

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SALUDA COUNTY
In The Circuit Court

Jocelyn Newman, Circuit Court Judge

Appeal No.: 2017-000198

Amy Potts.....Respondent.

v.

McCarty Enterprises, LLC, John Miles McCarty, Audrey S. McCarty, a/k/a Audrey J. McCarty and Jane DoeAppellants.

BRIEF OF APPELLANT

RECEIVED

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SC Court of Appeals

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I. ISSUES ON APPEAL

- A. DID THE COURT ERR IN FAILING TO GRANT DEFENDANT'S AMENDED MOTION TO DISMISS?
- B. DID THE COURT ERR IN GRANTING PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' ANSWER AND IN ENTERING DEFAULT IN PLAINTIFF'S FAVOR DESPITE THE FACT THAT MAILING WAS COMPLETE UPON DEPOSIT AT THE POST OFFICE AND THE POSTAL WORKER'S AFFIDAVIT CORRECTING THE COURT'S ERRONEOUS CONCLUSION REGARDING THE GREENVILLE POSTMARK BEING DISPOSITIVE?

II. STATEMENT OF THE CASE

A. Factual Background

Appellants John McCarty and Audrey live in Saluda County and own a small vehicle and trucking escort company known as McCarty Enterprises, LLC. Appellants McCarty's home and their trucking company are on contiguous property in Saluda County. **(R.p. 16)** Respondent and her husband are neighbors of Appellants.

This action arises out of the destruction of the Respondent's six plus year old Australian Shepherd dog by Appellant John McCarty while the animal was trespassing on Appellants' property on March 25, 2015, and threatening Appellants' animals after two of Appellants McCarty's emus were killed two days prior by the trespassing animal. **(R.pp. 17-18; 68-69)**

Several years prior, the Respondent's same shepherd attacked one of Appellants' family pets on Appellants' property, causing great injury to the Appellants' pet. At that time, the Saluda County Sheriff's Office warned Respondent and Appellants that "they needed to keep their dogs on their property and leashed at all times." They further advised both parties that "they had the right to protect their person and property against attacks on their property." **(R.pp. 68-69)**(Emphasis added)

Two days prior to when the Shepherd was destroyed while on Appellants' property, the Saluda County Sheriff's Office ("SCSO") again responded regarding the killing of Appellants' livestock, and Appellants were advised by the SCSO that "they have a right to protect her animals." (**Id.**) The SCSO also discussed the killing of the Appellants' livestock with Respondent. (**R.p. 69**) Appellant Audrey McCarty further discussed the killing of the two emus with Respondent the day before the Respondent's Shepherd was found trespassing again on Appellants' property, while attempting to harm Appellants McCarty's livestock, and was destroyed by Appellant John McCarty while on his property. (**R.pp. 29, 69**)

B. Procedural History

Respondent's husband, Frank Potts, Esq., initially filed suit on Respondent's behalf on June 8, 2015. (**R.pp. 13-20**). In the first Complaint, Respondent only alleged conspiracy. Specifically, on June 14, 2015, Respondent served Appellants by personally serving Audrey McCarty as a "defendant; spouse of defendant; and person who also represented herself as the authorized agent for defendant John McCarty." (**R.pp. 21-22**). Appellant John McCarty is the registered agent for Appellant McCarty Enterprises, LLC. (**Id.**; **R.p. 150**). Appellants responded to the initial complaint by filing a Motion to Dismiss twelve days later, on June 26, 2015. The same was processed and clocked in by the Saluda County Clerk of Court on July 1, 2015. (**R.pp. 23-27**). Thereafter, things became difficult.

Respondent's husband, Mr. Potts, filed an amended complaint on July 13, 2015, alleging the same conspiracy claim, but adding a two paragraph emotional distress claim. (**R.pp. 28-32**) However, Appellant's counsel never received a copy of the same or other letters Potts said he sent regarding the alleged default. (**R.pp. 65-66**). At the April 28, 2016 Motion for Default

hearing, when Appellants' counsel tried to tender her affidavit to the Court setting forth that she had not received the Amended Complaint filing or the letters, Mr. Potts claimed:

0

1 Mr. Potts via e-mail and mail.

2 **MR. POTTS:** Objection; not received, not filed.
3 That's part of her motion. I object to it.

4 **MS. KERN-FULLER:** To be clear, you haven't
5 received this?

6 **MR. POTTS:** Your Honor, if she wants to
7 interrogate me, I'll go on the witness stand.

8 **THE COURT:** What is it you have?

9 **MS. KERN-FULLER:** Your Honor, I have an
10 affidavit that was served by mail and served by
11 e-mail and I believe by fax within the two days as
12 required under Rule 6 in opposition to the motion
13 for a default. To make sure that it was received
14 within the two days, I provided it electronically to
15 Mr. Potts as well. The rule provides that I am to
16 provide it to opposing party within the two days.

17 **MR. POTTS:** I do not deny that I received it,
18 but I was not served.

(April 28, 2016 Tr. p. 11).

Mr. Potts then claimed while seated at counsel table with only his wife/Respondent:

2 And just as a "for what it's worth"; the
3 certificate of service of the mailing of the amended
4 complaint to -- excuse me -- the certificate of
5 service for the motion for default was signed by,
6 and she's right here, a United States Postal Service
7 employee who both checked for postage and the
8 contents before it went in the mail and actually did
9 the mailing. That was to assure that it was --
10 there was no question that she was getting notice of
11 it, that counsel was getting notice of it. Still

(R.p. 135)

However, at the subsequent hearing in front of Judge Newman, Mr. Potts claimed Mrs. Potts didn't work at the Post Office and that Appellant's counsel "got it wrong." **(R.p. 16)**.

On May 10, 2016, Judge Keesley ruled that given the mailing problems between counsel that Appellants had "15 days from the date this Order is mailed to the defense attorney to file and serve their responsive pleading." **(R.pp. 3-4)**. The order was manually postmarked by the Clerk of Court in Saluda on May 10, 2016, and postmarked at the Regional/SCF mailing facility in Columbia on May 11, 2016. **(R.pp. 1-8)**. In his Order, Judge Keesley encouraged the parties to send items certified mail, but did not require the same. **(R.p. 6)**. However, even with sending certified mail, Respondent's counsel continually challenged the dates and times of the postal center receipts, alleging fraud in certificates of service and at one point inexplicably alleging that Appellant's Counsel's staff placed the item in the mail at 10:16 p.m. on April 27, 2016, two days after they actually mailed it on April 25, 2016, because that is when the post office processed it

and entered into the certified mailing tracking system (as if counsel could control when the Post Office processed her mail). (R.pp. 81-82, 171).

In accordance with Judge Keesley's Order, Appellant's Counsel sent the Amended Motion to Dismiss and an Answer on May 25, 2016 and the discovery responses (with appropriate objections made as allowed by Judge Keesley's Order) on May 31, 2016. Monday, May 30, 2016, was Memorial Day. When the filing hadn't arrived at Saluda County by the morning of May 31, 2016, Appellant's counsel began trying to track down the mailing. She sent a runner to Saluda with an original filing and contacted her local post office. Though Appellant's counsel didn't get a response from her local post office about what actually happened to the mail, it eventually arrived in Saluda County and to Respondent's counsel several days later and was returned by the Saluda Clerk to Appellants' counsel because another original had been couriered to them (R.pp. 95-109, 169-171). Despite this, Judge Newman asserted that while she generally she agrees with SCRPC 5 and understands that a filing is complete upon mailing, "because of this tight time frame. Usually I agree that the rule says service is complete upon mailing but typically the evidence of the date of that mailing is the postmark on the envelope." (R.p. 172) Appellant's counsel and the Court then had the following dialogue:

MS. KERN-FULLER: The May 31st postmark, Your Honor, is in Greenville.

THE COURT: I see that.

MS. KERN-FULLER: That's what's important is because we mailed it in Easley. We didn't mail it in Greenville. And so what happened and our certificate of service, our sworn certificate of service -- and what happened is we put it in the Easley Post Office. Whenever it went from Easley and -- to Greenville to the regional mailing facility is when that postmark got put on it.

(Id.)

THE COURT: Why you are relying on a certificate of service dated six days before the postmark and you don't have an affidavit from anyone at the postal service. Maybe you could have, should have gone to the Easley Post Office and they say, hey, this is our process but --

MS. KERN-FULLER: I tried. I tried.

THE COURT: -- but certainly you're not an expert on the inner workings of the Easley Post Office, nor am I.

MS. KERN-FULLER: Yes, Your Honor.

THE COURT: And you want me to rely on your representations which may well be your understanding of it but may or may not be accurate.

MS. KERN-FULLER: I understand.

MR. POTTS: May I address the Court?

MS. KERN-FULLER: Your Honor, I do want --

THE COURT: Let her respond.

MS. KERN-FULLER: -- to explain to the Court that I did go to the post office and try to get them to give me something and they refused.

THE COURT: I'm sure. But the point is for whatever reason I don't have it.

MS. KERN-FULLER: I understand that, Your Honor.

If we had it to do over again, certainly we would have done it that way. In hindsight I probably would have sent it Fed-Ex. But, all I have is my word as an attorney and, you know, my standing as a bar member to say I watch my paralegal every day put that mail in the post office because I follow her home. And I know when she says, I put it in the post office box on this day, because she leaves at five o'clock

(R.p. 174)

The Court then asked if the Motion to Dismiss and Answer filed were the same as previous.

Appellant's counsel responded that the motion was the same, **but that she had taken the time to add an Answer:**

MS. KERN-FULLER: It was previously filed, a motion to dismiss. And this time I just went ahead and filed an answer, too. Even though I don't feel

like I needed to, I did. But it is -- I have it.

It is exactly the same as the previous motion to dismiss I had filed.

THE COURT: Okay. Which in my mind makes the delay in mailing it even more egregious because you could have hit print again and signed it and mailed it the same day.

(R.p. 175)(Emphasis added)

As such, the Court seemingly ignored what Counsel had said about additionally filing of an answer and simply assumed all counsel had to do was “hit print again.” **(Id.)**

Further, Respondent’s counsel focused during his argument on the fact that Appellant had no affidavit from the Postal Service to explain the delay or the difference between the Greenville postmark when the item was mailed from the Easley Post Office. **(R.p. 176)**. As such, the Court found, “the only competent evidence I have before me is that it was in fact mailed on May 31st which is beyond the deadline prescribed by Judge Keesley. So I'm going to grant the Plaintiff's motion for default.” **(R.p. 192)**. Judge Newman issued her Form 4 Order finding the same, which was mailed to Appellants’ counsel on October 4, 2016 and was received on October 6, 2016. Appellants then filed a Motion for Reconsideration on October 17, 2016 (a Monday).

Subsequent to the hearing, Appellant’s counsel met with a representative from the Greenville postal facility who was a postal clerk of over twenty years and the person who regularly receives customer complaints. **(R.pp. 110-127)** Ms. Chester ultimately provided her an affidavit detailing why the Greenville postmark of May 31, 2016 would not be the mailing date on a piece of mail placed in the box at the Easley post office. In her affidavit, she stated:

- 7) For instance, if you were to walk into a local post office to drop off a letter, the letter likely would not be postmarked there unless it was "local mail." More specifically, your mail would be placed in one of two bins behind the counter for pick up that evening – the local mail bin or the SCF bin. If it were "local mail," i.e. going to someone else in the exact same area code as that post office, later that evening it would be postmarked with the local post office postmark and then routed to the carrier. If it were going to the SCF facility, it likely would not be postmarked until it was sorted at the SCF location. If mail is placed in an outside box, it is collected at the local facility around 6 p.m. and sorted in a similar manner and then non-local mail is sent to the Greenville for further processing. Mail placed in an outside box at a local post office, unless it is local mail, it is likely not to be postmarked until sorted at the Greenville SCF and will bear the Greenville SCF postmark;

(R.p. 118)

Despite this additional information that had seemingly been craved by the Court previously, Judge Newman denied the Motion for Reconsideration without further hearing. (R.p. 12). This appeal follows.

III. ARGUMENT

A. THE COURT ERRED IN FAILING TO GRANT DEFENDANT'S MOTION TO DISMISS.

Despite Plaintiff's pending Motion to Strike Defendant's Amended Motion to Dismiss and Answer and Enter for Default Judgment for Plaintiff, without Plaintiff's objection (and, in fact, at Plaintiff counsel's suggestion, the Court first heard Defendant's Motion to Dismiss Plaintiff's claims. (R.pp. 154-162).

"A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff." McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006); *See also* Todd v. S.C. Farm Bureau Mut. Ins. Co., 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981) ("Conspiracy is the conspiring or combining together to do an unlawful act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another."); Vaught v. Waites, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct.App.1989) ("Civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, (3) which causes him special damage."). The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to a common design. Vaught, 300 S.C. at 208, 387 S.E.2d at 95.

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.** See Todd, 276 S.C. at 293, 278 S.E.2d at 611 (dismissing plaintiff's civil conspiracy cause of action because it did no more than incorporate the complaint's allegations in the previous causes of action and because the only alleged wrongful acts pled were those for which damages had already been sought). Further, the damages alleged must go beyond the damages alleged in other causes of action. See Vaught, 300 S.C. at 209, 387 S.E.2d at 95 (holding that Todd barred a conspiracy cause of action because no special damages were alleged aside from the damages already alleged for the plaintiff's breach of contract cause of action in that case)."

Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 324–25, 701 S.E.2d 39, 46 (Ct. App. 2010) (Emphasis added).

"An action for civil conspiracy is an action at law, and the trial court's findings will be upheld on appeal unless they are without evidentiary support. Gynecology Clinic, Inc. v. Cloer, 334 S.C. 555, 556, 514 S.E.2d 592, 592-93 (1999). A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff. Lawson v. S.C. Dept. of Corrections, 340 S.C. 346, 352, 532 S.E.2d 259, 261 (2000). Civil conspiracy involves acts that are by their very nature covert and clandestine and usually not susceptible of proof by direct evidence. Robertson v. First Union Nat'l Bank, 350 S.C. 339, 349, 565 S.E.2d 309, 314 (Ct.App.2002). However, a civil conspiracy cannot exist when the alleged acts arise in the context of a principal-agent relationship because by virtue of the relationship such acts do not involve separate entities. Perk v. Vector Resources Group, Ltd., 253 Va. 310, 485 S.E.2d 140, 144 (1997).

McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564–65, 626 S.E.2d 884, 886–87 (2006)

In the case at bar, Plaintiff alleged the following in its Amended Complaint as the sum total of her Conspiracy cause of action:

3. The defendant **Audrey McCarty** is the sole owner of the residential property located at **103 Kalyn Way, Leesville, South Carolina.**

4. The defendant, **McCarty Enterprises, LLC**, is a South Carolina corporation with its principal office located in **Saluda County at 105 Stone Ridge Road, Leesville, South Carolina.**

5. The defendant, Jane Doe, whose true name is currently unknown, is, upon information and belief, an agent or employee of McCarty Enterprises who resides upon property at 105 Stone Ridge Road owned by said corporation which is adjacent to and contiguous to the property upon which the defendants, Audrey and John McCarty, reside at 103 Kalyn Way.

Intentional Tort – Civil Conspiracy

7. The plaintiff was the owner of an Australian Shepherd dog who lived with the plaintiff at her residence in Leesville, South Carolina for over six years.

8. The defendants knew the plaintiff, where she lived, and that the Australian Shepherd dog, known as “Ruby” was her dog, pet, and constant companion for which the plaintiff had great love, affection, and caring and treated as a member of her family.

9. The defendants Audrey McCarty and John McCarty bore the plaintiff ill will because prior to July 2012, the plaintiff had accidentally run over and killed the defendants’ beloved Boston Terrier pet dog when it was chasing her van on Stone Ridge Road. Within a few months of that incident, the defendant Audrey McCarty threatened that the plaintiff’s dog “Ruby” would be killed if she trespassed on the defendants’ property.

10. On March 4, 2015 the defendant Audrey McCarty and defendant Jane Doe drove a golf cart to the plaintiff’s residence, and in the presence and hearing of the defendant Jane Doe, the defendant Audrey McCarty again threatened that “Ruby” would be killed if she trespassed on the defendants’ property. The plaintiff responded to the defendant that she loved and cared for “Ruby” as a member of her family, and had gone to the trouble and expense of

purchasing and installing a wireless underground fence which the defendant Audrey McCarty acknowledged had been effective at preventing "Ruby" from leaving the plaintiff's residential property for several years.

11. On Tuesday, March 24, 2015, defendants Audrey McCarty and Jane Doe again drove a golf cart to the plaintiff's residence to enquire whether or not the plaintiff knew the identities of the owners of a German Shepherd and a black Labrador Retriever which the defendant Jane Doe claimed to have observed killing two emus on the defendants' property the previous night. The defendant Jane Doe participated in the conversation between the defendant Audrey McCarty and the plaintiff, and took notes on a yellow legal pad. Upon information and belief, similar enquiries were made of at least two other neighbors by the defendant Audrey McCarty during the same day, and Jane Doe was observed taking notes on the yellow pad by each of the neighbors. At least one of those neighbors was told by defendant Audrey McCarty that the next dog that trespassed on the defendants' property would be killed.

12. The following morning, March 25, 2015, at approximately 8:40 a.m., the defendant John McCarty fired two shots from a shotgun, killing "Ruby" on or adjacent to the property line of his residence at 103 Kalyn Way.

13. The defendants at various and sundry times combined together for the sole and exclusive purpose of causing damage to the plaintiff by planning to kill, seeking an excuse or fabrication to kill, and eventually killing her dog in revenge for the accidental death of the Boston Terrier of the defendant Audrey McCarty which was chasing vehicles at the time of the dog's death.

14. The McCarty defendants had published threats or participated in the publishing of threats to kill the plaintiff's dog, and the defendant Jane Doe joined with Audrey and John

McCarty in the endeavor as an authorized employee or agent of her employer, defendant McCarty Enterprises.

15. With the participation of the three defendants named and the corporate defendant, an understanding was reached between the defendants to facilitate the killing of the plaintiff's dog at the earliest opportunity in order to intentionally inflict severe emotional distress on the plaintiff for the loss of her beloved pet "Ruby."

16. The killing or the wounding and killing of "Ruby" on March 25, 2015 was a planned, intentional, and an overt act of the defendants which was designed and intended to cause the plaintiff special damages in addition to the damages for the loss of her dog "Ruby."

17. The plaintiff has been damaged by the intentional killing of her dog, "Ruby," and, as a direct and proximate and intentional result thereof, has suffered severe emotional distress by the defendants who were certain their acts would result in such distress as the plaintiff endured by hearing the gunshots, seeing the body of her dog, and realizing that neighbors who lived across the street had killed a beloved family pet cruelly, maliciously, and vindictively.

18. The actions set forth herein of the defendants which resulted in the killing of a neighbor's pet dog was extreme and outrageous and exceeded all bounds of civilized behavior and is atrocious and utterly intolerable in a civilized community.

19. The intentional actions of the defendants resulting in the killing of the plaintiff's pet, were designed intended, and did cause the plaintiff severe emotional distress that she was incapable of enduring.

20. The emotional distress suffered by the plaintiff by the loss of her beloved pet dog, as well as the knowledge of the pain, confusion, and cruelty suffered by her dog throughout its killing, was sufficiently severe that no reasonable person could be expected to endure the same, and as a result thereof, the plaintiff was required to and did seek psychological treatment for the shock, illness, and bodily harm visited upon her by the defendants.

21. The plaintiff has been damaged by the cruel, malicious, and intentional acts of the defendants, both for her actual, punitive, and special damages in excess of twenty-five thousand dollars in such amount as a jury may award.

(R.pp. 28-31)

As far as the Emotional Distress cause of Action, besides incorporating the Conspiracy allegations, Plaintiff merely alleged:

23. As an alternative cause of action and in accordance with representations made by defendants' legal representative, plaintiff would allege, upon information and belief, that the defendant McCarty Enterprises was the employer and controlling person who, through the other individually named defendants, caused, directed and is responsible for the shooting death of the dog Ruby, and for intentionally inflicting emotional distress upon the plaintiff.

24. Whereas the plaintiff prays for judgement against each defendant, both actual and punitive and special damages for the first cause of action, jointly and severally, and for actual and punitive damages against the defendant corporation for the second cause of action, and for such further relief as the court deems just and proper.

(R.p. 32)

Defendant asserted at the Motion hearing on her Amended Motion to Dismiss that:
MS. KERN-FULLER: Thank you, Your Honor.

Your Honor, may it please the Court.

My name is Candy Kern-Fuller. I'm with the Upstate Law Group in Easley, South Carolina. I represent the McCartys and their small business which is McCarty Enterprises which is a small vehicle escort company. I represented them for a number of years. If you wonder why a company from Easley is representing a company from Batesburg-Leesville, that's why.

Your Honor, the McCartys have a home in Batesburg-Leesville. And as alleged in the complaint, this involves the destruction of a six-year-old Australian Shepherd. The two claims in the complaint, Your Honor, the original claims -- well, one claim and then thereafter, after the first motion to dismiss was filed there was a second claim that was added and now there are two claims. Those claims are conspiracy and emotional distress.

I believe that there are no facts alleged in the first amended complaint that Ms. Potts was present when the animal was destroyed. The animal was not destroyed in her presence. The animal was shot. The animal was shot not on her property. The animal was shot on the McCartys' property. The allegations in the complaint -- and I'm myself trying to find the first amended complaint as I am furiously flipping through -- are that the McCartys conspired with Jane Doe and that they did so in some sort of retribution for the fact that Mrs. Potts had accidentally run over Mrs. McCarty's Boston Terrier years before and that as a result of that -- and I believe that that date was 2012 if I recall -- and as a result of that, that in 2015 that she conspired with her husband, John McCarty, who were the only co-owners of McCarty Enterprises, and Jane Doe, to kill their Australian Shepherd. Now notably the Australian Shepherd, and she admits this in her complaint, had previously been on the property years before, in the complaint, and that they had installed an underground fence to prevent the animal from leaving their property. But on the day in question the animal was on

the McCarty property and that prior to this day in question, on May 24th, that Mrs. McCarty and Jane Doe came to her home to inquire about the death of two emus. So there's livestock on the McCarty property. There was livestock that was killed the day before the Australian Shepherd was killed. And on the day in question Mr. McCarty destroyed the Australian Shepherd and it was on the McCarty's property.

So the two claims that Mr. Potts has made on behalf of his wife are for emotional distress and conspiracy.

Conspiracy is an intentional tort. And the law is very clear as laid out in our motion to dismiss that the corporation cannot conspire with itself. And so you have the McCartys who are a married couple, and they own McCarty Enterprises, and Jane Doe who is alleged in the complaint if I recall -- and, as I say, I can't find the first amended complaint -- right off the top of my head right now, but in the complaint, I believe it's paragraph eight, she's alleged to be an employee of McCarty Enterprises.

So you can't conspire with yourself. And so the civil conspiracy claim must fail. And if the civil conspiracy claim fails it must be dismissed. So our motion to dismiss was that that civil conspiracy claim should be dismissed and that has been what the basis of that claim was.

On the intentional infliction of emotional distress claim. The intentional infliction of emotional distress claim we have alleged that the conduct has to be directed at the Plaintiff or occur in the presence of the Plaintiff to whom, of whom the Defendant is aware. In this case there are no allegations that

Mrs. Potts was present nor could there be because she wasn't present when the dog was destroyed. She learned about it from a neighbor as alleged in her first amended complaint. It's not even alleged in their complaint that she saw the body of the dog

afterwards per se.

So, there are allegations that this was retribution for the killing three years prior accidentally of Ms. Potts running over the McCarty's Boston Terrier. And that that's the reason allegedly that this was directed at the Plaintiff.

But the law limits claims of emotional distress to egregious conduct, egregious conduct towards a Plaintiff that is proximately caused by a Defendant. And it's not enough that the conduct be intentional or outrageous. It has to be conduct that's egregious and directed to the Plaintiff or heard in the Plaintiff's presence.

And the Plaintiff has failed to allege specific facts as to how the Defendant targeted the Plaintiffs to be harmed by their allegedly tortious acts when she was not even present when the dog was killed.

Now I have pets. I understand we love our pets. And I'm not discounting that at all. I'm not related to these folks. You know, I'm the one person in this whole litigation that's not personally involved in this. But I know this is an emotional matter.

But I'm looking at this as a lawyer. And I'm asking the Court to look at this as a legal matter, that when we look at this as a legal matter we're looking at, unfortunately, the way our law looks at pets and animals which is personal property. They look at our animals as chattel. This is a chattel. This is a chattel that I'm not even sure my client would be negligently liable for the destruction of because under the law my client had a right to protect his livestock if the animal was on his property threatening the livestock. And there's enough allegations in their complaint that there were two emus killed the previous day. The dog was on his property at the time it was killed. The Plaintiff was not present at the time the dog was killed.

So she can't even testify what was happening at the time the dog was killed. She can't give personal testimony about that to even overcome any testimony that the Defendants might give about that matter.

So, we've alleged in our motion to dismiss that the claim for civil conspiracy should be dismissed because at all times alleged John McCarty was married to Audrey McCarty. They're the owners of McCarty Enterprises. At the previous hearing in the file that you don't have, there's certificates of the service of who got served on behalf of McCarty Enterprises and who got substitute service on behalf of the other in the McCarty home. And the allegations in the complaint of the fact that Jane Doe was at all times an employee of the McCarty Enterprises.

And therefore under McMillan Versus Oconee Memorial Hospital, 367 South Carolina 559, they cannot conspire with themselves and therefore that claim must fail as a matter of law.

I have a copy of that case if Your Honor needs it.

THE COURT: Please.

MS. KERN-FULLER: And also that Plaintiff's allegation that Defendants killed her dog is not an actionable matter because Defendants cannot be held civilly liable for the killing of the dog under Section 47-3-530 of the law which lawfully permits the killing of a dog that is threatening to cause or causes personal injury or property damage. And the emus, like the dog, were chattel of my clients.

(R.pp. 155-161)

In reply, among other things, Respondent alleged that there "is not there is an allegation that Mr. McCarty, his wife were acting for or as agents or employees of the corporation. They are being sued strictly as individuals." **(R.p. 163)**. However, this logic doesn't save Respondent's claims.

First, Respondent must allege facts sufficient to show that Appellant's actions were illegal. *See Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981) ("Conspiracy is the conspiring or combining together to do an **unlawful** act to the detriment of another or the doing of a lawful act in an unlawful way to the detriment of another.") (Emphasis added) During oral argument and in Appellants' Amended Motion to Dismiss, Appellant cited S.C. Code Ann. §47-3-530, which lawfully permits the killing of a dog that is threatening to cause or causes personal injury or property damage. (**R.pp. 73; 161**). In paragraph 11 of the Amended Complaint, Respondent admits that Appellants had two emus killed on their property on March 23, 2015 and told Respondent of the same on March 24, 2015. Despite this, Appellant failed to secure her shepherd (who she was told the day before by Appellants participated in the killing of the two emus on March 23, 2015). As a result, the Shepherd was killed the "following morning, March 25, 2015, at approximately 8:40 a.m., [when] the Defendant John McCarty fired two shots from a shotgun, killing "Ruby" on or adjacent to the property of his residence at 103 Kalyn Way." (**R.p. 30**). Based on S.C. Code Ann. §47-3-530, Appellant John McCarty committed NO illegal act that could constitute conspiracy. Further, a civil conspiracy cannot exist when the alleged acts arise in the context of a principal-agent relationship because by virtue of the relationship such acts do not involve separate entities. *Perk v. Vector Resources Group, Ltd.*, 253 Va. 310, 485 S.E.2d 140, 144 (1997). John and Audrey McCarty are the agents of McCarty Enterprises, LLC as exhibited by Respondent's own certificate of service. John McCarty is the registered agent for the corporation and Audrey McCarty stated (also in the affidavit of service) that she was an authorized agent for McCarty Enterprises, LLC. (**R.p. 21-22**). The sole factual allegations about Jane Doe were that:

11. On Tuesday, March 24, 2015, defendants Audrey McCarty and Jane Doe again drove a golf cart to the plaintiff's residence to enquire whether or not the plaintiff knew the identities of the owners of a German Shepherd and a black Labrador Retriever which the defendant Jane Doe claimed to have observed killing two emus on the defendants' property the previous night. The defendant Jane Doe participated in the conversation between the defendant Audrey McCarty and the plaintiff, and took notes on a yellow legal pad. Upon information and belief, similar enquiries were made of at least two other neighbors by the defendant Audrey McCarty during the same day, and Jane Doe was observed taking notes on the yellow pad by each of the neighbors. At least one of those neighbors was told by defendant Audrey McCarty that the next dog that trespassed on the defendants' property would be killed.

13. The defendants at various and sundry times combined together for the sole and exclusive purpose of causing damage to the plaintiff by planning to kill, seeking an excuse or fabrication to kill, and eventually killing her dog in revenge for the accidental death of the Boston Terrier of the defendant Audrey McCarty which was chasing vehicles at the time of the dog's death.

14. The McCarty defendants had published threats or participated in the publishing of threats to kill the plaintiff's dog, and the defendant Jane Doe joined with Audrey and John McCarty in the endeavor as an authorized employee or agent of her employer, defendant McCarty Enterprises.

15. With the participation of the three defendants named and the corporate defendant, an understanding was reached between the defendants to facilitate the killing of the plaintiff's dog at the earliest opportunity in order to intentionally inflict severe emotional distress on the plaintiff for the loss of her beloved pet "Ruby."

(R.p. 30)

However, these allegations do not 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. See Todd, 276 S.C. at 293, 278 S.E.2d at 611. Further, the damages alleged must go beyond the damages alleged in other causes of action. See Vaught, 300 S.C. at 209, 387 S.E.2d at 95 (holding that Todd barred a conspiracy cause of action because no special damages were alleged aside from the damages already alleged for the plaintiff's breach of contract cause of action in that case).” In this situation, Respondent’s claim for civil conspiracy damages is no different than those for alleged emotional distress.

With regard to the emotional distress damages, the law limits claims of intentional infliction of emotional distress to egregious conduct toward a plaintiff proximately caused by a defendant. It is not enough that the conduct is intentional and outrageous. It must be conduct *directed at the plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware*. The Plaintiff/Respondent has failed to allege specific facts that Defendants/Appellants targeted Plaintiff/Respondent to be harmed or enticed the animal onto their property in any way to cause such harm. Rather, the Appellants warned Respondent the day before of the livestock damage they had suffered at the paws and mouth of Respondent’s animal and warned them they would destroy any other trespassing animals. There are NO allegations that this was directed solely at Respondent. There are NO allegations that Appellants lured the animal onto their property to destroy it. Rather, Respondent’s animal admittedly returned to Appellant’s property and was destroyed by Appellant John McCarty there. There are no allegations that Respondent even witnessed the shooting or the body of the animal before it was buried. (R.pp. 28-32) The Court tried to assist Respondent during its argument by stating:

As to the intentional infliction of emotional distress, is it not sufficient that the act was allegedly intended, it was directed towards Ms. Potts in order to cause some distress? Does it have to be in her presence?

(164)

The Respondent then pointed to paragraphs 15, 16 & 19 of her Amended Complaint, but again there were no specific allegations about how Appellants made Respondent's dog magically appear on their property, threatening their livestock so they could kill it for the sole reason to cause Respondent emotional distress. Rather, Appellant, by Respondent's own pleading, had a legitimate and legal reason for destroying the animal that was trespassing on Appellants' property after killing two emus only 2 days prior. (R.p. 30, ¶11-12)

For these reasons, the lower court should have granted Appellants' Motion to Dismiss and failing to grant such was error.

B. THE COURT ERRED IN GRANTING RESPONDENT'S MOTION TO STRIKE APPELLANTS' ANSWER AND IN ENTERING DEFAULT IN RESPONDENT'S FAVOR DESPITE THE FACT THAT MAILING WAS COMPLETE UPON DEPOSIT AT THE POST OFFICE AND THE POSTAL WORKER'S AFFIDAVIT EXPLAINED THE COURT'S ERROR IN ITS POSTMARK ASSUMPTION REGARDING THE GREENVILLE POSTMARK

Respondent's counsel focused on the fact during his Motion to Strike Appellant's Amended Motion to Dismiss and Answer and for Default argument that Appellant had no affidavit from the Postal Service to explain the delay or the difference between the May 31st Greenville postmark when the item was mailed from the Easley Post Office on May 25th. (R.p. 176). The Court stated, "Usually I agree that the rule says service is complete upon mailing but typically the evidence of the date of that mailing is the postmark on the envelope. And what do you want me to do with a May 31st postmark on this envelope?" (R.pp. 171-172) Appellants' counsel clarified again, "The May 31st postmark, Your Honor, is in **Greenville**. ... what's

important is because **we mailed it in Easley. We didn't mail it in Greenville.** And so what happened and our certificate of service, our sworn certificate of service -- and what happened is we put it in the Easley Post Office. Whenever it went from Easley and -- to Greenville to the regional mailing facility is when that postmark got put on it.” (R.p. 172)(Emphasis Added).

“Rule 5(b)(1), SCRPC, provides that “service by mail is complete upon mailing of all pleadings and papers subsequent to service of the original summons and complaint.” Mailing ordinarily occurs when a document is deposited with the U.S. Postal Service properly addressed with sufficient postage affixed. Southbridge Prop., Inc. v. Jones, 292 S.C. 198, 355 S.E.2d 535 (1987). Any designated mail depository box, whether in a building or along a mail route, constitutes a depository authorized for the receipt and delivery of mail. Rosen v. United States, 245 U.S. 467, 38 S.Ct. 148, 62 L.Ed. 406 (1918). Although the postmark date on an envelope is compelling evidence in cases where timely service through the mail is at issue, we are unaware of any authority, and the wife cites none, indicating the postmark date is dispositive. See William B. Johnson, Annot., *Proof of Mailing by Evidence of Business or Office Custom*, 45 A.L.R. 4th 476 (1986). Such would assume the infallibility of the U.S. Postal Service, an illogical assumption given the volume of letters and packages constantly being processed and the number of human hands any one envelope may pass through. We find no abuse of discretion in the trial court's finding that the motion was timely served by mail. Cf. Beckham v. Durant, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (Ct.App.1989) (failure to make proof of service does not affect the validity of service).”

Green v. Green, 320 S.C. 347, 350–51, 465 S.E.2d 130, 132 (Ct. App. 1995)

Contrary to the settled body of caselaw, the Court erroneously found, “the only competent evidence I have before me is that it was in fact mailed on May 31st which is beyond the deadline prescribed by Judge Keesley. So I'm going to grant the Plaintiff's motion for default.” (R.p. 192).

Subsequent to the hearing, Appellant's counsel met with a representative from the Greenville postal facility who was a postal clerk of over twenty years and the person who regularly receives customer complaints. (R.pp. 117-119) Ms. Chester ultimately provided her an affidavit detailing why the Greenville postmark of May 31, 2016 would not be the mailing date

on a piece of mail placed in the box at the Easley post office and the same was attached to Appellants' timely Motion for Reconsideration. In her affidavit, she stated:

- 7) For instance, if you were to walk into a local post office to drop off a letter, the letter likely would not be postmarked there unless it was "local mail." More specifically, your mail would be placed in one of two bins behind the counter for pick up that evening – the local mail bin or the SCF bin. If it were "local mail," i.e. going to someone else in the exact same area code as that post office, later that evening it would be postmarked with the local post office postmark and then routed to the carrier. If it were going to the SCF facility, it likely would not be postmarked until it was sorted at the SCF location. If mail is placed in an outside box, it is collected at the local facility around 6 p.m. and sorted in a similar manner and then non-local mail is sent to the Greenville for further processing. Mail placed in an outside box at a local post office, unless it is local mail, it is likely not to be postmarked until sorted at the Greenville SCF and will bear the Greenville SCF postmark;

(R.p. 118)

Despite this additional information that had seemingly been craved by the Court previously, Judge Newman denied the Motion for Reconsideration without further hearing. (R.p. 12). As such, the Court's wrong assumption that the Greenville postmark of May 31, 2016, was dispositive of the date of mailing, was clear error and an abuse of discretion. As such, the lower court's ruling should be reversed and the Appellant's Answer NOT stricken.

Quite simply, Respondent has from the start wanted this case decided for her on technicalities (and on erroneous ones at that) rather than have the matter heard on its merits, which is disfavored by this Court. Micronics, Inc. v. S.C. Dept. of Rev., 345 S.C. 506 (Ct. App. 2001).


IV. CONCLUSION

For the reasons set forth above, the Court erred in failing to grant Appellants' Amended Motion to Dismiss and erred further in striking Appellants' Answer and entering default against Appellants. For these reasons the lower court's ruling should be REVERSED.

V. CERTIFICATE OF COUNSEL

The undersigned certifies that pursuant to Rule 211(b), SCACR that the only corrections made to the Appellant's Final Brief were obvious typographical errors and misspellings and/or spacing errors and no others.

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