

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM RICHLAND COUNTY

Court of Common Pleas

Robert E. Hood, Circuit Court Judge

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SC Court of Appeals

Appellate Case No.: 2015-001754

James Chaffin and Marietta Chaffin,

Appellants,

v.

Richland County Sheriff's Department, Deputy Brian Metz,
Investigator Roy Livingston, Tallie and Devra Lackey, Individually
and as the parents to minor Miranda G.,

Respondents.

FINAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN CONVERTING RESPONDENTS' RULE 12(B)(6) MOTIONS TO DISMISS INTO A RULE 56(C) MOTIONS FOR SUMMARY JUDGMENT WITHOUT PROVIDING SUFFICIENT NOTICE TO THE APPELLANT OR AN OPPORTUNITY TO FILE COUNTER AFFIDAVITS?
2. DID THE CIRCUIT COURT ERR IN GRANTING THE MOTION TO DISMISS BECAUSE IT DID NOT SATISFY THE PLEADING REQUIREMENTS FOR AFFIRMATIVE DEFENSES IN ACCORDANCE WITH RULE 8(C), SCRCP IN THAT IT WAS NOT TIMELY FILED, DEFENDANTS' LACKEY ET AL. MOTION TO DISMISS PURSUANT TO 12(B)(6), SCRCP?
3. DID THE CIRCUIT COURT ERR IN FAILING TO RECUSE HIMSELF BY FAILING TO DISCLOSE THAT HE INTIMATLY KNEW THE PARTIES, ONE OF WHOM WAS PRESENT AT THE HEARING, REQUIRING HIM TO BE RECUSED FROM THIS CASE BECAUSE OF A PRIOR WORK AND PERSONAL RELATIONSHIP WITH THE LACKEY FAMILY?
4. DID THE CIRCUIT COURT ERR IN GRANTING SUMMARY JUDGEMENT BECAUSE THE COMPLAINT'S ISSUES ARE FACTUAL ISSUES TO BE DECIDED BY A JURY?

STATEMENT OF THE CASE

This is a consolidated appeal from two orders issued by Circuit Court Judge Robert E. Hood. This action was originally filed on April 4, 2014. (R. p. 17)

On May 9, 2014, Defendants Richland County et. al filed an Answer and Motion to Dismiss the Complaint and discovery requests by attorneys at Lindeman and Davidson. (R. p. 42) Defendant Tallie Lackey signed for the Complaint on April 15, 2014. (R. p. 40) On May 16, 2014, John S. Simmons and Derek A. Shoemake filed and mailed a Notice of Motion and Motion to Dismiss (pursuant to Rule 12(B)(6) SCRCP) on behalf of Defendants Tallie and Devra Lackey, individually and as the parents to Minor. (R. p. 55) On May 17, 2014, Devra Lackey's service was returned but no defense of insufficient service was filed. On June 11, 2014, John S. Simmons and Derek A. Shoemake filed and mailed a Memorandum in support of the above

referenced Motion to Dismiss.

A motions hearing was held before Judge Hood on July 21, 2014. At that hearing, Judge Hood initially addressed Rule 12(b)(6) motions to dismiss that had been filed by all Defendants never addressing the Plaintiffs' Request for Default against Defendants' Lackey et. Al..

Arguments were heard from all defendant parties on their respective motions to dismiss the Complaint. Without providing any notice prior to the hearing, Judge Hood converted the motion to dismiss into a motion for summary judgment and proceeded to consider matters beyond the pleadings. Judge Hood subsequently granted summary judgment to the defendants (herein after "Respondents") on all claims granted with prejudice. This is an appeal of those orders granting summary judgment filed September 9, 2014.

STATEMENT OF FACTS

By way of background, on January 8, 2007, the Lackey Defendants' daughter – who at the time was a minor – revealed to a therapist that Chaffin had sexually abused her. Pls.' Compl. at ¶ 7. (R. p. 20) After the daughter's therapist notified police, members of the Richland County Sheriff's Department ("RCSD") interviewed the daughter and her mother, Devra. Id. at ¶¶ 8–9. (R. p. 20) In the course of the interviews, the daughter revealed the details of her sexual assault allegations. Id. at ¶¶ 11–15, 23. (R. p. 21, 23) Investigators also interviewed the daughter's therapist. Id. at ¶ 10. (R. p. 21)

On February 15, 2007, RCSD investigators obtained a warrant charging Chaffin with Criminal Sexual Conduct with a Minor, and on March 9, 2007, investigators did in fact arrest him. Id. at ¶¶ 16–17. (R. p. 22) Chaffin was ultimately released from custody on March 13, 2007. Id. at ¶ 20. (R. p. 22) According to Plaintiffs' Complaint, the Richland County Solicitor's

Office ultimately dismissed the charges against Chaffin on September 5, 2012. Id. at ¶ 24. (R. p. 23)

ARGUMENT

I.

Because without providing any notice prior to the hearing, Judge Hood converted the Motions to Dismiss filed as Rules 12(b)(6) into Motions for Summary Judgment under Rule 56 (c) and proceeded to consider matters beyond the pleadings without providing sufficient notice to the appellant or an opportunity to file counter affidavits the circuit court erred in dismissing the responding parties.

At the July 21, 2014, hearing, Judge Hood converted the Defendants’ Rule 12(b)(6) motions to dismiss into a motion for summary judgment and thereby considering matters outside the pleadings. Rule 12(b), SCRCP provides as follows:

If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleadings are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.
Rule 12(b), SCRCP. (Emphasis added)

The South Carolina Supreme Court has “interpreted this language as meaning the trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure. The notice provisions in Rule 56 are incorporated into Rule 12(b)(6).” Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69, 73 (1999), citing Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697, 698-99 (1987). The issue here involves satisfaction of Rule 56’s notice provision

when a 12(b)(6) motion is converted into a motion for summary judgment. South Carolina appellate courts have addressed conversion on a few occasions. In Brown, the Supreme Court reversed a trial court's grant of a 12(b)(6) motion because the trial court considered supporting affidavits and ruled on "defenses ... not apparent from the face of the complaint." The first indication the non-movants had that the trial court was going to consider the submitted affidavits were the order of dismissal. Id. The court stated that "the notice provisions in Rule 56 are incorporated into Rule 12(b)(6)." Id. at 367, 353 S.E.2d at 699. Brown does not expressly state whether the non-movant had copies of the supporting affidavits at least 10 days before the hearing as required by Rule 56. However, in Bowen & Smoot v. Plumlee, 301 S.C. 262, 391 S.E.2d 558 (1990), our Supreme Court implied that less than express notice of the court's intent to convert would be sufficient. The Plumlee court held that the trial judge properly denied conversion of a 12(b)(6) motion to a Rule 56 motion because the supporting "affidavit was never sent to the [non-movants] nor were they advised of the [movant's] request for summary judgment." Id. at 266, 391 S.E.2d at 560. In Crosswell Enters. v. Arnold, 309 S.C. 276, 422 S.E.2d 157 (Ct.App.1992), the court sanctioned conversion "because the motion was supported by matters outside the pleadings." The court noted that "the parties were afforded a reasonable opportunity to introduce evidentiary matters in accordance with Rule 56(c) and (e)." Id. at 279, 422 S.E.2d at 159.

"A ruling on a 12(b)(6) SCRCF motion to dismiss must be based solely upon the allegations set forth on the face of the complaint and the motion cannot be sustained if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." Toussaint v. Ham, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987)."

Under Rule 12(b)(6), SCRPC, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999); Bergstrom v. Palmetto Health Alliance, 352 S.C. 221, 573 S.E.2d 805 (Ct. App. 2002). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint. Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995); Bergstrom, 352 S.C. at 233, 573 S.E.2d at 811; see also Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987) (trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint); Williams, 347 S.C. at 233, 553 S.E.2d at 499 (trial court's ruling on 12(b)(6) motion must be premised solely upon allegations set forth by plaintiff).

A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. See Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999); Stiles, 318 S.C. at 300, 457 S.E.2d at 602-03; see also Baird, 333 S.C. at 527, 511 S.E.2d at 73 (if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997) (motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case). In deciding whether the trial court properly granted the

motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. See Gentry, 337 S.C. at 5, 522 S.E.2d at 139; see also Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief).

Here, Plaintiff James Chaffin was accused and establishes that charges were *nolle prossed* for reasons which imply or are consistent with innocence, an action for malicious prosecution may be maintained. McKenney v. Jack Eckerd Co., 304 S.C. 21, 402 S.E.2d 887 (1991) The Supreme Court, Chandler, J., granted certiorari and held that entry of *nolle prosee*, for reasons which imply or are consistent with innocence, is sufficient termination of criminal prosecution to support action for malicious prosecution. McKenney, 304 S.C. 21, 402 S.E.2d 887 (1991)

Although “South Carolina has long embraced the rule that a true bill of indictment is prima facie evidence of probable cause in an action for malicious prosecution,” Kinton v. Mobile Home Indus., Inc., 274 S.C. 179, 182, 262 S.E.2d 727, 728 (1980) , it is only prima facie evidence and not conclusive. See 54 C.J.S. Malicious Prosecution § 34 at 555 (1987) (stating that “where the result of the preliminary examination before a magistrate or other judicial officer is unfavorable to the accused, and he is held, or committed . . . this is prima facie evidence of probable cause, but not conclusive.”).

In Melton v. Williams, 281 S.C. 182, 314 S.E.2d 612 (Ct. App. 1984) , we concluded that, even though an arrest warrant was issued, “[u]nder the circumstances it was for the jury to say whether or not there was probable cause for the swearing out of the warrant by Williams.” Id. at 187 , 314 S.E.2d at 615 ; see also Parrott v. Plowden Motor Co., 246 S.C. 318, 323, 143 S.E.2d 607, 609

(1965) ; Millhouse v. Food Lion, Inc., 289 S.C. 203, 203, 345 S.E.2d 739, 739 (Ct. App. 1986) ; cf. Gist v. Berkley County Sheriff's Dep't, 336 S.C. 611, 616, 521 S.E.2d 163, 165 (Ct. App. 1999) (finding error in a trial court's grant of summary judgment in an action for false imprisonment because the arrest warrant was insufficient and did not establish probable cause).

The motion cannot be sustained if facts alleged in the Complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case Camp v. Springs Mortg. Corp., 307 S.C. 283, 414 S.E. 2d 784 (Ct. App. 1991) . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Rule 12, SCRCPS.C. R. Civ. P. 12

II.

The Court Erred In Granting The Motion To Dismiss Because It Did Not Satisfy The Pleading Requirements For Affirmative Defenses In Accordance With Rule 8(C), SCRRP In That It Was Not Timely Filed, Defendants' Lackey Et Al. Motion To Dismiss Pursuant To 12(B)(6), SCRCP

The first three sentences of Rule 12(a) SCRCP state the general proposition that a party must respond to a complaint within thirty days of service. A Defendant may assert affirmative defenses in a reply pleading to a preceding pleading. Rule 8(c), SCRCP The rule states :

a party shall set forth affirmatively the defenses: accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, fraud, illegality, injury by fellow servant, laches, license, misrepresentation, mistake, payment, plene administravit or the administration of the estate is closed, recrimination, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court shall treat the pleading as if there had been a proper

designation. A party may file a reply to any of the foregoing affirmative defenses. Rule 8(c), SCRCP.

The calculation of the thirty-day period to respond to the summons and complaint is governed by Rule 6(a) SCRCP stating:

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a State or Federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

The mailing of pleadings subsequent to the summons and complaint adds an additional five days from the date of the mailing to the response time under Rule 6(e), SCRCP. However, that provision does not extend the time to respond to a summons and complaint served by mail under Rule 4(d)(8) SCRCP, which is calculated from receipt by the defendant.

Service by Certified Mail. Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c), including a sheriff or his deputy, by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person. If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules. Rule 4(d)(8) SCRCP.

The presentation of defenses as listed in Rule 12(b), SCRCP lists eight defenses that the pleader has the option of raising by motion before the first answer or in the first responsive pleading. The detail required is not state in the rule, but precedent suggests that the defect should be made clear. Unisun Ins. Co. v. Hawkins, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000).

Rules 12(g) and (h) SCRCP require the pleader to raise all Rule 12(b) defenses at the same time.

Unasserted defenses based on challenges including insufficiency of process are waived if they are not included in the Rule 12(b) motion. Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847

(1993).

Here, the relative time calculation is as follows:
From and including: Tuesday, April 15, 2014
To and including: Friday, May 16, 2014
Result: 32 days
It is 32 days from the start date to the end date, end date included
Or 1 month, 2 days including the end date
There were no legal holidays.

An Entry of Default against Defendants' Lackey Et Al. Pursuant to Rule 55, SCRCPP Should Be Entered Because They Did Not Satisfy The Pleading Requirements For Affirmative Defenses In Accordance With Rule 12 (a) SCRCPP Because It Was Not Timely Filed. The entry of default is the ministerial act recognizing that a party has not completed a required action in the time provided under the rules. Beckham v. Durant, 300 S.C. 329, 331 n.2, 387 S.E.2d 701, 702 n.2 (Ct. App. 1989). Rule 55, SCRCPP requires a showing of the default by affidavit or otherwise.

Here, Defendants Tallie and Devra Lackey, individually and as the parents to Minor have failed to meet deadlines. The defendants had thirty days from the date of service to answer or otherwise plead. Rule 12(a) SCRCPP (see argument and exhibits referenced above.

III.

Because the Judge had relationships with the family members and intimate previous knowledge about this case, he should have disclosed that relationship and recused himself from the proceedings.

The hearing was attended by a Ms. Rena Convington, who sat in the gallery during the entire motions hearing. Counsel for Apellant later learned that James Chaffin's mom Rena Covington who is also the sister of Devra Lackey worked closely for over 20 years with Judge Hood for emergency extractions of kids within the mentor program. During which time she got to

know Judge Hood very well. Working hand in hand to place the emergency extracted kids in temporary housing with the mentoring program. She also work hand-in-hand to give updates and status updates on the children. Rena Convington and her family the named defendant's in the Complaint discussed this case with the family several times. Rena Convington was not named on this case but was allowed to sit in the courtroom when Judge hood dismissed the case.

In the Matter of Estate of Jones, 495 SE 2d 450 (1998), our Supreme Court noted with approval its' determination in Matter of Anonymous Member, Id., that "a lawyer may represent clients with adverse interests only with the consent of each after client has full disclosure of the possible effects of such representation." Id. [emphasis added]. The latest determination of our Supreme Court in regard to its' interpretation of Rule 1.7 was In the matter of Anonymous Member of South Carolina Bar, 432 S.E.2d 467 (2010). The Court held "... that a sexual relationship with the spouse of a current client is a per se violation of Rule 1.7, as it creates the significant risk that the representation of the client will be limited by the personal interests of the attorney." The obvious concern of our Supreme Court is not simply a technical determination of when a matter is adverse, but an objective determination that the on-going representation will be limited by the opportunity for the enmity and ill-feeling such divided interests inevitably provoke. This is consistent with the Court's determination in Matter of Anonymous Member, 432 SE 2d 467 (S.C. Sup. Ct. 1993) that the standard is objective reasonableness. It is undisputed that the Appellant has never provided its' consent to the adverse representation of Respondent or any such client by Turner Padgett. As required by the second part of Rule 1.7, and the divided interests of Turner Padgett's dual representation of clients with adverse interests are clearly and "inevitably provoked."

Respectfully, as our Supreme Court has specifically ruled that an attorney may not, as matter of law, simultaneously represent clients with adverse interests without the express written consent of both parties. Please also note that the Supreme Court of South Carolina in Smith v. Haynsworth, Marion, McKay & Geurard, stated that “a violation of the Rules of Professional Conduct is merely a circumstance that along with other facts and circumstances, may be considered in determining whether the attorney acted with reasonable care in fulfilling his legal duties to a client.” 322 S.C. 433, 437, 472 S.E.2d 612, 614 (1996). Furthermore, the court stated that the Rules of Professional Conduct may be relevant and admissible in assessing the legal duty of an attorney in a malpractice action. Id. As well, this is a violation of several of the Judicial Cannons.

IV.

Because the facts alleged in the complaint and the inferences drawn therefrom regarding relationships between and amongst the parties are factual issues to be decided by a jury the court erred in granting the defendants’ Motion to Dismiss.

In determining whether any triable issues of fact exist, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing the motion. Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (2009). An appellate court applies the same standard used by the trial court under Rule 56(c) when reviewing the grant of a motion for summary judgment. Id. Because summary judgment is a drastic remedy, it should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004). Some of the following arguments display the factual disputes to be

decided by a jury.

Respectfully, the Applicant's actions became actionable upon the occurrence of the overt acts of the Defendants as detailed in the Plaintiffs' complaint. At this stage of the litigation, the Defendants are on notice that the Plaintiffs have, in fact, alleged special damages as a result of the actions of the Defendants. Special damages are defined as, "damages that are alleged to have been sustained in the circumstances of a particular wrong." Black's Law Dictionary 419 (8th Ed. 2004). In South Carolina, special damage is economic loss to the plaintiff which have a "ready market value," such that the amount of damages theoretically may be determined with relative certainty, including those as stated with great specificity in the Plaintiffs complaint.

In the final analysis, triable issues of fact, such as the determination of damages, is a question for the jury, or, as the situation may warrant, an arbitration panel. Baril v. Aiken Reg'l Med. Ctrs., 352 S.C. 271, 573 S.E.2d 830 (Ct. App. 2002); Young v. South Carolina Dep't of Corrections, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999). The Plaintiffs, as noted above, have pled special damages to put the Defendants on notice of damages being claimed that may not be implied by law. The Plaintiffs have met their burden.

In the case at bar, the individuals are being sued in their joint and individual capacities for tortuous actions that are clearly outside of the scope of their official responsibilities. In fact, § 15-78-60(17) specifically excepts "conduct outside the scope of its official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." In footnote 5, Eldeco v. Charleston County, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007) the Court stated:

The concept of “intent to harm” is analogous to the concept of “malicious intent,” which courts have previously interjected into the analyses of claims for intentional interference with contractual relations and intentional interference with prospective contractual relations. However, consideration of these concepts in this context is often an error, due in large part to the historical use of the term “malicious” to describe the idea that the intent must generally be improper in some way. Therefore, as modern courts have addressed these causes of action, the distorted notion of “malicious intent” has been removed, and the elements of these torts have been clarified as specifically requiring the intent to interfere for an improper purpose rather than a motive generally grounded in some sort of spite or ill-will towards the plaintiff. *See* 2 Dan B. Dobbs, The Law of Torts § 446 (2001 & Supp.2006); and Prosser and Keeton, The Law of Torts §§ 129-130 (5th ed. 1984). See also Santoro v. Schulthess, 681 SE 2d 897 (2009).

Respectfully, the allegations of the complaint as to the Defendants in their individual capacity demonstrate that their negligence towards the Appellants.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant respectfully requests that this Court reverse all Orders of Judge Robert E. Hood.

Respectfully submitted,

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