

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM SOUTH CAROLINA
Court of Common Pleas

MAR 10 2016

G. Thomas Cooper, Jr., Circuit Court Judge
Trial Court Case No.: 2013-CP-40-03078

SC Court of Appeals

Appellate Case No.: 2015-000740

Clarence S. Gregory, #227394,.....Appellant,

v.

Riley, Pope & Laney, LLC,.....Respondent,

FINAL BRIEF OF RESPONDENT

RILEY, POPE & LANEY, LLC

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v.

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TABLE OF CONTENTS

Table of Authorities	iii
Statement of the Issues on Appeal	1
Statement of the Case	2
Statement of the Facts	3
Arguments	
I. The Trial Court Correctly Dismissed Claims Barred by the Statute of Limitations.....	6
II. Inmate's Argument that the Trial Court Failed to Address His Motion to Amend Pleadings is Not Preserved for Appellate Review.....	9
III. The Trial Court Correctly Dismissed Inmate's Claims Relating to the Filing and Granting of Subsequent Summary Judgment Motions.....	9
IV. The Trial Court Correctly Dismissed Inmate's Claims Regarding Abuse of Process.....	11
V. The Trial Court Correctly Dismissed Inmate's Claims Regarding Bad Faith.....	12
VI. The Trial Court Correctly Dismissed Inmate's Claims Regarding Duplicity.	12
VII. The Trial Court Correctly Dismissed Inmate's Claims Regarding Unclean Hands.	13
VIII. The Trial Court Correctly Dismissed Inmate's Claims Regarding Civil Conspiracy.	13
Conclusion	15

TABLE OF AUTHORITIES

CASES

<u>Houston v. Lack</u> , 487 U.S. 266 (1988).....	8
<u>State v. Samuels</u> , 403 S.C. 551, 743 S.E.2d 773 (2013).....	13
<u>Doe v. Marion</u> , 373 S.C. 390, 645 S.E.2d 245 (2007)	6
<u>Elam v. S. Carolina Dep't of Transp.</u> , 361 S.C. 9, 602 S.E.2d 772 (2004)	9
<u>Dorrell v. S. Carolina Dep't of Transp.</u> , 361 S.C. 312, 605 S.E.2d 12 (2004).....	10
<u>Peoples Federal Savings and Loan Assn. of South Carolina v. Resources Planning Corp.</u> , 358 S.C. 460, 596 S.E.2d 51 (2004)	14
<u>Ingram v. Kasey's Associates</u> , 340 S.C. 98, 531 S.E.2d 287 (2000).	13
<u>Ballenger v. Bowen</u> , 313 S.C. 476, 443 S.E.2d 379 (1994)	10
<u>Crossley v. State Farm Mut. Auto. Ins. Co.</u> , 307 S.C. 354, 415 S.E.2d 393 (1992).....	12
<u>Broadmoor Apartments of Charleston v. Horwitz</u> , 306 S.C. 482, 413 S.E.2d 9 (1991)	11
<u>Johnson v. Painter</u> , 279 S.C. 390, 307 S.E.2d 860 (1983).	11
<u>Greenwich Sav. Bank v. Jones</u> , 261 S.C. 515, 201 S.E.2d 244 (1973)	10
<u>Ross v. Ross</u> , 394 S.C. 261, 715 S.E.2d 359 (Ct. App. 2011)	7, 8
<u>Cricket Cove Ventures, LLC v. Gilland</u> , 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010).....	14
<u>Capital City Ins. Co. v. BP Staff, Inc.</u> , 382 S.C. 92, 674 S.E.2d 524 (Ct. App. 2009)..	6
<u>Hackworth v. Greywood at Hammett, LLC</u> , 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009).....	14
<u>Hill v. York Cnty. Sheriff's Dep't</u> , 313 S.C. 303, 437 S.E.2d 179 (Ct. App. 1993) ..	10
<u>Crosswell Enterprises, Inc. v. Arnold</u> , 309 S.C. 276, 422 S.E.2d 157, (Ct. App. 1992)	10

STATUTES

S.C. Code § 15-3-530(5)	7
-------------------------------	---

RULES

Rule 413, SCACR.....	9, 13
Rule 12(b)(6), SCRCP.....	6
Rule 15(c), SCRCP.....	9
Rule 59(e), SCRCP.....	3, 6, 9

SECONDARY MATERIALS

Black's Law Dictionary (9th ed. 2009)	11
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STATEMENT OF ISSUES ON APPEAL

- I. The Trial Court Correctly Dismissed Claims Barred by the Statute of Limitations.
- II. Inmate's Argument that the Trial Court Failed to Address His Motion to Amend Pleadings is Not Preserved for Appellate Review.
- III. The Trial Court Correctly Dismissed Inmate's Claims Relating to the Filing and Granting of Subsequent Summary Judgment Motions.
- IV. The Trial Court Correctly Dismissed Inmate's Claims Regarding Abuse of Process.
- V. The Trial Court Correctly Dismissed Inmate's Claims Regarding Bad Faith.
- VI. The Trial Court Correctly Dismissed Inmate's Claims Regarding Duplicity.
- VII. The Trial Court Correctly Dismissed Inmate's Claims Regarding Unclean Hands.
- VIII. The Trial Court Correctly Dismissed Inmate's Claims Regarding Civil Conspiracy.

STATEMENT OF THE CASE

This matter is before the Court of Appeals from an Order granting a Motion to Dismiss filed on behalf of the Respondent Riley, Pope & Laney, LLC (hereinafter “RPL”).

Appellant (hereinafter “Inmate”), an inmate incarcerated within the South Carolina Department of Corrections (hereinafter “SCDC”), filed a Summons and Complaint on May 22, 2013. [R. pp. 67–139]. The Complaint set forth fifteen (15) causes of action against RPL, a law firm organized under the laws of the State of South Carolina, its members and two of its former attorneys. [R. pp. 87–134]. The allegations in the Complaint relate to RPL’s defense of two previous civil actions, case numbers 2007-CP-40-03742 and 2009-CP-40-02442, filed by Inmate against SCDC and its employees regarding conditions of Inmate’s incarceration. [R. pp. 69–86].

In lieu of filing an Answer, counsel for RPL filed and timely served a Motion to Dismiss on or about June 13, 2013. [R. pp. 272–73]. The motion alleged the Complaint should be dismissed with prejudice as Inmate failed to allege facts sufficient to constitute a cause or causes of action, that any causes of action are barred by the applicable statute of limitations, and that the Court of Common Pleas lacked subject matter jurisdiction over one or more of the alleged causes of action. [R. pp. 272–73].

A hearing was held on RPL’s Motion to Dismiss before the Honorable G. Thomas Cooper at the Richland County Courthouse on April 24, 2014. [R. pp. 503–528]. Both Inmate and counsel for RPL were present. [R. p. 505]. The court heard arguments from both sides and took the matter under consideration. [R. pp. 506–13; 515–27].

On May 29, 2014, Judge Cooper issued an Order granting RPL’s Motion to Dismiss, which Inmate alleges he received on June 2, 2014. [R. pp. 5–14]. On or about

June 12, 2014, Inmate submitted for filing and served a Rule 59(e), SCRCPP, Motion to Alter, Amend, or Reconsider the Order of Dismissal. [R. pp. 218–21].

On February 27, 2015, Judge Cooper issued an Order denying the Rule 59(e), SCRCPP, motion, which Inmate alleges he received on March 10, 2015. Inmate filed and served his Notice of Appeal on or about March 23, 2015.

STATEMENT OF FACTS

The present action relates to the defense of two (2) previous civil actions filed by Inmate. Both the 2007 and 2009 cases were *pro se* actions brought against SCDC and current or former employees of SCDC concerning allegations of tortuous conduct resulting in alleged injuries to the Plaintiff while incarcerated within SCDC. In both the 2007 and 2009 actions, the defendants were represented by RPL through one or more of its attorneys.

A. Facts relative to Case No. 2007-CP-40-03742

On July 5, 2007, Inmate, appearing *pro se*, filed suit against Jon Ozmint, Morris Elmore, Claude Hilton, John Sawadske, and SCDC alleging violations of his rights under the South Carolina Tort Claims Act and noncompliance with SCDC Rules and Regulations; specifically, that defendants allegedly installed a faulty steel-caged door with a one way egress into the Lieber Correctional Institution cafeteria tray room entrance area, which due to the alleged improperly installed caused injuries to his left three fingers. [R. p. 6].

RPL answered Gregory's Complaint on September 6, 2007, and filed a Notice and Motion for Summary Judgment on October 30, 2007, which was unsupported by affidavits and relied solely on the facts pleaded in the Complaint. [R. p. 6].

On January 10, 2008, a hearing on the summary judgment motion was held before this Court. [R. p. 7]. On March 26, 2008, this Court issued an Order finding there were issues of fact to be resolved at trial and, therefore, summary judgment was denied. [R. p. 7].

It is uncontested that following the Order, counsel obtained permission to take Inmate's deposition and took Inmate's deposition. On May 7, 2009, RPL filed a second motion for summary judgment supported by deposition testimony, an affidavit of Lt. Elmore, and portions of a transcript from a motion hearing conducted on February 12, 2009. [R. p. 7].

Following a hearing on the second motion for summary judgment, Judge Michelle Childs issued an Order on June 10, 2010, which in part granted the defendant's motion for summary judgment. The Order was not appealed. [R. p. 7].

B. Facts relative to Case No. 2009-CP-40-02442

On April 2, 2009, Inmate, appearing *pro se*, filed suit against Jon Ozmint and SCDC alleging violations of his rights under the South Carolina Tort Claims Act and noncompliance with SCDC Rules and Regulations; specifically, that defendants were responsible for Plaintiff being injured while in the institution's cafeteria. (R. p. 7). On October 8, 2009, RPL filed summary judgment motion which relied solely on the pleadings. [R. p. 7].

Following a hearing on January 14, 2010, Judge Childs issued an Order finding there were genuine issues of fact and denying summary judgment. [R. p. 7]. The Order was filed on April 5, 2010. [R. p. 7]. On May 14, 2010, RPL deposed Inmate and filed a second summary judgment motion on February 23, 2011, which was supported by the deposition testimony. [R. p. 7].

Following a hearing on August 31, 2011, Judge Benjamin issued an Order granting to the defendants summary judgment. [R. p. 7]. The Order was filed on October 17, 2011. (R. p. 7). The Order was not appealed. [R. p. 7].

C. Allegations as to RPL

Inmate's Complaint set forth 277 enumerated paragraphs. [R. p. 68–139]. The crux of the allegations relate to Inmate's assertion that it was improper for RPL to file a second summary judgment motion in each of the above cases after the first summary judgment motions were denied. [R. pp. 76; 82–83].

Inmate also alleges that he was intimidated by counsel during his October 2009 and May 14, 2010 depositions. [R. pp. 75; 77–79; 81–84].

Inmate contends that counsel engaged in misconduct by filing more than one summary judgment motion and further alleges that counsel violated their professional responsibilities, and ethical duties. [R. pp. 77; 83–84]. Inmate captioned fifteen (15) causes of action as follows:

- I. Abuse of Process (Case 2007-CP-40-03742);
- II. Civil Conspiracy (Case 2007-CP-40-03742);
- III. Bad Faith (Case 2007-CP-40-03742);
- IV. The Doctrine of Unclean Hands (Case 2007-CP-40-03742);
- V. Judge Shopping (Case 2007-CP-40-03742);
- VI. Doctrine of Duplicity (Case 2007-CP-40-03742);
- VII. Fraud and Fraudulent Conduct (Case 2007-CP-40-03742);
- VIII. Abuse of Legal Process (Case 2009-CP-40-02442);
- IX. Civil Conspiracy (Case 2009-CP-40-02442);
- X. Bad Faith (Case 2009-CP-40-02442);

- XI. Judge Shopping (Case 2009-CP-40-02442);
- XII. Doctrine of Duplicity (Case 2009-CP-40-02442);
- XIII. Fraud and Fraudulent Conduct (Case 2009-CP-40-02442);
- XIV. Breach of “solemnly oath of duties of office” (Both Cases).

[R. pp. 87–134].

Following a hearing on RPL’s Motion to Dismiss, the circuit court granted the motion dismissing all causes of action. [R. pp. 5–14]. Inmate subsequently filed and served a twenty-seven (27) page Rule 59(e), Motion to Reconsider. [R. p. 218–21].

STANDARD OF REVIEW

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.

Capital City Ins. Co. v. BP Staff, Inc., 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009).

“In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court.” Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (internal citation omitted).

ARGUMENTS

I. The Trial Court Correctly Dismissed Claims Barred by the Statute of Limitations.

The trial court ruled that, to the extent Inmate was seeking relief under any of the enumerated causes of action in the Complaint relating to allegations that he was intimidated or threatened with intimidation during his depositions taken in October 18,

2008 and May 10, 2010, the claims would be barred by the applicable statute of limitations as the Complaint was filed on May 22, 2013. [R. p. 14].

The statute of limitations for personal injury actions and actions for the injury to the rights of another is three (3) years. S.C. Code § 15-3-530(5). Accordingly, Inmate's Complaint was filed more than three (3) years after the statute of limitations expired as to the last deposition taken.

Inmate argues the statute of limitations should be equitably tolled due to the Clerk of Court's failure to accept and file Inmate's Summons and Complaint in 2012. [Inmate Brief, pp. 5–7].

The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness *to a diligent plaintiff* ... [and] is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights....

Ross v. Ross, 394 S.C. 261, 264, 715 S.E.2d 359, 360 (Ct. App. 2011) (emphasis added).

Inmate contends he was forced to seek relief from the Supreme Court of South Carolina in the form a Writ of Mandamus in order to get the Richland County Clerk of Court to accept and file his Summons and Complaint. [Inmate Brief, p. 6–7].

However, Inmate indicates that the issue was resolved in a letter from Larry C. Smith of the Richland County Attorney's Office dated February 27, 2013, approximately three (3) months prior to the running of the statute of limitations. [Inmate Brief, pp. 6–7].

Inmate offered no evidence to the trial court explaining his three (3) month delay in resubmitting the Summons and Complaint to the Richland County Clerk of Court for filing, said Summons and Complaint being re-dated and sent for filing on May 15, 2012

as evidenced by the notarized Certificate of Mailing, after the statute of limitations expired.¹ [Supp. R. p. 141].

The Summons and Complaint were already drafted in 2012 and the only changes to the document appears to be the re-dating of the Certificate of Mailing. The issue regarding the Writ of Mandamus was resolved on February 27, 2013. Inmate offered no evidence or explanation to the trial court regarding his two and one-half month delay in remailing the Summons and Complaint to the Clerk of Court.

Moreover, Inmate has offered no argument to this Court to explain the delay the re-filing of the Summons and Complaint. As Inmate failed in his diligence to timely file the Complaint before the statute of limitations expired even though there was ample time to do so, the trial court's ruling should be affirmed. Ross, 394 S.C. at 264, 715 at

360

Even if the trial court erred in not equitably tolling the statute of limitations in this action, the Order simply indicated to the extent Inmate sought to use the alleged conduct of counsel during depositions to support any of the fifteen (15) causes of actions in the Complaint, the allegations were time barred. The only claims to which the allegation of attorney conduct would apply was the claims for breach of "solemnly oath of duties of office." As stated by the trial court, both the trial court and this Court lack subject matter jurisdiction to entertain matters related to a lawyer's ethical and professional conduct. Rule 413, 3(b), SCACR. Therefore, the trial court's decision should be affirmed.

II. Inmate's Argument that the Trial Court Failed to Address His Motion to Amend Pleadings is Not Preserved for Appellate Review.

¹ A pleading is considered "filed" by an inmate when it is delivered to prison authorities for mailing. See Houston v. Lack, 487 U.S. 266, 276 (1988).

Inmate contends the trial court erred in not granting Inmate's Motion to Amend Complaint. [Inmate Brief, p. 21]. Inmate contends it was prejudicial not to allow him to amend his Complaint add facts that relate back, pursuant to Rule 15(c), SCRPC. However, as evidenced from the motion and proposed amendments, the additional information would have had no additional bearing regarding the basis for the Order granting the Motion to Dismiss. [R. pp. 292–93].

Regardless of whether this was or was not an error, the trial court did not address Inmate's Motion to Amend in the Order and Inmate failed to raise the issue in his motion to reconsider. [R. pp. 5–14; 304–37]. Therefore, the issue is not preserved for appellate review. Elam v. S. Carolina Dep't of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (stating “issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court” and “a party *must* file such a [Rule 59(e)] motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review”).

III. The Trial Court Correctly Dismissed Inmate's Claims Relating to the Filing and Granting of Subsequent Summary Judgment Motions.

Inmate makes several arguments alleging the trial court erred in dismissing Inmate's claims regarding the filing of subsequent summary judgment motions in the 2007 and 2009 tort actions against SCDC after the first motions for summary judgment were denied. [Inmate Brief Issues 3 (pp. 22–28); 4 (pp. 29–32); 5 (pp. 33–34); & 6 (pp. 35–37)].

If a first motion for summary judgment is unsuccessful, the court has the power to permit a second motion for summary judgment prior to trial, which may be heard by a different judge. See Dorrell v. S. Carolina Dep't of Transp., 361 S.C. 312, 325, 605

S.E.2d 12, 18 (2004); Crosswell Enterprises, Inc. v. Arnold, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992) (stating the denial of a summary judgment motion “does not bar a party from making a later motion for summary judgment based on matters not involved in the decision on the first motion”). Accordingly, the trial court did not err in finding it was permissible to file subsequent summary judgment motions and such action did not constitute fraud or fraudulent concealment. [R. pp. 5–14].

Inmate makes reference to allegations that defendants in the underlying tort actions were “bound” by the unappealed Orders denying the first summary judgment motions. (Inmate Brief, p. 28). However, the denial of summary judgment does not establish the facts of the case. Ballenger v. Bowen, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994) (finding that a denial of a motion for summary judgment does not affect the merits of the case and simply indicates that the case should proceed to trial). Moreover, the denial of summary judgment is not appealable. Greenwich Sav. Bank v. Jones, 261 S.C. 515, 516, 201 S.E.2d 244, 245 (1973) (stating the general rule that an order denying a motion for summary judgment is an interlocutory decision which is not directly appealable”]. Accordingly, Inmate’s argument is without merit.

Inmate further argues that the trial court was presented a different case in support of the proposition that a party may file more than one summary judgment motion. [Inmate Brief, p. 33]. While the case of Hill v. York Cnty. Sheriff’s Dep’t, 313 S.C. 303, 437 S.E.2d 179 (Ct. App. 1993) was referenced at the hearing, the final Order referenced Dorrell, *infra*. However, Inmate fails to recognize that both cases support the same proposition of law, that a party may file more than one summary judgment motion in a case. Therefore, the trial judge’s Order should be affirmed.

Inmate also argues the trial court lacked subject matter jurisdiction to hear the second summary judgment motions. For the reasons set forth above, Inmate's argument is without merit and the trial court's order should be affirmed.

IV. The Trial Court Correctly Dismissed Inmate's Claims Regarding Abuse of Process.

Inmate argues the trial court erred in dismissing his abuse of process claims; specifically that there was evidence that counsel did not inform the court during the second summary judgment motions that previous summary judgment motions had been denied. [Inmate Brief, p. 37].

"The tort of abuse of process . . . involves the malicious misuse or perversion of the process, after its issuance, for an end not lawfully warranted by it. The essential elements of abuse of process are: (1) an ulterior purpose; and (2) a wilful [sic] act in the use of the process not proper in the regular conduct of the proceeding." Johnson v. Painter, 279 S.C. 390, 391, 307 S.E.2d 860 (1983).

The principle is general, and is applicable to all kinds of abuses outside of the proper service of lawful process, whether civil or criminal, that for every such wrong there is a remedy, not only against the officer whose duty it is to protect the person under arrest, but also against all others who may unite with him in inflicting the injury.

Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 486, 413 S.E.2d 9, 12 (1991) (internal citation omitted). Process is "the proceedings in any action or prosecution" or a "summons or writ, esp. to appear or respond in court." Black's Law Dictionary (9th ed. 2009).

The trial court correctly determined based upon the pleadings that neither RPL nor its clients instituted either the 2007 or 2009 cases, that RPL did not procure or serve

process on Inmate and, therefore, there were no facts to support a cause of action for abuse of process. Therefore, the trial court's Order should be affirmed.

V. The Trial Court Correctly Dismissed Inmate's Claims Regarding Bad Faith.

Inmate argues the trial court erred in dismissing his bad faith claim; specifically that there was evidence that counsel had a duty to inform the court in the underlying tort actions that a previous summary judgment motion had been denied. [Inmate Brief, p. 38].

The elements of a cause of action for bad faith refusal to pay first party benefits under a contract of insurance are: (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) refusal by the insurer to pay benefits due under the contract; (3) resulting from the insurer's bad faith or unreasonable action in breach of an implied covenant of good faith and fair dealing arising on the contract; (4) causing damage to the insured.

Crossley v. State Farm Mut. Auto. Ins. Co., 307 S.C. 354, 360, 415 S.E.2d 393, 397 (1992).

The trial court correctly found there were no facts alleged in the Complaint to support any of the elements for a cause of action for bad faith. Therefore, the trial court's Order should be affirmed.

VI. The Trial Court Correctly Dismissed Inmate's Claims Regarding Duplicity.

Inmate argues the trial court erred in dismissing his claim for "duplicity;" specifically, Inmate relies on allegations of counsel's conduct in the underlying tort actions. [Inmate Brief, p. 41].

The doctrine of duplicity applies to the rule regarding duplicitous indictments and has no implication in the civil context. See State v. Samuels, 403 S.C. 551, 557,

743 S.E.2d 773, 776 (2013). Accordingly, the trial court correctly dismissed Inmate's claims for the doctrine of duplicity.

To the extent Inmate is relying on allegations of attorney conduct, the trial court lacked subject matter jurisdiction to entertain matters related to a lawyer's ethical and professional conduct and, therefore, Inmate's argument is without merit. Rule 413, 3(b), SCACR.

Accordingly, the trial court's Order should be affirmed.

VII. The Trial Court Correctly Dismissed Inmate's Claims Regarding Unclean Hands.

Inmate argues the trial court erred in dismissing his claim for unclean hands. In support of his position, Inmate cites to case law addressing equitable actions. [Inmate Brief, p. 43].

The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. Ingram v. Kasey's Associates, 340 S.C. 98, 107, 531 S.E.2d 287, 292 (2000). It is an equitable defense and does not give rise to an independent cause of action. Accordingly, the trial court ruled correctly in dismissing the claim and the trial court's Order should be affirmed.

VIII. The Trial Court Correctly Dismissed Inmate's Claims Regarding Civil Conspiracy.

Inmate argues the trial court erred in dismissing his claim for civil conspiracy; specifically, Inmate relies on allegations regarding one of the counsel who handled one of the underlying actions and that counsel's alleged representations or lack of representations made to the court. [Inmate Brief, pp. 44–45].

“The tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage.” Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009). “In a civil conspiracy claim, one must plead acts in furtherance of the conspiracy that are separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim.” Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 325-26, 701 S.E.2d 39, 46 (Ct.App.2010). Moreover, the Plaintiff must allege special damages, which are “damages that are the natural, but not the necessary or usual, consequence of the defendant’s conduct.” Greywood at Hammett, LLC, 385 S.C. at 117, 682 S.E.2d at 875. However, a plaintiff cannot recover damages for a particular act or wrong and likewise recover on a conspiracy to do the act or wrong. Peoples Federal Savings and Loan Assn. of South Carolina v. Resources Planning Corp., 358 S.C. 460, 476, 596 S.E.2d 51, 59 (2004).

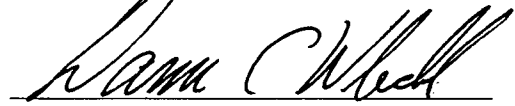
Inmate’s reliance on counsel’s representations to the court in a single proceeding do not address the lack of facts as to each of the required elements or the pleading of special damages. As argued to the trial court, all of the alleged causes of action are based on the same set of facts and seek the same damages. As no independent facts were alleged in the Complaint to support the civil conspiracy claims, those claims must be dismissed.

Therefore, the trial court correctly dismissed Inmate’s civil conspiracy claim and the Order should be affirmed.

CONCLUSION

For the reasons set forth, Respondent respectfully requests the Court affirm the Order on Appeal.

RILEY POPE & LANEY, LLC

A handwritten signature in black ink, appearing to read 'Damon C. Włodarczyk', is written over a horizontal line.

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March 9, 2016

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March 10, 2016

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SC Court of Appeals

(VIA HAND DELIVERY)
The South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Clarence S. Gregory, #227394 v. Riley Pope & Laney, LLC
Appellate Case No.: 2015-000740
Our File: 5052.00713

Dear Clerk:

Please find enclosed for filing one (1) original unbound and fifteen (15) bound copies of Respondent's Final Brief along with one (1) original and one (1) copy of the Certificate of Service and Certification of Counsel. Please return a filed copy of each to me with my courier.

Thank you for your kind assistance in this matter.

Sincerely,



Damon C. Wlodarczyk

DCW/

Enclosures

cc: Clarence S. Gregory, #227394

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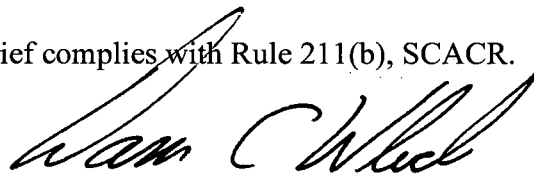
Riley, Pope & Laney, LLC,.....Respondent,

CERTIFICATE OF SERVICE AND CERTIFICATION OF COUNSEL

This is to certify that I have this day caused to be served upon the person named below the attached **Respondent's Final Brief** in the above-captioned matter via United States mail, first-class postage prepaid, to the following individuals:

Clarence S. Gregory, Inmate #227394
Broad River Correctional Institution
Murray Unit, B-Wing Room 234
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Counsel further certifies that the final brief complies with Rule 211(b), SCACR.



Damon C. Włodarczyk

Columbia, SC

March 10, 2016