

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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OCT 13 2017

SC Court of Appeals

Appellate Case No. 2017-001330
Case No. 2015-CP-04-01605

Kenji Kilgore Appellant,

v.

Estate of Samuel Joe Dixon, Samuel Joe Dixon, and Fredda L. Dixon Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly dismiss Appellant's Complaint against Samuel E. Dixon and Fredda Dixon pursuant to Rule 12(b)(6), SCRCPP, when Appellant failed to plead the required elements needed to establish a duty to warn?

2. Does Appellant have any basis to argue the need to pursue discovery on a Rule 12(b)(6), SCRCPP, dismissal for failure to allege a legal duty when Appellant failed to pursue any discovery for almost two years while the case was pending?

STATEMENT OF THE CASE

In a Complaint filed on July 1, 2015, Appellant brought suit alleging Samuel Joe Dixon (hereinafter referred to as shooter) intentionally shot him. (Paragraphs 12 & 21) In addition to naming shooter, Appellant also named Respondents as defendants. Appellant, however, did not allege in the Complaint that Respondents had any “special relationship” with anyone, Respondents had “the ability to monitor, supervise, and control” shooter, or Respondents were aware of a “specific threat or harm” that shooter directed at Plaintiff.

On January 24, 2017, the trial court dismissed the Complaint against Respondents pursuant to Rule 12(b)(6); SCRPC.¹ (Dismissal Order) The trial court found the Complaint failed to establish Respondents owed a legal duty based on established and uncontested South Carolina law. (Dismissal Order)

Appellant filed a Motion to Reconsider as to Respondents on very narrow grounds. On May 8, 2017, the trial court denied Appellant’s Motion to Reconsider. (Order Denying Reconsideration)

During the year and ten months this case was pending in the circuit court, Appellant never served or participated in discovery. (Brief pp. 3-4)

¹The trial court also dismissed the Complaint against shooter because Appellant never commenced an action within the statute of limitations. Appellant did not challenge this ruling with the trial court or on appeal.

ARGUMENTS

I. THE TRIAL COURT PROPERLY FOUND APPELLANT'S COMPLAINT FAILED TO ALLEGE THE REQUIRED ELEMENTS TO ESTABLISH A LEGAL DUTY TO WARN.

This Court should affirm the trial court's decision to dismiss Respondents pursuant to Rule 12(b)(6), SCRCP because (1) the trial court applied the proper law concerning a duty to warn and (2) Appellant's Complaint did not contain the required elements to state a cause of action for a duty to warn. In this appeal, Appellant does not raise any argument against either of these propositions.

A Rule 12(b)(6) motion tests the legal sufficiency of the allegations in the pleading. James F. Flanagan, South Carolina Civil Procedure 101 (3d. ed. 2010) "In a negligence action, the court must determine, as a matter of law, whether the defendant owed a duty of care to the plaintiff." Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 545 (2002). "All well pleaded allegations are taken as true but not conclusions of law, and not necessarily inferences drawn by the plaintiff from the facts." Id. at 102. "An appellate court will uphold the trial court dismissal of a claim where the defendant demonstrates that the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court." Jean Hoefler Toal, Appellate Practice in South Carolina 244 (3d ed. 2016) (citing Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007)).

A. Appellant concedes the trial court applied the correct law concerning a duty to warn.

South Carolina law does not recognize a general duty to warn a third party or potential victim of danger or to control the conduct of another. Rogers v. S.C. Dep't of Parole & Cmty. Corr., 320 S.C. 253, 255, 464 S.E.2d 330, 332 (1995). An exception exists, however, when a "special

relationship” exists with the injurer. Faile, 350 S.C. at 334, 566 S.E.2d at 546. The “special relationship” exception requires allegations of (1) “the ability to monitor, supervise and control an individual's conduct” and (2) “the individual has made a specific threat of harm directed at a specific individual.” Roe v. Bibby, 410 S.C. 287, 295-96, 763 S.E. 2d 645, 649-50 (Ct. App. 2014).

On appeal, Appellant does not challenge any of the law applied by the trial court. Therefore, to raise an exception to the general rule that no duty to warn exists, Appellant would have to allege in the Complaint a “special relationship” evidenced by (1) “the ability to monitor, supervise and control an individual's conduct” and (2) “a specific threat of harm directed at a specific individual.” Id.

B. Appellant must concede the Complaint does not contain the required elements to create a duty to warn.

The trial court correctly held and the record on appeal proves the Complaint does not contain any allegations that Respondents had any “special relationship” with anyone, Respondents had “the ability to monitor, supervise, and control” shooter, or Respondents were aware of a “specific threat of harm” shooter directed at Plaintiff. (Order Dismissing Case p.5) Accordingly, the trial court properly granted Respondents’ Rule 12(b)(6), SCRPC, motion based on South Carolina law. Id.

In this appeal, Appellant does not and cannot argue the Complaint contains allegations sufficient to allege an exception to the general rule that Respondents had no duty to warn. In addition, without question, the Complaint is deficient—Appellant did not preserve any issue regarding the trial court’s Rule 12(b)(6), SCRPC, ruling because Appellant did not present any argument to the trial court on this issue that the allegations in the Complaint were sufficient. Jean Hoefler Toal, Appellate Practice in South Carolina 185 (3d ed. 2016) (“The first step in preserving an issue for

appellate review is to actually raise it to the lower court.”)

C. Appellant has not raised any appellate issue challenging the Rule 12(b)(6), SCRPC, dismissal of Respondents.

Appellant simply has not presented any argument on appeal that the Complaint contains sufficient allegations to establish a duty to warn based on well established South Carolina law. “[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory manner without supporting authority.” Jean Hoefler Toal, Appellate Practice in South Carolina 208 (3d ed. 2016) (citing Jinks v. Richland Cnty., 355 S.C. 341, 585 S.E.2d 281 (2003)).

Appellant’s Appellate Brief actually supports the Rule 12(b)(6), SCRPC, dismissal of Respondents. Appellant’s Brief contain numerous statements regarding Respondent’s duty to warn that were not presented to the trial court and totally unsupported by the record on appeal.² These unsupported and improper statements on appeal, however, illustrate the type of allegations that Appellant needed to include in the Complaint. The failure of Appellant to make such allegations in the Complaint is exactly why the Appellant cannot prevail on this appeal.

² Appellants statements which contain no citation to the record are not preserved for appeal and should not be considered on appeal. Rule 201(h), SCAR. Furthermore, this Court should note that the only argument presented by Appellant to the trial court were the very limited arguments at the Motion to Reconsider hearing of May 5, 2017. Any attempt to expand those limited arguments which focus on a request for discovery and never addresses the sufficiency of the allegations contained in the Complaint, should be disregarded by this Court. Jean Hoefler Toal, Appellate Practice in South Carolina 187 (3d ed. 2016) (“Where the appellate argument differs from the ground for a party’s trial objection, the issue is not preserved.”)

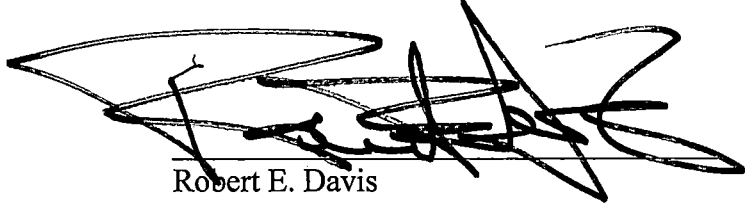
II. APPELLANT HAS NO RIGHT TO DISCOVERY ON A RULE 12(b)(6) MOTION ESPECIALLY WHERE APPELLANT FAILED TO PURSUE ANY DISCOVERY FOR THE TWENTY-TWO MONTHS THE CASE WAS PENDING.

Appellant's request to conduct discovery on a Rule 12(b)(6), SCRPC, dismissal is totally without merit. Because a dismissal pursuant to Rule 12(b)(6), SCRPC, is based solely on the allegations within the four corners of the complaint, discovery is not necessary. See Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

Furthermore, Plaintiff's request for more time to conduct discovery tests the boundaries of good faith. In the almost two years this case was pending below, Plaintiff failed to engage in discovery in any manner. (Brief Opposing Motion to Reconsider pp. 3-4) Plaintiff did not serve any written discovery, request depositions, or even responded to Defendant's written discovery that was served on February 27, 2016. (Brief Opposing Motion to Reconsider pp. 3-4) While discovery is not even relevant on a Rule 12(b)(6) motion, Plaintiff certainly is not entitled to relief for his own dilatory behavior. See Dawkins v. Fields, 354 S.C. 58, 71, 580 S.E.2d 433, 439-40 (2003).

CONCLUSION

The trial court made the appropriate decision to dismiss this case pursuant to Rule 12(b)(6), SCRCF, based on South Carolina law. Appellant has not present any basis to support this appeal. This Court, therefore, should affirm the decision of the trial court.



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PROOF OF SERVICE

I certify that I have served Respondent's Initial Brief and Designation of Matters to be Included in the Record on Appeal and Proof of Service upon Appellant's attorney of record, Donald L. Smith, 122 N. Main Street, Anderson, South Carolina 29621 by US Mail, on 10/11, 2017.

10/11, 2017.



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October 10, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
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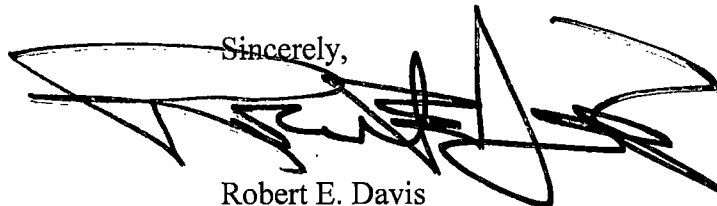
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Re: Kenji Kilgore, Appellant v. Estate of Samuel Joe Dixon, Samuel Joe Dixon, and Fredda L. Dixon, Respondents
Appellate Case No. 2017-001330
Case No. 2015-CP-04-01605

Dear Ms. Kitchings:

Please find enclosed an original and a copy of Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal, along with the Proof of Service, in the above-referenced matter. Please return a file stamped copy to me in the enclosed, stamped envelope. By copy of this letter to Appellant's attorney, I am serving Appellant with these documents. Thank you for your attention to this matter.

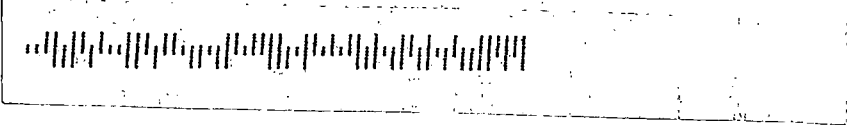
Sincerely,



Robert E. Davis

RED/awg
Enclosures

cc: Donald L. Smith, Esquire (w/encls.)



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