THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
In The Court of Common Pleas

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SC Court of Appeals

Honorable Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2016-001525

Trial Court Case No. 2014-CP-39-350

Alliance Biomedical Research, LLC ..... Appellant,

v.

Judith H. Parham, Personal Representative of
the Estate of David Michael Parham, deceased
and Parham & Smith, LLC ..... Respondents.

FINAL BRIEF OF RESPONDENTS

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly grant summary judgment on the entire case where Alliance Biomedical Research failed to advance any evidence to clear its threshold burden of proving that Defendants acted outside of the scope of their professional representation of their clients?

Suggested Answer: ***YES.***

2. Are Alliance Biomedical Research's arguments that the trial court erred in granting summary judgment on the merits of its abuse of process and malicious prosecution causes of action preserved for review?

Suggested Answer: ***NO.***

3. Has Alliance Biomedical Research presented any evidence to satisfy the elements of its abuse of process and malicious prosecution causes of action and allow those claims to survive summary judgment?

Suggested Answer: ***NO.***

COUNTERSTATEMENT OF THE CASE

A. Factual Background

Defendant Judith Parham, Personal Representative of the Estate of David Michael Parham, deceased (hereinafter "Attorney Parham"), is the personal representative of the estate of attorney Mike Parham, who tragically passed away after an automobile accident on September 13, 2012. Defendant Parham & Smith, LLC is Attorney Parham's former law firm (Attorney Parham and Defendant Parham & Smith, LLC may hereafter be referred to collectively as "Defendants" or "Respondents").

This case arises from Defendants' representation of John Bruce and Marilyn Bruce in a medical malpractice action that Attorney Parham filed in the South Carolina Court of Common Pleas for Greenville County, styled John L. Bruce and Marilyn Bruce v. Greenville Pharmaceutical Research, Inc. and Alliance Biomedical Group, 2011-CP-23-6967 (hereinafter the "Bruce Litigation"). In the Bruce Litigation, John Bruce and Marilyn Bruce alleged that Greenville Pharmaceutical Research, Inc. (hereinafter "GPR") and Plaintiff/Appellant Alliance Biomedical Research, LLC (hereinafter "Alliance" or "Appellant") were negligent in, among other things, failing to diagnose or report John Bruce's lung cancer at an early stage, which allowed the cancer to grow undetected until it became inoperable and caused his death. (Compl. in Bruce Litigation at ¶18) (R. p. 17). Specifically with regard to Alliance, John Bruce and Marilyn Bruce alleged that "Alliance Biomedical Research, LLC[1] is the parent company of Greenville Pharmaceutical Research, Inc. At all times herein mentioned, the Defendant Alliance Biomedical Research, LLC, acted by and through its subsidiary Greenville Pharmaceutical

[1] The defendant named in the caption of the Bruce Litigation was "Alliance Biomedical Group." However, the substantive allegations in the complaint in the Bruce Litigation identify "Alliance Biomedical Research, LLC." as the party.

Research, Inc. together with its servants, agents and employees." (Id. at ¶6) (R. p. 15).

After conducting discovery, John Bruce and Marilyn Bruce dismissed Alliance from the Bruce Litigation. (Stip. of Dism. as to Alliance[2] in the Bruce Litigation filed 4/19/12) (R. p. 24). John and Marilyn Bruce later settled the remainder of the Bruce Litigation with GPR.[3] (Release dated 10/1/12) (R. pp. 562-564). Notably, Alliance did not timely move for sanctions under Rule 11 or under the South Carolina Frivolous Civil Proceedings Sanctions Act, nor has it asserted any claim against the Bruces.

Alliance has filed this suit against the Defendants for damages allegedly resulting from its inclusion in the Bruce Litigation. Alliance claims that it never should have been included as a defendant in the Bruce Litigation because it is not and never was GPR's parent company and this fact was known or should have been known by the Defendants.

B. Procedural History

Alliance's Second Amended Complaint, which is the operative pleading here, admits that this case "arises out of alleged conduct by" Defendants "as counsel and . . . as the representing firm" in the Bruce Litigation. (11/3/14 Alliance's 2nd Am. Compl. at ¶6) (R. p. 26). Alliance's first cause of action is for Abuse of Process and alleges that Attorney Parham named Alliance in the Bruce Litigation despite being informed by GPR and Alliance's counsel[4] that Alliance was not GPR's parent company, and that Alliance was included purely at Attorney Parham's insistence and for the ulterior purpose to gain leverage against Alliance's co-defendant GPR.

[2] The Stipulation of Dismissal was actually as to the named defendant "Alliance Biomedical Group."

[3] GPR subsequently filed a lawsuit against Parham & Smith, LLC in Greenville County for defamation as a result of statements that Defendants made during the Bruce Litigation. Milton Mann, counsel for Alliance here, represented GPR in that case. See *Greenville Pharmaceutical Research, Inc. v. Parham & Smith, LLC et al*, 2014-CP-23-05776. As in this case, Parham & Smith, LLC was granted summary judgment there.

[4] Milton Mann, counsel of record for Alliance in this case, served as counsel for both GPR and Alliance regarding pre-suit discussions in the Bruce Litigation.

(Id. at ¶¶16-25) (R. pp. 28-29). Alliance further alleges that Attorney "Parham was driven by greed for his own monetary gain because of the contingency fee contract with his client[s]." (Id. at ¶42) (R. p. 31). Alliance's second cause of action is for Malicious Prosecution and alleges essentially the same theory as the Abuse of Process claim: that Alliance was brought into the Bruce Litigation purely at the insistence of Attorney Parham and that Attorney Parham did no internal investigation about Alliance prior to naming Alliance in the Bruce Litigation. (Id. at ¶¶48-51) (R. pp. 32-33).

Defendants conducted discovery by serving two sets of Interrogatories, one set of Requests for Production, a set of Requests for Admission, and taking the deposition of Alliance's member Dr. Gregory Feldman, who testified unequivocally that he was speaking on behalf of Alliance. Alliance did not serve any written discovery requests or notice a single deposition. Discovery ended on February 1, 2016 in accordance with an Amended Consent Scheduling Order. (12/18/15 Am. Consent Sched. Ord.) (R. p. 6).

On February 16, 2016, Defendants filed a Motion for Summary Judgment (2/16/16 Def's Mot. Summ. J.) (R. pp. 42-44), which was supplemented by a Memorandum in Support of Motion for Summary Judgment. (3/31/16 Def's Mem. Supp. Mot. Summ. J.) (R. pp. 45-98). Judge Perry H. Gravely granted Defendants' Motion for Summary Judgment by way of an Order filed on June 29, 2016, holding that Alliance could not maintain this suit against the Defendants unless Alliance presented evidence that the Defendants acted for their own personal motives outside the scope of their representation of the Bruces when they added Alliance to the Bruce Litigation. Specifically, Judge Gravely found that (1) Alliance failed to present any evidence to carry its threshold burden of proving that Defendants acted outside of the scope of their representation of John Bruce and Marilyn Bruce when they included Alliance in the Bruce

Litigation and (2) Alliance had other remedies available against Defendants, including seeking sanctions under either Rule 11 of the South Carolina Rules of Civil Procedure or the South Carolina Frivolous Civil Proceedings Sanctions Act, neither of which Alliance pursued. (6/29/16 Order) (R. pp. 8-12).

Alliance did not move to alter or amend the Order but instead filed the instant appeal.

C. Summary of the Arguments

Although Alliance alleged causes of action against the Defendants for Abuse of Process and Malicious Prosecution, the trial court properly granted summary judgment as to those claims, since Alliance failed to satisfy its threshold burden of proving that the Defendants acted outside of the scope of their representation of John Bruce and Marilyn Bruce when they included Alliance in the Bruce Litigation. South Carolina jurisprudence is clear that since Alliance sued an opposing attorney and his law firm, Alliance's claims cannot stand unless it can show that the attorney acted outside of the scope of his representation of his clients. Alliance has presented no such evidence, and thus the trial court properly granted Defendants' Motion for Summary Judgment.

As to the merits of the specific causes of action, Alliance's arguments that it presented evidence to survive summary judgment on those claims is not preserved for review, as they were not ruled on by the trial court. Finally, even if the evidence in this case is analyzed against the elements of those causes of action, summary judgment is appropriate because it does not create a genuine issue of material fact which would allow those claims to be submitted to the jury. While Alliance claims to have such evidence, it has not cited to any here.

ARGUMENTS

I. Standard of Review

Rule 56, SCRCP, provides the trial court shall grant summary judgment if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "[I]n 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 Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006).

"In order to resist a motion for summary judgment, the nonmoving party must come forward with specific facts showing genuine issues necessitating trial. Once a party moving for summary judgment carries the initial burden of showing an absence of evidentiary support for the nonmoving party's case, the nonmoving party may not simply rest on mere allegations or denials contained in the pleadings." NationsBank v. Scott Farm, 320 S.C. 299, 303, 465 S.E.2d 98, 100 (Ct. App. 1995) (internal citations omitted). "[A] court cannot ignore facts unfavorable to th[e non-moving] party and must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." Stewart v. State Farm Mut. Auto Ins. Co., 341 S.C. 143, 533 S.E.2d 597, 600 (Ct. App. 2000).

"It is not sufficient that one create an inference that is not reasonable or an issue of fact that is not genuine. The judge is not required to single out some one morsel of evidence and attach to it great significance when patently the evidence is introduced solely in a vain attempt to

create an issue of fact that is not genuine [or material]." Priest v. Brown, 302 S.C. 405, 396 S.E.2d 638 (Ct. App. 1990) (internal citations omitted).

"An appellate court reviews the granting of summary judgment under the same standard applied by the trial court." Wells v. City of Lynchburg, 331 S.C. 296, 301, 501 S.E.2d 746, 749 (Ct. App. 1998). The appellate court "may affirm the grant of summary judgment on any ground found in the record." See Moore v. Weinberg, 373 S.C. 209, 229, 644 S.E.2d 740, 750 (Ct. App. 2007) (citing Rule 220(c), SCACR. ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.")); accord Rule 208(b)(2) SCACR ("Respondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c).").

II. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE ENTIRE CASE BECAUSE ALLIANCE FAILED TO ADVANCE ANY EVIDENCE TO CLEAR ITS THRESHOLD BURDEN OF PROVING THAT DEFENDANTS ACTED OUTSIDE OF THE SCOPE OF THEIR PROFESSIONAL REPRESENTATION OF JOHN BRUCE AND MARILYN BRUCE

Generally, in South Carolina one may not sue an attorney for acts and omissions done while acting in the scope of the attorney's representation of a client other than the plaintiff. Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). An attorney who acts in good faith with the authority of his client is not liable to a third party in an action for malicious prosecution. Gaar v. N. Myrtle Beach Realty Co., Inc., 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (Ct. App. 1986). The South Carolina Supreme Court has consistently held that an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client. Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010).

In Gaar, this Court further noted:

> The attorney normally conducts the litigation solely in his professional capacity. He has no personal interest in the suit. In his professional capacity the attorney is not liable . . . for injury allegedly arising out of the performance of his professional activities . . . . ***Even if the attorney who initiates civil proceedings for his client has no probable cause to do so, he is still not liable if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of the client's claim.***

287 S.C. at 528-29, 339 S.E.2d at 889 (emphasis added).

The South Carolina Supreme Court has expressed this legal maxim very clearly, finding that an attorney is immune from liability for actions that were taken in the attorney's professional capacity of representing a client, but is not immune for actions the attorney takes outside of the scope of the professional representation. Stiles, 318 S.C. at 299, 457 S.E.2d at 602.

A. Discovery and Summary Judgment

Defendants served Interrogatories and Requests for Production on Alliance requesting, amongst other things, identification and production of all evidence to support certain allegations of the Second Amended Complaint, including the allegations that Alliance was included in the Underlying Action purely at the insistence of Attorney Parham (Interrogatory No. 20, Request for Production No. 19) (R. pp. 668, 626), that Attorney Parham acted out of his own personal interests (Request for Production No. 23) (R. p. 630), and that Attorney Parham acted outside of the scope of his professional representation of his clients John Bruce and Marilyn Bruce (Request for Production No. 24) (R. p. 631). Alliance identified and produced only two things in response: (1) the complaint in the Bruce Litigation and (2) the transcript of John Bruce's deposition taken in the Bruce Litigation. (Alliance's Amended Responses to Defendants' Interrogatories and Second Amended Responses to Defendants' Request for Production, dated March 17, 2016) (R. pp. 619-672).

Defendants also served Requests for Admission on Alliance, asking it to admit that Defendants acted in their role as John Bruce's and Marilyn Bruce's attorneys at all times relevant to the Bruce Litigation; that Defendants acted solely on behalf of John Bruce and Marilyn Bruce at all times relevant to the Bruce Litigation; that Defendants had no personal interest, other than earning a fee, in bringing or maintaining the Bruce Litigation; and that Defendants always acted primarily for the purpose of aiding John Bruce and Marilyn Bruce in obtaining an adjudication of the Bruce Litigation. Alliance denied all Requests for Admission. (Alliance's Responses to Requests for Admission dated February 17, 2016) (R. pp. 601-602). When asked to state the basis of all denials to Defendants' Requests for Admission, Alliance responded simply that "Client, John L. Bruce, testified as to having no knowledge of Alliance Biomedical Research, LLC." (Alliance's Responses to Defendants' Second Interrogatories dated March 17, 2016, No. 12) (R. p. 681).

At his deposition on December 16, 2015, Dr. Gregory Feldman unequivocally testified that he was testifying on behalf of Alliance. (Gregory Feldman, M.D. Dep., December 16, 2015, 13:17-19; 59:19-20) (R. pp. 301, 313). Dr. Feldman summarized Alliance's allegations in this case: Defendants filed the Bruce Litigation "without any grounds against Alliance Biomedical Research without any investigation." (Id. at 14:9-15) (R. p. 302). When asked what Defendants' pre-litigation internal investigation revealed, Dr. Feldman responded that he did not know because he is not a "mind reader," but testified that Alliance "will conduct that investigation." (Id. at 31:16-32:16; 112:4-113:2) (R. pp. 306, 326). When asked if he was aware of any evidence showing that Defendants acted outside of the scope of their representation of the Bruces in the Bruce Litigation, Dr. Feldman responded by referring to Alliance's Complaint and stating that Alliance had not conducted its discovery yet. (Id. at 100:13-101:12) (R. p. 323). When Dr.

Feldman was asked if he was aware of any evidence to support his allegation that Defendants acted for their own personal interests, he testified that he did not and he would find out in discovery. (Id. at 140:14-141:12) (R. p. 333).

Discovery closed on February 1, 2016 without Alliance performing any discovery. Thereafter, Defendants filed their Motion for Summary Judgment and Memorandum in Support. (2/16/16 Def's Mot. Summ. J. and 3/31/16 Def's Mem. Supp. Mot. Summ. J.) (R. pp. 42-98). Defendants' first argument was that the Plaintiff failed to advance even a scintilla of evidence that could be used to meet its threshold burden of proving that the Defendants acted outside of scope of their representation of John Bruce and Marilyn Bruce by including Alliance in the Bruce Litigation, as such is required by Stiles, Gaar, and Argoe. (3/31/16 Def's Mem. Supp. Mot. Summ. J. pp. 5-8) (R. pp. 49-52). Defendants' second and third arguments, respectively, were that even if the merits of Alliance's Abuse of Process and Malicious Prosecution causes of action were analyzed, Alliance failed to present any evidence to satisfy the elements of those torts. (3/31/16 Def's Mem. Supp. Mot. Summ. J. pp. 8-9) (R. pp. 52-53).

In response, Alliance served (but did not file) a Memorandum in Opposition to Defendants' Motion for Summary Judgment, as well as an Affidavit of Gregory J. Feldman, M.D. signed April 7, 2016. In its brief, Alliance simply copied and pasted the majority of the allegations of its Second Amended Complaint, word for word, and then cited to a document that purportedly supported each allegation. Alliance even copied the paragraph number from the allegations in its Second Amended Complaint and pasted that number into the brief. (Compare 4/8/16 Alliance's Mem. Opp. Summ. J. pp.4-15 (R. pp. 248-259) with 11/3/14 Alliance's 2nd Am. Compl. at ¶¶11-53 (R. pp. 27-33)). Alliance then argued that its "Second Amended Complaint alleges, in great detail, the depth the Defendants conducted themselves with cites to factual support. [Alliance] respectfully submits that

there exists for (sic) more than the mere scintilla of evidence required to withstand Defendants' Motion for Summary Judgment." (4/8/16 Alliance's Mem. Opp. Summ. J. pp.12, 15, 16) (R. pp. 256, 259-260). As to the allegations that Alliance has to prove to clear its threshold burden and the merits of its two causes of action, the documents Alliance cited to as "factual support" are the Complaint in the Bruce Litigation, the transcript of John Bruce's deposition in the Bruce Litigation, the transcript of Dr. Feldman's deposition in this case, and Dr. Feldman's April 7, 2015 Affidavit signed in this case.

The portion of the deposition of John Bruce from the Bruce Litigation on which Alliance relies reads as follows:

> **Q: Now, there's a company called Alliance Biomedical Group. Do you recall ever talking with anyone from a group named Alliance Biomedical Group?**
>
> **A: No, sir.**
>
> **Q: If you met somebody that worked with that group, you don't know it, do you?**
>
> **A: No, sir, I don't.**

(Dep. of John L. Bruce taken April 16, 2012 in the Bruce Litigation) (R. p. 294).

Judge Gravely's Order focused solely on Alliance's failure to present any evidence to clear its threshold burden of proving that Defendants acted outside of the scope of their representation of John Bruce and Marilyn Bruce and found that "Alliance has not identified or produced one piece of evidence to show that Defendants were acting outside of the scope of their professional representation of the Bruces" and that "Alliance did not even attempt to uncover any evidence." (6/29/16 Order at p.4) (R. p. 11). Judge Gravely specifically analyzed John Bruce's deposition testimony from the Bruce Litigation, which Alliance leans on as evidence to meet its threshold burden, and found that it "is a far cry from evidence that Defendants were acting outside of the

scope of their representation of the Bruces when they included Alliance as a Defendant in the Bruce Litigation." (Id.) Judge Gravely succinctly summarized his ruling by finding that Alliance "has not advanced any evidence to show that Defendants were doing anything other than attempting to gain leverage for a larger settlement for the Bruces and, even if Defendants did not have probable cause to asset claims against Alliance in the Bruce Litigation, that is not a basis for Alliance's current claim under the Gaar analysis." (Id. at pp.4-5) (R. pp. 11-12). Finally, Judge Gravely noted that Alliance failed to pursue the available remedies of seeking sanctions against the Defendants under Rule 11 or the South Carolina Frivolous Civil Proceedings Sanctions Act. (Id. at p.5) (R. p. 12). Indeed, apart from its conclusory claim that the Defendants acted out of greedy self-interest, the Second Amended Complaint does not even allege facts from which one can possibly conclude that Attorney Parham was motivated or was acting other than in his capacity as the Bruces' attorney.

B. Alliance's Argument on Appeal

The vast majority of Alliance's Appellate Brief mirrors its Memorandum in Opposition to Summary Judgment and its Second Amended Complaint, in that it copies the allegations of the Second Amended Complaint and includes citations to documents that Alliance claims supports those allegations. (Compare 11/3/14 Alliance's 2nd Am. Compl. at ¶¶11-53 (R. pp. 27-33) to 4/8/16 Alliance's Mem. Opp. Summ. J. pp. 4-15 (R. pp. 248-259) and Alliance's App. Brief pp. 5-13). The only differences between pages 5-13 of Alliance's Appellate Brief and its Summary Judgment brief are that Alliance changed the word "Plaintiff" to "Appellant" and removed the paragraph numbers that correspond to the Second Amended Complaint.

Alliance does not attempt to distinguish Stiles, Gaar, or Argoe, or argue that it does not have to meet a threshold burden prior to reaching the merits of its causes of action. Instead, Alliance singles out one excerpt from Argoe, which stands for the proposition that an attorney is immune from liability to a third person for acts arising from the performance of his professional duties on behalf of "and with the knowledge of his client." Alliance then argues that John Bruce's deposition testimony from the Bruce Litigation and the fact that John Bruce did not sign a Verification to the Complaint[5] in the Bruce Litigation is at least a scintilla of evidence that Defendants "were acting outside of the scope of their representation" (Alliance's App. Brief, p. 15) and acted "neither in good faith nor with the authority of their client." (Alliance's App. Brief, p. 17)

C. Defendants' Response

1. ALLIANCE ADOPTS TOO NARROW AN INTERPRETATION OF *STILES, GAAR, AND ARGOE*

Alliance appears to argue that it can satisfy its threshold burden under Stiles, Garr, and Argoe simply by proving that Defendants named Alliance in the Bruce Litigation without their clients' specific knowledge. That is a misreading of these cases. The Gaar Court succinctly noted that so long as the attorney is acting for the primary purpose of aiding his client in prosecuting the client's claim, the attorney cannot be liable to an affected third party: "Even if the attorney who initiates civil proceedings for his client has no probable cause of do so, he is still not liable if he acts primarily for the purpose of aiding his client in obtaining a proper adjudication of the client's claim." Gaar, 287 S.C at 529, 339 S.E.2d at 889. None of these cases stand for the proposition that the client must have expressly authorized the specific act on which the plaintiff bases its claim.

[5] This is the first time that Alliance argued that John Bruce's failure to sign a verification of the Complaint in the Bruce Litigation should be considered as evidence that Alliance cleared its threshold burden. This argument is not preserved for review. Hill v. South Carolina Dep't of Health & Envtl. Control, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010).

Alliance's threshold burden is to present evidence showing that Defendants were acting in some way other than to aid John Bruce and Marilyn Bruce, not just that they acted without their specific knowledge and consent. Alliance did not present any such evidence at the summary judgment stage, and has not done so here. The Second Amended Complaint itself makes it clear that Defendants were acting on their clients' behalf; it alleges no facts from which one can reasonably infer that the Defendants were acting without their clients' knowledge and consent. Accordingly, Defendants respectfully request that this Court affirm the grant of summary judgment.

2. ALLIANCE HAS NOT PRODUCED ANY EVIDENCE THAT DEFENDANTS WERE ACTING OUTSIDE OF THE SCOPE OF THEIR REPRESENTATION OR WITHOUT THE KNOWLEDGE OF JOHN BRUCE AND MARILYN BRUCE

Even if Alliance's narrow reading of Stiles, Gaar, and Argoe is correct such that Alliance can meet its threshold burden by simply presenting evidence that Defendants added Alliance to the Bruce Litigation without the express knowledge of John Bruce and Marilyn Bruce, Alliance has failed to even present that evidence. Alliance points only to the deposition of John Bruce in the Bruce Litigation as evidence that the Defendants acted without the knowledge of their clients. First, the Defendants' clients in the Bruce Litigation were both John Bruce and Marilyn Bruce. (Complaint in Bruce Litigation) (R. pp. 14-18). Even if John Bruce's deposition testimony is evidence that he did not know that the Defendants named Alliance in the Bruce Litigation or that he did not consent in naming them, which it is not, it is surely not evidence that Defendants acted in any way without ***Marilyn Bruce's*** knowledge or consent. At the hearing on Defendants' Motion for Summary Judgment, Alliance admitted that it did not take Marilyn Bruce's deposition, but suggested that Defendants should have submitted her affidavit stating that she did know that Alliance was being sued. (6/6/16 Hearing Tr. 28:25-29:13) (R. pp. 499-500). It is Alliance's burden to present evidence to satisfy its threshold burden.

More importantly, as Judge Gravely held, John Bruce's deposition testimony in the Bruce Litigation is a "far cry from evidence that Defendants were acting outside of the scope of their representation of the Bruces when they included Alliance as a Defendant in the Bruce Litigation." (Order p. 4) (R. p. 11). John Bruce's deposition testimony is not even evidence that John Bruce was unaware that the Defendants included Alliance as a defendant in the Bruce Litigation. John Bruce testified that he did not recall ever talking with anyone from "Alliance Biomedical Group" and that he was unaware if he ever met someone who worked for "Alliance Biomedical Group." Importantly, Alliance Biomedical Group is not the Plaintiff or the Appellant in this case. The Plaintiff/Appellant is "Alliance Biomedical Research, LLC." Mr. Bruce's deposition testimony from the Bruce Litigation is silent on whether he knew who Alliance Biomedical Research, LLC was or if he was aware that they were a defendant in his litigation.

Further to this point, even if Mr. Bruce did testify that he did not recall talking to anyone with Alliance Biomedical Research, LLC or that he was unaware if he ever met someone who worked for Alliance Biomedical Research, LLC, which he did not, such testimony still would not be evidence that John Bruce was unaware that Defendants included Alliance Biomedical Research as a defendant in the Bruce Litigation. Mr. Bruce could have been well aware that Alliance Biomedical Research, LLC was a defendant in his case, but still testified that he did not recall talking to or knowing anyone that worked there. Mr. Bruce's lack of recollection of speaking to anyone or knowing anyone who worked for any Alliance-related entity is not probative of anything of relevance in this case.

Finally, Alliance has not presented any evidence to meet its actual threshold burden of proving that the Defendants acted outside of the scope of their representation of the Bruces. Dr. Feldman was clear in his deposition that Alliance has no evidence that the Defendants acted outside

of the scope of their representation, or acted in their own interests, when they named Alliance as a Defendant in the Bruce Litigation, but assured that he would find such evidence in discovery. (Feldman Depo 100:13-101:12; 140:14-141:12) (R. pp. 323, 333). Alliance never conducted any discovery in this case, and thus never even attempted to find the evidence that Dr. Feldman insisted he would.

3. ALLOWING ALLIANCE TO SUE THE DEFENDANTS WOULD HAVE A CHILLING EFFECT ON THE ENTIRE PRACTICE OF LAW

Alliance attempts to create the standard that an attorney is liable for any actions he takes in representing his client of which the client does not have specific knowledge. As stated in Section II.C.1, supra, Alliance's position is simply not a correct interpretation of the law. Clearly the narrow immunity exception that the Supreme Court described in Stiles is intended to permit suit against a lawyer for whom his ostensible representation of his client was but a pretext to carry out his personal agenda against the plaintiff. This case – even as alleged in Alliance's Second Amended Complaint is far from that situation. Indeed, the Second Amended Complaint goes so far as to allege that everything that the Defendants did was in furtherance of their representation of their client. (11/3/14 Alliance's 2nd Am. Compl. at ¶6) (R. p. 26). To require, as a condition of asserting immunity from suit, that the lawyer prove that his client specifically knew of and approved everything he did, would effectively write the immunity out of existence. It is not reasonable to think that a client will have actual and specific knowledge of every single act that his/her attorney performs on his behalf. In this case, specifically, there is no reason to believe that the Bruces would not want the Defendants to name as a party any entity that might have liability for their injuries. So long as the Defendants named the party for the purpose of pursuing their client's claim, and not for any personal motivation, the client's specific knowledge of the party is not necessary.

To allow the attorney to be liable to the party if it turns out that it is not a proper defendant would result in attorneys across the state being wary about filing meritorious cases on behalf of their deserving clients out of fear of the attorney's own exposure. This chilling effect was recognized by the Gaar Court:

> Attorneys must be free to act and advise their clients without constant fear of harassment from lawsuits. An attorney has an ethical obligation zealously to pursue any lawful claim of his client. If he does not properly represent and support his client's position, an attorney is subject to a suit for malpractice. To hold that an attorney who files a pleading has acted overzealously, and is therefore liable to the other party in damages for malicious prosecution, would create a conflict of interest with the attorney's obligation to properly represent and support his client.

287 S.C. at 529, 339 S.E.2d at 889-90 (internal citations omitted).

Here, the only evidence in the record shows that the Defendants named both GPR and Alliance in the Bruce Litigation because of their belief that Alliance was GPR's parent company, and therefore liable for GPR's negligence. Alliance's counsel even admitted that Defendants' belief was not unreasonable. In an email sent to Dr. Feldman after Alliance was named as a defendant to the Bruce Litigation, Alliance's counsel represented that "the 'Alliance' website has created an inference that [Alliance] has an ownership interest in GPR." (3/19/12 email from M. Mann to G. Feldman) (R. p. 567). To now hold Defendants liable to Alliance for including it as a defendant in the Bruce Litigation, when Alliance's own counsel conceded that Defendants had a reasonable basis to do so, would be unjust.

Alliance also ignores Judge Gravely's finding that it had valid avenues of relief against Defendants which it did not pursue. This finding is also supported by Gaar:

> The attorneys acted solely in their capacity as attorneys to bring the lawsuit, and did not become parties to the suit. . . . This does not leave the plaintiff without a remedy. If the appropriate elements are demonstrated, the other party is subject to disciplinary proceedings if he knowingly pursues a claim when it is obvious such action will merely harass or maliciously injure another, or if he knowingly and in bad faith advances an unwarranted claim. A client subjected to a malicious

> prosecution suit may be able to sue his attorney for legal malpractice if the attorney negligently files an unwarranted claim.

287 S.C at 529-30, 339 S.E.2d at 889-90 (internal citation omitted).

Here, Alliance had the option of suing John Bruce and Marilyn Bruce for abuse of process and malicious prosecution. If that suit was successful and John Bruce and Marilyn Bruce faced exposure because of the Defendants' conduct, the Bruces could have then brought a malpractice suit against Defendants. Alliance however chose not to sue the Bruces and instead sued the Defendants directly. Further, Alliance could have but chose not to initiate sanctions proceedings against Defendants under Rule 11 of the South Carolina Frivolous Civil Proceedings Sanctions Act, either of which, if meritorious, could have compensated Alliance for its claimed damages. Judge Gravely questioned Alliance at the summary judgment hearing as to why it did not file for sanctions. Alliance's response was simply that it considered filing for sanctions, but chose to file this case instead. (6/6/16 Hearing Tr. 21:4-22:15) (R. p. 492-493).

Despite other routes, Alliance chose the one avenue to recovery that was blocked by Stiles, Gaar, and Argoe. Defendants requests that this Court affirm summary judgment.

III. ALLIANCE'S ARGUMENTS THAT IT PRESENTED EVIDENCE SUFFICIENT TO RAISE A QUESTION OF FACT ON THE MERITS OF ITS ABUSE OF PROCESS AND MALICIOUS PROSECUTION CLAIMS ARE NOT PRESERVED FOR REVIEW BUT, IF THEY WERE, NO SUCH EVIDENCE HAS BEEN PRESENTED

"[T]o preserve an issue for appellate review, a matter may not be raised for the first time on appeal, but must have been *both* raised to *and ruled upon* by the trial court." Hill v. South Carolina Dep't of Health & Envtl. Control, 389 S.C. 1, 21, 698 S.E.2d 612, 623 (2010) (emphasis added) (citing Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998)). "[A] party *must file a motion to alter or amend* when an issue has been raised, but not ruled upon, in order to preserve it for review." Id. (emphasis added).

Judge Gravely's Order granting Defendants summary judgment did not rule on, or even discuss the merits of either of Alliance's Abuse of Process of Malicious Prosecution causes of action because, as addressed above, he properly disposed of the entire case on the threshold immunity issue. Alliance did not file a motion to alter or amend Judge Gravely's order to obtain a ruling on the merits of its specific causes of action. Alliance now attempts to argue that it presented a scintilla of evidence to allow its Abuse of Process and Malicious Prosecution claims to survive summary judgment. These arguments are not preserved for this Court's review. Id.

Regardless, Alliance has not presented any evidence, and does not even point to evidence it its appellate brief, that could satisfy the elements of either tort. Instead, the evidence on the record actually disproves each cause of action.

1. ABUSE OF PROCESS

The abuse of process cause of action allows relief for a party damaged by another's perversion of a legal procedure for a purpose not intended by the procedure. Food Lion, Inc. v. United Food & Commercial Workers Int'l Union, 351 S.C. 65, 69, 567 S.E.2d 251, 253 (Ct. App. 2002). The elements of abuse of process are: 1) an "ulterior purpose," and 2) a "willful act in the use of the process not proper in the conduct of the proceeding." Hainer v. Am. Med. Int'l, Inc., 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997).

The first element of an ulterior purpose exists if the process is used to obtain an illegitimate objective. D.R. Horton, Inc. v. Wescott Land Co., 398 S.C. 528, 551, 730 S.E.2d 340, 352 (Ct. App. 2012). To allege that a party had a bad motive or ulterior purpose in bringing an action, standing alone, is sufficient to sustain a claim for abuse of process. Id. No abuse of process action lies where a party has an incidental or concurrent motive of spite, or if the party seeks to gain a collateral advantage from the process. Food Lion, 351 S.C. at 75-75, 567 S.E.2d

255-56. A party may only be liable for abuse of process if it uses the process "*primarily* to accomplish a purpose for which it is not designed." Id. at 75, 567 S.E.2d at 255-56. The collateral objective must be the "sole or paramount reason for acting."

In its brief to this Court, Alliance cites to case law regarding the requirements for an abuse of process claim, relying heavily on Palleres v. Seinar, 407 S.C. 359, 756 S.E.2d 128 (2014). (Alliance's App. Brief pp. 12-15). Then, Alliance copies word for word (typos included) the argument it made in its opposition to summary judgment: "Appellant's Second Amended Complaint alleges, in great detail, the depths the Respondents conducted themselves with cites to factual support. Appellant respectfully submits that there exists for more than the mere scintilla of evidence required to withstand Respondent's Motion for Summary Judgment." (Id. at p. 16; 4/8/16 Alliance's Mem. Opp. Summ. J. p. 12 (R. p. 256)).

Alliance cites language from Judge Gravely's Order that Alliance "has not presented any evidence to show that the Defendant attorneys acted out of personal or malicious motives" and then cites to case law stating that intent or actual malice is not required to prove an abuse of process claim. (Alliance's App. Brief p.13).

Finally, Alliance cites to Judge Gravely's finding that Alliance "has not advanced any evidence to show Defendants were doing anything other than attempting to gain leverage for a larger settlement for the Bruces . . ." and argues that naming an innocent third party (Alliance) to gain leverage for a larger settlement from a co-defendant shows that Defendants "were merely seeking to gain a collateral advantage form the process and using Appellant to accomplish their efforts." (Alliance's App. Brief p.14).

As an initial matter, Palleres is inapposite to this case in that it was a case filed by one party to an underlying proceeding against the other, not by one party against the other's attorney. Also, the Palleres Court allowed that abuse of process claim to survive summary judgment because there was evidence on the record that the alleged abusers disliked Palleres, desired to drive Palleres from their residential neighborhood, and even sought to have Palleres mentally committed when they had no legal authority to do so. 407 S.C. at 373, 756 S.E.2d at 134. Alliance does not cite to any specific evidence in its brief, or anywhere else on the record, that Defendants (or even the Bruces) used the Bruce Litigation to accomplish any ulterior motive or illegitimate objective such as running Alliance out of town or injuring its business in any way. In fact, Alliance never even attempted to uncover evidence of what objective Defendants or the Bruces sought to accomplish by adding Alliance to the Bruce Litigation, but simply relied on its own unsubstantiated statements that Alliance was included to induce a larger settlement from a co-defendant.[6]

Next, Alliance appears to contradict itself in its brief, as it cites to and even emphasizes the case law stating that "no action lies where a person has an incidental or concurrent motive of spite or **merely seeks to gain a collateral advantage from the process**." (Alliance's App. Brief p.14) (emphasis in original). In the next breath of Alliance's brief, in what appears to be Alliance's sole one-sentence argument on the merits of its abuse of process claim, it posits that naming Alliance in the Bruce Litigation shows that Defendants were merely seeking a collateral advantage. Id. at 14. As Alliance recognizes, even if Defendants did include Alliance to gain a

[6] Alliance is even inconsistent in identifying which co-defendant in the Bruce Litigation it believes Defendants were trying to influence by adding Alliance. In its Second Amended Complaint, Alliance alleges that Defendants attempted to gain leverage against GPR. (11/3/14 Alliance's 2nd Am. Compl. at ¶18) (R. p. 28). However, Dr. Feldman testified that he, testifying on behalf of Alliance, believed that Defendants were trying to pressure Dr. Desai and his practice, who are totally unrelated to Alliance to GPR, to settle the Bruce Litigation. (Feldman Depo 86:4-87:22) (R. p. 320). Alliance's Appellate Brief then reverts back to claiming that Defendants were trying to pressure GPR. (Alliance's App. Brief p. 18).

collateral advantage, a fact which Alliance has presented no evidence to support, that act considered alone is insufficient to support an abuse of process claim. Food Lion, 351 S.C. at 75-75, 567 S.E.2d 255-56.

Further, assuming Alliance's argument is correct, which it is not, and that an attorney or a party could be liable for abuse of process solely for naming one party to a lawsuit to gain a collateral advantage from another party, Alliance itself would be liable for abuse of process in this case. In this action, Alliance named Attorney Parham and Parham & Smith, LLC as the Defendants. At the hearing on Defendants' Motion for Summary Judgment, Alliance's counsel stated on two occasions that "I don't think Parham & Smith[, LLC] did anything wrong." (6/6/16 Hearing Tr. 18:10-11; 20:3-4) (R. pp. 489, 491). Under Alliance's own logic, it and its counsel would be liable to Parham & Smith, LLC for abuse of process because it included Parham & Smith, LLC as a party to this case not because Parham & Smith was liable, but solely to gain a collateral advantage against Attorney Parham.

Next, Alliance's issue with Judge Gravely's finding that Alliance failed to present evidence that Defendants acted out of personal or malicious motives is misplaced. As stated above and is clear from Judge Gravely's Order, he did not analyze the elements of Alliance's Abuse of Process claim. Judge Gravely's finding that that Alliance presented no evidence of Defendants' personal or malicious motives was part of his analysis of the threshold issue, not of the Abuse of Process claim.

Finally, the evidence on the record supports only one conclusion, that Defendants added Alliance to the Bruce Litigation in an effort to help their clients, John and Marilyn Bruce, recover damages. That is the absolute purpose of filing a medical malpractice or negligence action, and is far from an illegitimate objective. This Court should affirm the grant of summary judgment.

2. MALICIOUS PROSECUTION

To succeed in an action for malicious prosecution, a plaintiff must establish every one of the following elements: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage. Law v. S. Carolina Dep't of Corr., 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006).

In its brief, Alliance copies and pastes, word-for-word, the Palleres Court's recitation of malicious prosecution jurisprudence. (Alliance's App. Brief pp. 15-16). Alliance then cites Judge Gravely's Order's language that "even if Defendants did not have probable cause to assert claim against Alliance in the Bruce Litigation, that is not a basis for Alliance's current claim under the Gaar analysis." Alliance then simply states that "whether or not probable cause existed is a triable issue for the jury to decide." Id. at 16-17.

Just as Alliance did with its Abuse of Process argument, it has confused Judge Gravely's holding on the threshold issue as a finding on the merits of the Malicious Prosecution claim. That is simply an inaccurate interpretation of these proceedings, as Judge Gravely never ruled on Alliance's Malicious Prosecution claim and his references to probable cause were not in the malicious prosecution context, but rather used in the analysis under Gaar, as is clearly stated in his Order and even recognized in the language Alliance pulled therefrom.

In any event, Alliance has still not presented any evidence to satisfy each of the six elements of it Malicious Prosecution cause of action. As to the second element, Alliance has no evidence that it was included in the Bruce Litigation "at the insistence of" the Defendants. Alliance conducted no discovery to determine how Alliance came to be named in the Bruce Litigation. Alliance could have deposed Marilyn Bruce or the living members/employees of

Parham & Smith, LLC to determine who suggested and decided that Alliance be named. Or easier, Alliance could have simply served requests for production on the Defendants, requesting all materials from their file on the Bruce Litigation, which may have included internal memoranda, emails, or notes regarding who Defendants or the Bruces believed to be the proper parties to the Bruce Litigation.

Also, the fifth element of Alliance's Malicious Prosecution claim requires it to prove that Defendants lacked probable cause in naming Alliance in the Bruce Litigation. "Probable cause in this context does not turn upon the plaintiff's guilt or innocence, but rather upon whether the facts within the prosecutor's knowledge would lead a reasonable person to believe the plaintiff was guilty of the crimes charged." Palleres, 407 S.C. at 367, 756 S.E.2d at 131 (quoting Kinton v. Mobile Home Indus., Inc., 274 S.C. 179, 181, 262 S.E.2d 727, 728 (1980)). "The issue is not what the actual facts were, but what the prosecuting party honestly believed them to be." Id.

Here, Alliance failed to present any evidence as to what the Defendants believed the relationship between Alliance and GPR to be. Alliance's pleading alleges that Defendants should have known that Alliance was not GPR's parent company because GPR's attorney informed them so. (11/3/14 Alliance's 2nd Am. Compl. at ¶17) (R. p. 28). However, Alliance's own counsel in this case, who is its in-house counsel and also represents GPR, admitted that Alliance's website creates the appearance that Alliance has an ownership interest in GPR. (3/19/12 email from M. Mann to G. Feldman) (R. p. 567). While Alliance took no efforts to learn whether the Defendants researched Alliance's website before naming it in the Bruce Litigation, the website alone creates probable cause to name Alliance as a defendant.

CONCLUSION

Alliance's lawsuit against a deceased attorney and his former law firm, based on actions taken while the attorney was representing his clients in a lawsuit against Alliance, cannot survive summary judgment unless Alliance can come forward with evidence that the Defendants sued Alliance because of some personal motive, outside the scope of representing their clients. Alliance has presented no such evidence and in fact alleges just the opposite; thus, this Court should affirm Judge Gravely's grant of summary of judgment.

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Dated: March 21, 2017
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
In The Court of Common Pleas

Honorable Perry H. Gravely, Circuit Court Judge

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SC Court of Appeals

Appellate Case No. 2016-001525

Trial Court Case No. 2014-CP-39-350

Alliance Biomedical Research, LLC.....Appellant,

v.

Judith H. Parham, Personal Representative of
the Estate of David Michael Parham, deceased
and Parham & Smith, LLC.....Respondents.

CERTIFICATE OF COUNSEL

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

March 21, 2017

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PROOF OF SERVICE

I certify that I have served the Final Brief of Respondent on Appellant Alliance Biomedical Research, LLC by depositing a copy of it in the United States Mail, postage prepaid, on March 21, 2016, addressed to its counsel of record F. Milton Mann, Jr., Esquire at address 151 Harold Fleming Court, Spartanburg, SC 29303.

Lindsey Perkins
Legal Assistant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
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Appellate Case No.: 2016-001525
Trial Court Case No.: 2014-CP-39-350
BWPH File No.: 59.020

Dear Ms. Kitchings,

Enclosed please find an original and ten (10) copies of the Final Brief of Respondents with regard to the above referenced matter. Upon filing the original, please return one (1) clocked copy to me in the envelope enclosed for your convenience. Please do not hesitate to contact me with any questions or concerns.

Sincerely,

Jeffrey M. Bogdan

JMB/lap
Enclosures
cc: F. Milton Mann, Jr., Esquire (enclosure)

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