RECEIVED
NOV 10 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable J. Cordell Maddox, Jr., Circuit Court Judge

Case No. 2016-000569

Greenville Pharmaceutical Research, Inc., Appellant,

v.

Parham & Smith, LLC and Gerald H. Sokol, M.D., Defendants,
Of whom, Gerald H. Sokol, M.D. is the Respondent.

FINAL BRIEF OF APPELLANT

November 8, 2016

F. Milton Mann, Jr., Esquire
151 Harold Fleming Court
Spartanburg, SC 29303
(864) 680-5079
Attorney for Appellant

<u>TABLE OF CONTENTS</u>

Table of Authorities ii

Statement of Issues
On Appeal 1

Statement of the Case 2

Argument 3

1. The Court of Common Pleas erred in dismissing Appellant's Complaint by *sua sponte* raising the issue of witness immunity, which had not been raised in Respondent's Motion to Dismiss nor Respondent's Memorandum in Support of his Motion to Dismiss, thus denying Appellant Due Process........................... 3

Conclusion 8

TABLE OF AUTHORITIES

CASES

Adams v. B.D., 297 S.C. 416, 377 S.E.2d 315 (1989)................................. 7

Ashley River Prop. I, L.L.C. v. Ashley River Prop. II, L.L.C., 374 S.C. 271, 648 S.E.2d 295 (Ct. App. 2007).. 3

Bass v. Bass, 272 S.C. 177, 249 S.E.2d 905 (S.C., 1978)............................. 5

Collins Entertainment, Inc. v. White, 363 S.C. 546, 611 S.E.2d 262 (Ct. App 2005)... 7

Heins v. Heins, 344 S.C. 146, 543 S.E.2d 224 (A.C. App., 2001).................... 5, 6

Loftis v.Loftis, 286 S.C. 12, 331 S.E.2d 372 (S.C. App., 1985)...................... 5

Manning v. Dial, 271 S.C. 79, 245 S.E.2d 120 (1978)............................... 3, 5

Mortgage Electronic Registration Systems, Inc. v. Michael F. Parrott, et al., Opinion No. 2006-UP00402 (S.C. App. 12/11/2006)(S.C. App., 2006)............. 6

Murdock v.Murdock, 338 S.C. 322, 526 S.E.2d 241 (Ct. App. 1999)............... 6

Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007)................................ 3

Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (S.C. 1991).............. 3, 6

South Carolina Dep't of Soc. Servs. v. Beeks, 325 S.C. 243, 481 S.E.2d 703....... 6

South Carolina Dep't of Soc. Servs. v. Meek, 352 S.C. 523, 575 S.E.2d 846........ 6

TCI Media, Inc. v. NuVox Communications, Inc., 010709 SCCA, 2009-UP-004... 3

U.S. Casualty Company v. Hiers, 233 S.C. 333, 104 S.E.2d 561 (1958)..............3, 6

SOUTH CAROLINA RULES OF CIVIL PROCEDURE

Rule 8(c), SCRCP.. 7

Rule 12(b)(6), SCRCP... 3

STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Common Pleas err in granting Respondent's Motion to Dismiss based upon the *sua sponte* application of an affirmative defense of witness immunity, which was not raised by Respondent, thus denying Appellant Due Process?

Statement of the Case

The lower court action was commenced on October 20, 2014, when Appellants filed a Summons and Complaint initiating an action for Fraud against Respondent Sokol and Defamation Per Se against Defendant Parham & Smith, LLC in the Greenville County Court of Common Pleas seeking damages, along with attorneys' fees and costs, arising as a result of alleged wrongdoings in a medical malpractice action captioned John L. Bruce and Marilyn Bruce v. Greenville Pharmaceutical Research, Inc. and Alliance Biomedical Group, filed in the Court of Common Pleas for Greenville County, Thirteenth Judicial Circuit, case number 2011-CP-23-6967. The underlying litigation was settled. A Form 4 Order for Dismissal was entered on July 25, 2012.

Respondent Sokol moved to dismiss Appellant's Complaint in lieu of answering same. Upon hearing the oral arguments of Respondent before the Honorable J. Cordell Maddox, Jr., on February 12, 2015, the Court entered a Form 4 Order granting Respondent Sokol's Motion to Dismiss on February 19, 2015. Appellant timely filed its Motion for Reconsideration on March 9, 2015. On September 14, 2015, Appellant filed an Amended Motion for Reconsideration, which is now moot as to Defendant Parham & Smith, LLC. Appellant's Motion for Reconsideration was denied by Order of the Court entered on February 10, 2016 and Appellant received written notice of the entry on February 15, 2016.

It is from the Orders of the Honorable J. Cordell Maddox, Jr. entered February 19, 2015 and February 10, 2016, granting Respondent Sokol's Motion to Dismiss and denying Appellant's Motion for Reconsideration, respectively, that Appellant appeals.

ARGUMENT

1. The Court of Common Pleas erred in dismissing Appellant's Complaint by *sua sponte* raising the issue of witness immunity, which had not been raised in Respondent's Motion to Dismiss nor Respondent's Memorandum in Support of his Motion to Dismiss, thus denying Appellant Due Process.

Respondent's filed a Rule 12(b)(6) Motion to Dismiss (R. pp. 26-28) and Memorandum in Support of Motion to Dismiss (R. pp. 29-58), the Court acknowledged the hearing as a 12(b)(6) Motion to Dismiss in both the December 30, 2014 and February 11, 2015 emails to counsel and the Honorable J. Cordell Maddox granted Respondent's 12(b)(6) Motion to Dismiss (R. pp. 9-10).

"The ruling on a 12(b)(6), SCRCP, motion to dismiss must be based solely on the allegations set forth in the complaint. *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007)." *TCI Media, Inc. v. NuVox Communications, Inc.*, 010709 SCCA, 2009-UP-004 "The motion cannot be granted if the facts set forth in the complaint and the inferences reasonably drawn therefrom would entitle the Plaintiff to relief on any theory of the case. *Ashley River Prop. I, L.L.C. v. Ashley River Prop. II, L.L.C.*, 374 S.C. 271, 278, 648 S.E.2d 295, 298 (Ct. App. 2007)." *TCI Media, Inc. v. NuVox Communications, Inc.*, 010709 SCCA, 2009-UP-004. "Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties. *Manning v. Dial,* 271 S.C. 79, 245 S.E.2d 120 (1978). Further, a judgment on the pleadings is considered to be a drastic procedure by our courts. *U.S. Casualty Company v. Hiers,* 233 S.C. 333, 104 S.E.2d 561 (1958)." *Russell v. City of Columbia,* 305 S.C. 86, 406 S.E.2d 338 (S.C. 1991).

Judge Maddox's primary focus during the February 12, 2015 hearing, was the fact that Respondent Sokol signed a Pre-Suit Affidavit in the underlying litigation.

> I'd like to tell you that I don't think much of this. I know you're a good lawyer but what I'm concerned about is it's very difficult, as you know, to get a doctor – let's assume – for any reason to file one of these Affidavits because they're immediately ostracized.
>
> The statute requires you to get one and thank God I got out of that practice before the statute came into place because I have my own opinion of it but all he did was give his opinion that the threshold for filing the lawsuit was there and if the opinion was wrong, then it was wrong.

(R. p. 429, lines 20-p. 430, line 6) The Court inquired, "Let me get this straight, this doctor is asked by a lawyer to issue an opinion in an affidavit that comports with the statute that's part of the tort reform requiring a presuit affidavit and the defendant's allegation is that his opinion was erroneous and that he would have said anything if Mike Parham asked him to say it?" (R. p. 428, line 7-p. 429, line 3; p. 430, lines 20-25; p. 431, lines 3-7 an 6-22; p. 432, lines 1-3 and 19-22; p. 433, lines 3-8) The basis for the Order granting the Motion was a potential "killing effect" (sic) on getting doctors to signs Pre-Suit Affidavits in the future. (R. p. 430, lines 14-15) Judge Maddox further states:

> ... I don't think there's a cause of action here. I think if I don't dismiss this, then ever (sic) doctor in the world that signs – and it could happen to the defense just the same way – could be subject to – they are already under a tremendous amount of pressure not to get involved in these, but the remedy here is to go to the medical board and say, this guy is not really doing what he's supposed to be doing, he's a trained hire (sic) gun.
>
> Look, I knew hired guns. They were the worse (sic) things in the world because you could get them to say anything and as the late great Carrie Doyle, rest his soul, used to tell you don't every (sic) hire those people. If

he's that, then I think all you need to go to the medical board.

I'm not sure there's anything you can do in this case against Dr. Sokol.

(R. p. 433, line 15-p. 434, line 6). Attorney for Appellant immediately questioned, "Judge, I don't know what grounds other than what you just said I'm not pleading the cause of action." (R. p. 434, lines 7-9) Judge Maddox replied, "I think under the theory of summary judgment – I think just looking at the case and the facts and what I have in front of me, there's not enough there to deny summary judgment." (R. p. 434, lines 10-13) By granting Respondent's Motion to Dismiss, or Summary Judgment, under this theory, the Court is saying Respondent Sokol is immune from being held accountable for his fraudulent actions simply by signing a pre-suit affidavit. Clearly, this theory is outside the four corners of the Complaint, in that immunity was never contemplated by the Appellant or Respondent. In addition, immunity was not addressed in Respondent's Motion to Dismiss, nor in Respondent's Memorandum in Support of his Motion to Dismiss. The theory of Respondent's alleged immunity was brought up for the first time by the Court, *sua sponte*, during the February 12, 2015 hearing. The Court in *Heins v.Heins*, 344 S.C. 146, 543 S.E.2d 224 (S.C. App., 2001) stated, "It is well settled that ordinarily a party may not receive relief not contemplated in his pleadings. *Loftis v. Loftis*, 286 S.C. 12, 331 S.E.2d 372 (Ct. App. 1985)." Pleadings in a case should be construed liberally so that substantial justice is done between the parties. *Manning v. Dial,* 271 S.C. 79, 245 S.E.2d 120 (1978). However, they cannot "be stretched so as to permit the judge to award relief not contemplated by the pleadings. Due process requires that a litigant be placed on notice of the issues which the court is to consider." *Bass v. Bass*, 272 S.C. 177, 249 S.E.2d 905 (1978). Appellants were never placed on notice of a potential immunity affirmative

defense for Respondent Sokol until the Court, *sua sponte*, raised the issue during the February 19, 2015 hearing. As such, Appellant was denied due process. "Due process is a flexible concept, and the requirements of due process in a particular case are dependent upon the importance of the interest involved and the circumstances under which the deprivation may occur." *South Carolina Dep't of Soc. Servs. v. Beeks*, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* "Litigants should be placed on notice of the issues that the court is to consider in order to comply with due process. *Murdock v. Murdock*, 338 S.C. 322, 333, 526 S.E.2d 241, 248 (Ct.App.1999)." *South Carolina Dep't of Social Services v. Meek*, et al., 352 S.C. 523, 575 S.E.2d 846.

A judgment on the pleadings is considered to be a drastic procedure by our courts. *U.S. Casualty Company v. Hiers,* 233 S.C. 333, 104 S.E.2d 561 (1958)." *Russell v. City of Columbia,* 305 S.C. 86, 406 S.E.2d 338 (S.C. 1991). In the instant case, the Court, *sua sponte*, raised the immunity affirmative defense as to Respondent Sokol and granted his Motion dismissing the case, all in the same hearing. As such Appellant was denied due process by not having an "opportunity to be heard at a meaningful time and in a meaningful manner." "As to the master raising *sua sponte* affirmative defenses on behalf of the Respondents: Heins v. Heins, 344 S.C. 146, 152, 543 S.E.2d 224, 227 (Ct. App. 2001)('It is well settled that ordinarily a party may not receive relief not contemplated in his or her pleadings.'); Collins Entertainment, Inc. v. White, 363 S.C. 546, 563, 611 S.E.2d 262, 270 (Ct. App. 2005)('[T]he failure to plead an affirmative defense is deemed a waiver of the right to assert it.')." *Mortgage Electronic Registration Systems, Inc. v. Parrott et al.*,

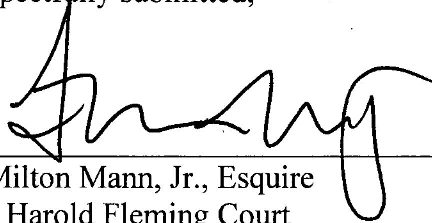
Opinion No. 2006-UP-00402 (S.C. App. 12/11/2006)(S.C. App., 2006). Respondent should not be granted relief he did not contemplate and denying Appellant due process. Immunity is "an affirmative defense which must be specifically pled. Rule 8(c), SCRCP. The failure to plead an affirmative defense is deemed a waiver of the right to assert it. *Adams v. B&D, Inc.*, 297 S.C. 416, 419, 377 S.E.2d 315, 317 (1989)." *Collins Entertainment, Inc. v. White*, 611 S.E.2d 262, 363 S.C. 546 (SC, 2005).

Appellant contends that the Court erred in dismissing Appellant's Complaint by *sua sponte* raising the issue of immunity as to Respondent Sokol, an issue which had not been raised in Respondent's Motion to Dismiss nor Respondent's Memorandum in Support of his Motion to Dismiss and thus denying Appellant due process. A full reading of the February 12, 2015 hearing transcript clearly indicates the Court acted upon matters well beyond the four corners of the Complaint and in doing so, denied Appellant due process. In short, the Court applied an absolute immunity respecting witness testimony irrespective of the actual factual assertions of Appellant's Complaint. Thus, Appellant requests that the Court of Common Pleas' Order Dismissing its Complaint be reversed and this matter be remanded for a trial on the merits.

CONCLUSION

For the reasons stated above, Appellant requests that the Court of Common Pleas Order granting Respondent's Motion to Dismiss Appellant's Complaint be reversed and this matter remanded for a trial on the merits.

Respectfully submitted,



November 8, 2016

F. Milton Mann, Jr., Esquire
151 Harold Fleming Court
Spartanburg, SC 29303
(864) 680-5079
Attorney for the Appellant

RECEIVED
NOV 10 2016
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable J. Cornell Maddox, Jr., Circuit Court Judge

Case No. 2016-000569

Greenville Pharmaceutical Research, Inc., Appellant,

v.

Parham & Smith, LLC and Gerald H. Sokol, M.D., Defendants,
Of whom Gerald H. Sokol, M.D. is the Respondent.

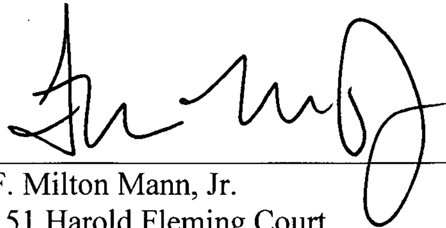
PROOF OF SERVICE

I certify that I have served Final Brief of Appellant upon The Honorable Jenny Abbott Kitchings, South Carolina Court of Appeals Clerk of Court, by depositing the original and fifteen (15) copies in the United States Mail, postage pre-paid; Respondent Gerald H. Sokol, M.D. and, other counsel of record, Jeffrey M. Bogdan, Esquire, by email and by depositing copies in the United States Mail, postage pre-paid, on November 8, 2016, at the addresses listed below:

T. David Rheney, Esquire
Gallivan, White & Boyd, P.A.
P.O. Box 10589
Greenville, South Carolina 29601
Phone: (864) 271-9580
Attorney for Respondent Sokol

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Clerk of Court
1220 Senate Street
Columbia, South Carolina 29201

Jeffrey M. Bogdan, Esquire
Barnwell Whaley Patterson & Helms, LLC
P.O.Drawer H
Charleston, South Carolina 29402
Phone: (843) 577-7700
Attorney for Parham & Smith, LLC



F. Milton Mann, Jr.
151 Harold Fleming Court
Spartanburg, South Carolina 29303
(864) 680-5079
Attorney for Appellant

November 8, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
NOV 10 2016
SC Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable J. Cornell Maddox, Jr., Circuit Court Judge

Case No. 2016-000569

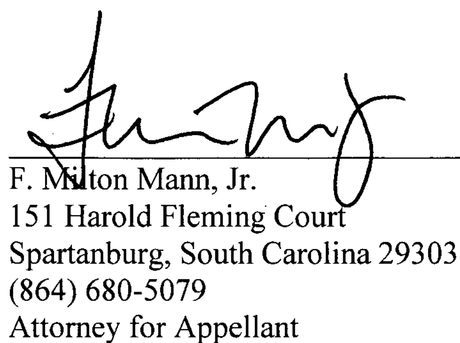
Greenville Pharmaceutical Research, Inc., Appellant,

v.

Parham & Smith, LLC and Gerald H. Sokol, M.D., Defendants,
Of whom Gerald H. Sokol, M.D. is the Respondent.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief of Appellant complies with Rule 211(b), SCAR.



F. Milton Mann, Jr.
151 Harold Fleming Court
Spartanburg, South Carolina 29303
(864) 680-5079
Attorney for Appellant

November 8, 2016