, and James L. Leslie, Jr.....Respondents.

PROOF OF SERVICE

I certify that I have served the Respondents' Initial Brief and Designation of Additional Matter on counsel for the Appellants on 12/31/15, by mailing a copy of each to Arthur K. Aiken, Aiken & Hightower, PA, 2231 Devine Street, Suite 201 Columbia, SC, 29205.

12/31/15
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RE: Meridian Films, Inc., Video Group, LLC, Bodylab, LLC, Firm Direct, LLC and Firm Media, LLC v. Everett C. Davis, Barbara J. Mooneyham, Carl S. Copeland, and James L. Leslie, Jr.
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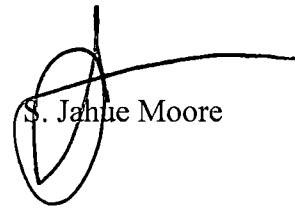
Dear Ms. Kitchings:

Please find attached to this letter the original and one copies of Initial Brief of Respondent and Respondents' Designation of Additional Matter to be Included in the Record on Appeal in this matter. Please file the originals and return the clocked copies to us by way of the self addressed, stamped envelope enclosed for your convenience.

By copy of this letter, we are serving opposing counsel of the same.

Thank you for your assistance with this matter.

Respectfully yours,



S. Jahue Moore

/lgi
Enclosures

cc: Arthur K. Aiken, Esquire

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