

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas

SC Court of Appeals

Honorable Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2017-002013

Trial Court Case No. 2016-CP-07-02253

Tonja McAllister,

Appellant,

v.

Susan Cato and CAPA of Beaufort,

Respondents.

INITIAL BRIEF OF RESPONDENTS

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COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Did the trial court properly grant Respondents' Motion to Dismiss when Appellant's Complaint failed to allege facts that could satisfy the two necessary elements of an abuse of process cause of action?

Suggested Answer: YES.

2. Did the trial court properly grant Respondents' Motion to Dismiss because Respondents did not institute the process that McAllister allege they abused?

Suggested Answer: YES.

3. Should this Court affirm the trial court's dismissal of this case because Appellant's Complaint failed to allege facts that could satisfy her burden of proving proximate cause?

Suggested Answer: YES.

COUNTERSTATEMENT OF THE CASE

A. Factual Background

In January 2008, Appellant Tonja McAllister (hereinafter “McAllister” or “Appellant”) was arrested for embezzling approximately \$60,000 from her then-employer Respondent Child Abuse Prevention Association of Beaufort (hereinafter “CAPA”), a non-profit organization. (R. p. __) (Motion to Dismiss, Exhibit A).¹ McAllister was charged with Breach of Trust with Fraudulent Intent in an amount greater than \$5,000 and, after pleading guilty, was sentenced to three years in prison, suspended on five years’ probation and payment of costs, assessments, and \$66,610.58 in restitution to CAPA. (Id.) Neither of the Respondents were parties to that criminal case (State v. McAllister, 2008-GS-07-00248) or the civil matter that resulted in the restitution judgment (State v. McAllister, 2013-CP-07-02809).

On October 24, 2013, days before McAllister’s five-year probation period was scheduled to expire, she appeared before the court on a hearing to revoke her probation. (R. p. __) (Compl. ¶9). Neither of the Respondents called for or instituted this hearing. McAllister claimed that the only issue before the court was whether she satisfied the part of her sentence that required her to pay CAPA restitution. (R. p. __) (Compl. ¶10). McAllister claimed that Respondent Susan Cato (hereinafter “Cato”), then-executive director of CAPA, truthfully informed the court that McAllister had not satisfied her restitution obligations. (R. p. __) (Comp. ¶12). The court revoked McAllister’s probation and sentenced her to two years in prison, or to pay the remainder of the

¹ Respondents present some of these facts and exhibits as background for the Court, as they did to the Trial Court. The Trial Court’s Order noted that it considered these facts as background, but did not find them necessary to grant the Respondents’ Motion to Dismiss. Further, these facts and exhibits are official court records from related matters and this Court can take judicial notice, at any stage of the proceedings, thereof. S.C. Dep’t of Soc. Servs. v. Janice C., 383 S.C. 221, 227, 678 S.E.2d 463, 467 (Ct. App. 2009).

restitution, which was converted to a civil judgment. (R. p. __) (Compl. ¶13); see also (R. p. __) (Motion to Dismiss Exhibits B and C).

McAllister appealed the court's decision to revoke her probation and the Court of Appeals reversed and remanded because the underlying court had not made findings (1) that McAllister willfully failed to pay the restitution or (2) that there were no other adequate methods of punishment. (R. p. __) (Compl. ¶18); see also (R. p. __) (Motion to Dismiss Exhibit D). On remand, McAllister's probation and outstanding restitution were discharged. (R. p. __) (Motion to Dismiss Exhibit E).

Before filing this suit against the Respondents, McAllister first filed a legal malpractice lawsuit against the public defender who represented her at the October 24, 2013 hearing, claiming that the attorney was negligent in the representation. McAllister claimed that her damages included "time in prison, loss of job, depression, and anxiety." After the defendant attorney filed a motion to dismiss, McAllister agreed to dismiss that case with prejudice. (R. p. __) (Motion to Dismiss Exhibit F).

Then, on the three-year-anniversary of the October 24, 2013 hearing, McAllister filed this action against Respondents for abuse of process.

B. Procedural History

McAllister's Complaint based her sole abuse of process claim on the statement that Cato made at the October 24, 2013 hearing. (R. p. __) (Compl. ¶¶ 24-26). McAllister took issue with the fact that Cato informed the court that McAllister had not paid all of the restitution she owed. (R. p. __) (Compl. ¶¶ 12-17). McAllister did not contend that she had paid all of the ordered restitution, or that Cato said anything that was not true. Instead, McAllister seemed to claim that, since CAPA had been made whole by receiving proceeds from its own insurance carrier plus

partial restitution payments from McAllister, Cato's statement to the court that McAllister had not entirely paid her ordered restitution was an abuse of process. (R. p. __) (Compl. ¶¶ 20-21). McAllister claimed that her damages included "time in prison, loss of job, depression, and anxiety." (R. p. __) (Compl. ¶27).

Respondents timely filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure on March 6, 2017, arguing that McAllister's Complaint did not allege facts sufficient to support an abuse of process cause of action. (R. p. __) (Motion to Dismiss).

On June 20, 2017, two days before the hearing on Respondents' Motion to Dismiss, McAllister filed a Memorandum in Opposition. (R. p. __) (Memorandum in Opposition to Motion to Dismiss). On July 3, 2017, the trial court entered an Order granting Respondents' Motion to Dismiss. (R. p. __) (July 3, 2017 Order).

McAllister filed a Rule 59(e) Motion to Alter or Amend the Court's Judgment on July 13, 2017 (R. p. __) (Rule 59(e) Motion to Alter or Amend), which the trial court denied via Form 4 Order entered on August 22, 2017 (R. p. __) (Form 4 Order). McAllister followed with this appeal.

ARGUMENTS

I. STANDARD OF REVIEW

Rule 12(b)(6) of the South Carolina Rules of Civil Procedure allows a defendant to move to dismiss a claim based on a failure to state facts sufficient to constitute a cause of action. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). The court may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). The trial court's grant of a motion to dismiss will be sustained if the facts alleged

in the complaint do not support relief under any theory of law. Tatum v. Medical Univ. of South Carolina, 346 S.C. 194, 552 S.E.2d 18 (2001). Upon review of a dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard of review implemented by the trial court. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

II. THE TRIAL COURT PROPERLY GRANTED THE MOTION TO DISMISS BECAUSE THE COMPLAINT FAILED TO ALLEGE FACTS THAT COULD SATISFY THE NECESSARY ELEMENTS OF AN ABUSE OF PROCESS TORT

McAllister did not properly allege, since she does not have, a valid cause of action for abuse of process against Respondents stemming from the truthful statements Cato made to the court at the October 24, 2013 hearing.

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).

A. McALLISTER'S COMPLAINT DID NOT ALLEGE FACTS THAT COULD SATISFY THE FIRST, "ULTERIOR PURPOSE," ELEMENT

The ulterior purpose element is satisfied if the plaintiff proves that the process is used to obtain an object not legitimate in the use of the process. 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 insufficient 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. (emphasis in original) (internal citation omitted). The collateral objective must be the “sole or paramount reason for acting.” “The tort centers on events occurring outside the process; the improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, but the use of the process as a threat or a club.” Pallares v. Seinar, 407 S.C. 359, 371, 756 S.E.2d 128, 133 (2014).

McAllister alleges that the Respondents’ ulterior purpose was to use McAllister’s “probation to extract money in excess of the amount that was lost by” CAPA. Compl. ¶24. In other words, McAllister claims that the Respondents’ ulterior purpose was to collect the full amount of the restitution that the court ordered McAllister to pay. This is not, as a matter of law, an ulterior purpose that can be used to satisfy the first prong of an abuse of process cause of action in South Carolina for at least three reasons.

First, the legal process that was being conducted was a hearing regarding McAllister’s probation and the main issue, according to McAllister, was whether she had satisfied her \$66,610.58 restitution obligation to CAPA. As recounted by McAllister in her Complaint, Respondent Cato was asked by the court to speak about McAllister’s satisfaction of that obligation, and Cato told the court that McAllister stole the money from CAPA and had not fully repaid it. On its face, Cato’s statement to the court, which McAllister admits was true, is not an abuse of process because it was aimed at a legitimate object of that proceeding: McAllister’s payment of restitution. Even assuming that Cato’s objective was to have the court send McAllister to prison, that would also be a legitimate objective of the probation hearing and could not support an abuse of process cause of action.

Second, the statements that Respondent Cato made, as quoted in McAllister's Complaint, do not even rise to a request or demand that Plaintiff complete the restitution payment. Instead, upon being asked by the court to speak, Cato truthfully informed the court that Plaintiff still owed restitution, but fell short of demanding that McAllister complete her payment obligation. The Complaint alleges that Cato told the court:

Well, I'm disappointed that probation can't be extended, because she does owe the money So, you know, she does owe the money. She stole the money. So, it's just misfortunate that she hasn't been able to pay it. But, that doesn't diminish the fact that she still owes the money.

(R. p. ___) (Compl. ¶12). McAllister does not dispute that she still owed restitution money and, therefore, Cato was simply responding truthfully to the court's inquiry. McAllister now attempts to couch Cato's statement as a demand that McAllister pay CAPA the balance of the \$66,610.58 restitution obligation and that, since CAPA had already received more than \$66,610.58 (\$50,000 from its own insurance carrier), Cato abused the process of the probation hearing by making this demand for money to which CAPA was not entitled. Since McAllister's own pleading shows that Cato's statement was not a demand, McAllister's theory of abuse of process fails.

Third and finally, even assuming Cato told the Court that McAllister still owed restitution money *and* demanded that McAllister pay all of it, such a statement would not satisfy the ulterior purpose element. As noted above, collection of restitution payments is absolutely a legitimate object of a probation revocation hearing.

B. McALLISTER'S COMPLAINT DID NOT ALLEGE FACTS THAT COULD SATISFY THE SECOND, "WILLFUL ACT," ELEMENT

The second element of the abuse of process tort has been described as "[s]ome definite act or threat not authorized by the process or aimed at an object not legitimate in the use of the process[.]" Hainer, 328 S.C. at 136, 492 S.E.2d at 107. The "willful act" element consists of three

components: (1) “a ‘willful’ or overt act”; (2) “in the use of the process”; (3) “that is improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective.” Food Lion, Inc., 351 S.C. at 71, 567 S.E.2d at 254 (citations omitted).

McAllister alleged that Respondents’ willful act was Cato telling the court, at the court’s request, that the balance of the restitution order was still outstanding and that this was aimed at extracting more money from McAllister. Compl. ¶¶25-26. Similar to the “ulterior purpose” requirement, the “willful act” prong requires that the willful act be improper because it is either (a) unauthorized or (b) aimed at an illegitimate collateral objective. For the same reasons stated above, Cato’s act of telling the court that McAllister still owed restitution, even if done for the primary or collateral purpose of (1) collecting the full amount of restitution despite the fact that CAPA had already recovered the full amount that McAllister stole or (2) sending McAllister to prison, was not unauthorized or aimed at an illegitimate collateral objective. Both of these purposes were authorized and legitimate in the framework of the process being used. Therefore, McAllister did not plead facts that, if proven true, could satisfy the second prong of an abuse of process claim.

C. McALLISTER WAS NOT ENTITLED TO A SETOFF OF HER RESTITUTION OBLIGATION BECAUSE OF THE PROCEEDS THAT CAPA RECEIVED FROM ITS OWN INSURANCE CARRIER

McAllister argues that she was entitled to a setoff of her restitution obligation in the amount of the \$50,000 that CAPA’s own insurance carrier paid it such that, at the time of Cato’s statements to the court, McAllister actually did not owe CAPA any further restitution and, thus, Cato’s statement that McAllister had not paid the entire award was an abuse of process.

Restitution is statutorily defined in South Carolina as “payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender’s criminal conduct.”

S.C. Code Ann. §16-3-1110(12). “Restitution orders do not limit any civil claims a crime victim may file.” Id. When a person “is convicted of a crime which has resulted in pecuniary damages or loss to a victim, the court must hold a hearing to determine the amount of restitution due the victim or victims of the defendant’s criminal acts . . . and in addition to any other sentence which it may impose, the court shall order the defendant make restitution or compensate the victim for any pecuniary damages.” S.C. Code Ann. §17-25-322(A). The victim has the right to be present and be heard on the issue of restitution. Id.

In State v. Morgan, 417 S.C. 338, 790 S.E.2d 27 (Ct. App. 2016), the Court of Appeals discussed the interplay between criminal restitution awards and civil recoveries. There, Morgan caused an automobile accident in which the victim suffered physical injuries. The victim initiated a civil suit against Morgan, which resulted in the victim signing a covenant not to execute against Morgan in exchange for Morgan’s insurance carrier paying its \$25,000 policy limits to the victim. Id. at 339-40, 790 S.E.2d at 28. Independently, the State of South Carolina instituted a criminal proceeding against Morgan for felony driving under the influence. Id. Morgan pled guilty to assault and battery in the second-degree and was sentenced to three years in prison, suspended upon the service of three years’ probation. Id. at 340, 790 S.E.2d at 29. At a restitution hearing, the State requested that Morgan be ordered to pay the victim \$238,660.10. Morgan argued that because *his* insurance carrier paid the \$25,000 policy limits to the victim and the victim executed the covenant not to execute any judgment against Morgan, the circuit court could not require Morgan to pay the victim any restitution. The circuit court disagreed and ordered Morgan to pay his victim the entire \$238,660.10 requested as restitution. Id. at 340-41, 790 S.E.2d at 29.

Morgan appealed the restitution award and the Court of Appeals affirmed, adopting the reasoning that “[u]nlike a civil claim for damages, the purpose of restitution is twofold: (1) to

compensate the victim and (2) to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system.” Id. at 342, 790 S.E.2d at 30. The Court of Appeals found that “the constructs of restitution and civil damages are separate and distinct.” Id. at 344, 790 S.E.2d 30. In a footnote, the Court of Appeals identified, in dicta, that a similar case out of Florida provided that a restitution award could be offset by a civil settlement that the victim may receive. Id. at 343 n.1, 790 S.E.2d at 30. However, the Court of Appeals recognized that Florida’s offset was mandated by statute and found that South Carolina had no such statute authorizing the offset of a restitution award. Id. The Court of Appeals did note that it would be “reasonable” to allow Morgan an offset of the \$25,000 paid by his liability carrier. Id. Nevertheless, the Court of Appeals *did not* apply a \$25,000 offset and instead affirmed the circuit court’s entire \$238,660.10 restitution award. Id. at 344, 790 S.E.2d at 31.

Similarly, in Fanning v. Hicks, 284 S.C. 456, 327 S.E.2d 342 (1985), Hicks was charged with a crime whereby 21 guns were stolen from Fanning’s home. Hicks returned eight of the 21 guns and pled *nolo contendere* to one count of receiving stolen goods. Id. at 457, 327 S.E.2d at 343. Hicks’ prison sentence was suspended upon two years’ probation, a condition of which was that Hicks immediately pay Fanning restitution in the amount of \$3,850 for the 13 guns that were not returned. Id. at 457-58, 327 S.E.2d at 343. Fanning later brought a civil action against Hicks for conversion of the 13 unreturned guns and damage to the eight returned guns. Id. at 458, 327 S.E.2d at 343. Hicks argued in defense that the \$3,850 in restitution was an accord and satisfaction of Fanning’s civil claim. Id. The trial court disagreed and struck that defense. Id. The Supreme Court affirmed, allowing Fanning to maintain her entire civil recovery despite the \$3,850 restitution award. Id.

Here, as an initial matter, the court properly awarded CAPA \$66,610.58 in restitution, to be paid *by McAllister*. That order of restitution is separate and distinct from any amount of money that CAPA may collect from McAllister by way of a civil proceeding, or from any other source. Morgan, 417 S.C. at 344, 790 S.E.2d 30. The purpose of the restitution award was not just to compensate CAPA as the victim of McAllister's crime, but also to "serve the rehabilitative, deterrent, and retributive goals of the criminal justice system." Id. at 342, 790 S.E.2d at 30. If McAllister is allowed to have \$50,000 of her restitution obligation absolved because CAPA had the sound business judgment to purchase its own insurance coverage to mitigate against the risk of such crimes, the second function of the restitution award would be defeated. Certainly, if CAPA had purchased insurance coverage with a \$100,000 limit and received from its own carrier the entire \$66,610.58 that McAllister stole, McAllister's restitution obligation would not be forgiven. Further, Fanning makes certain that, even if McAllister had personally paid CAPA the entire restitution award, which she did not, CAPA still could have maintained a separate civil action to recover the same amount she stole. McAllister is not entitled to a setoff of her restitution obligation because of CAPA's insurance carrier's payment.

Next, even if the dicta contained in Morgan's footnote establishes that a restitution payee is entitled to a restitution setoff in the amount of any payment that the restitution payer may receive from any source, which Respondents do not concede, the Court of Appeals did not issue the Morgan opinion until July 20, 2016, almost three years after the statements that Cato made to the court. On October 24, 2013, when Cato made the statements to the court, there was no authority in South Carolina even suggesting that McAllister would be entitled to a setoff of her restitution obligation such that she may not have owed any more money to CAPA. Accordingly, at that time, it was impossible for Cato to know or even suspect that McAllister was entitled to a setoff and her

statement to the court that McAllister still owed CAPA money could not have been an abuse of process.

Further, the payment that the Morgan Court suggested could be, but did not apply as, a setoff to the restitution award, is distinguishable to the payment CAPA received here. In Morgan, the \$25,000 payment came from *Morgan's* insurance carrier where the payment to CAPA here came from *CAPA's own* insurance carrier, not from McAllister's insurance carrier. McAllister is not entitled to a reduction of the restitution that she owed CAPA because CAPA's insurance carrier paid benefits on the policy, for which CAPA paid premiums. The \$50,000 that CAPA received from its own insurance carrier is the quintessential collateral source payment, for which McAllister should not be entitled to any benefit. See In re W.B. Easton Const. Co., Inc., 320 S.C. 90, 92, 463 S.E.2d 317, 318 (1995) (The collateral source rule provides that compensation received by an injured party from a source wholly independent of the wrongdoer will not reduce the amount of damages owed by the wrongdoer); see also Fanning, 284 S.C. 456, 327 S.E.2d 342 (finding that a criminal's satisfaction of the court's restitution order by paying the restitution to the victim did not preclude the victim from seeking additional money from the criminal in a civil suit). McAllister wants a credit to her \$66,610.58 restitution obligation because of the \$50,000 insurance proceeds that CAPA paid for through years of premium payments. If McAllister's position is accepted, she would only be required to pay CAPA \$16,610.58 of her restitution obligation because CAPA had the good judgment to purchase and pay for its own insurance. McAllister is not entitled to such a windfall.

McAllister's only argument in support of her setoff position is that S.C. Code §16-3-1190, entitles her "to a setoff or reduction of her restitution" obligation. This argument fails for two reasons. First, § 16-3-1190 does not apply to the facts of this case. Second, § 16-3-1190's set-off

provision is permissive and not mandatory, stating that a restitution award “*may* be reduced or set off” by certain payments. (emphasis added).

1. *Section 16-3-1190 does not apply to this case*

Title 16, Chapter 3 of the South Carolina Code is entitled “Offenses Against the Person.” The first seven articles are entitled as follows: Article 1 – Homicide; Article 3 – Lynching; Article 5 – Dueling; Article 6 – Hazing; Article 7 – Assault and Criminal Sexual Conduct; Article 8 – Sexual Performance by Children; Article 9 – Kidnapping. These are all crimes, as the title of the chapter suggests, that can only be committed against an individual person, not a corporation. Article 13 of this Chapter is entitled “Compensation of Victims of Crime” and it sets forth procedures for a “victim” or “claimant” of one of these crimes “against a person” to receive an award from the South Carolina Victim Compensation Fund. Section 16-3-1170 provides that such an award can only be given if “the crime directly resulted in physical or psychic trauma to the victim.” The next section under this chapter, §16-3-1180, describes how the amount of an award is derived. The following section, the one relied on by McAllister, is entitled “Reduction of award” and describes when an “award made pursuant to this article may be reduced or set off.”

McAllister’s crime was not one “against a person” and is not governed by Title 16, Chapter 3 or any of its articles. McAllister’s crime also did not directly result “in physical or psychic trauma” of CAPA, being that it was a financial crime and that CAPA is not a person who can feel physical or psychic trauma. The restitution that the court ordered McAllister pay to CAPA was not an “award” pursuant to any of these articles nor was it an award from the South Carolina Victim Compensation Fund and, therefore, it cannot be reduced by §16-3-1190.

The Court of Appeals has already looked at this statute and determined that it does not provide a setoff against a restitution award. In Morgan, the Court of Appeals cited to §16-3-

1110(12) for the definition of restitution. 417 S.C. at 342, 790 S.E.2d at 29. However, in its footnote discussing the Florida statute, which allows a restitution offset, the Morgan Court held that “South Carolina law does not contain a provision requiring an offset” Id. at 343 n.1, 790 S.E.2d at 30. Despite being aware of and citing the title and chapter that McAllister argues requires a restitution offset, the Court of Appeals correctly held that South Carolina law has no such provision.

2. Section 16-3-1190’s setoff language is permissive, not mandatory

Even if §16-3-1190 did apply to this case – it does not – it still does not support McAllister’s argument that she was “entitled” to a setoff or reduction of her restitution obligation. As quoted by McAllister, §16-3-1190 provides that an “award made pursuant to this article *may* be reduced by or set off by the amount of any payments received or to be received as a result of the injury . . . (b) from any other private or public source” (emphasis added). It cannot be ignored that the legislature used the permissive word “may” in this section, as opposed to a mandatory word such as “must” or “shall.” Clearly, even in situations where §16-3-1190 does apply, the offender is not automatically entitled to a setoff because someone else paid money to the victim. Instead, the Victim Compensation Fund “may” treat the independent payment as a setoff or reduction.

CAPA had a right to the entire restitution amount from the McAllister, regardless of the amount they had already collected from their own insurance carrier. Accordingly, even a statement that demanded full restitution payment, which is not even what McAllister alleges Cato made, would have been absolutely appropriate and certainly not an abuse of process.

III. THE TRIAL COURT PROPERLY GRANTED THE MOTION TO DISMISS BECAUSE THE RESPONDENTS DID NOT INSTITUTE THE PROCESS THAT MCALLISTER ALLEGES THEY ABUSED

The Trial Court found, as a threshold matter, that McAllister's abuse of process claim failed as a matter of law because neither of the Respondents instituted the legal process which McAllister alleged they abused. (R. p. __) (July 3, 2017 Order pp.3-4). McAllister now argues that the Trial Court must have confused her claim for abuse of process with the tort of malicious prosecution, as she believes that a party can be liable for abuse of process, but not for malicious prosecution, without initiating the process. As an initial matter, McAllister did not include this argument in her Memorandum in Opposition to Respondents' Motion to Dismiss (R. p. __) (McAllister's Memorandum in Opposition to Respondents' Motion to Dismiss), nor did she argue it to the trial court at the hearing (R. p. __) (Transcript of June 22, 2017 hearing on Motion to Dismiss). While she did raise it, for the first time, in her Rule 59(e) Motion (R. p. __) (McAllister's Rule 59(e) Motion to Alter or Amend the Court's Judgment at pp. 1-2), that does not preserve this issue for appellate review. "[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 & Env'tl. 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). Since McAllister did not raise this issue prior to her motion to alter or amend, it is not preserved for appellate review.

In any event, McAllister's position is incorrect. First, while she attempts to contrast the torts of abuse of process and malicious prosecution by arguing that malicious prosecution requires initiation of the legal process, that is a misstatement of the law. See Law v. S. Carolina Dep't of

Corr., 368 S.C. 424, 435, 629 S.E.2d 642, 648 (2006) (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). Initiation of a proceeding is not required for a malicious prosecution claim.

As authority for her position, McAllister quotes Huggins v. Winn-Dixie of Greenville, Inc., 249 S.C. 206, 209-10, 153 S.E.2d 693, 695 (1967) as stating "to cause process to issue without justification is an essential element of malicious prosecution, but not of abuse of process." However, McAllister's interpretation of this quote is flawed. It is not the initiation of the process that is superfluous to an abuse of process claim, but rather abuse of process simply does not require that the alleged abuser initiate the process "without justification," as is required in a malicious prosecution case. Stated differently, Huggins held that malicious prosecution requires initiation of process without justification, while abuse of process simply requires the initiation of the process.

~~McAllister has not cited to any South Carolina case that endorsed an abuse of process cause~~
of action against a witness to a legal proceeding, or any other entity, who did not initiate, prosecute, or maintain the proceeding. Instead, as correctly cited by the trial court in its Order, South Carolina case law shows that abuse of process claims, whether they have been ultimately found to be meritorious or not, are made against a person or entity who initiated the legal process that the plaintiff claimed was abused. See e.g. Pallares v. Seinar, 407 S.C. 359, 364-65, 756 S.E.2d 128, 130 (2014) (alleging defendant abused process by improperly filing a petition with the probate court and seeking restraining orders); Swicegood v. Lott, 379 S.C. 346, 351, 665 S.E.2d 211, 213 (Ct. App. 2008) (alleging abuse of process against a Sherriff who had plaintiff arrested); Food

Lion, Inc., 351 S.C. at 68, 567 S.E.2d at 252 (alleging abuse of process against defendant for funding and directing a civil lawsuit be filed against plaintiff); Broadmoor Apartments of Charleston v. Horwitz, 306 S.C. 482, 485, 413 S.E.2d 9, 11 (1991) (alleging abuse of process against a person who unjustifiably filed a *lis pendens* against plaintiff's property).

Here, the legal process, generally, that McAllister alleged was abused was the criminal proceeding that the State of South Carolina initiated and prosecuted - - State v. McAllister, 2008-GS-07-00248. Neither of the Respondents initiated or maintained the criminal case against McAllister, and McAllister's Complaint does not allege that they did. The more specific legal process that McAllister complains that the Respondents abused was the October 24, 2013 hearing regarding her probation and restitution, which was initiated by the South Carolina Department of Probation, Parole, and Pardon Services. See S.C. Code Ann. §17-25-322(C) (the SCDPPPS "must initiate legal process to bring every probationer, whose restitution is six months in arrears, back to court, regardless of willful failure to pay"). Neither of the Respondents called for this hearing, and McAllister's Complaint does not allege that they did. Cato, as a representative of CAPA was merely a victim-witness at the October 24, 2013 hearing. Since the Respondents did not initiate the process that McAllister claims they abused, Respondents cannot be liable for abusing that process. Accordingly, McAllister's Complaint fails to set forth facts that, if accepted as true, would support her sole abuse of process cause of action.

IV. THE TRIAL COURT'S ORDER SHOULD BE AFFIRMED BECAUSE MCALLISTER'S COMPLAINT FAILS TO ALLEGE FACTS THAT COULD PROVE HER CLAIMED DAMAGES WERE PROXIMATELY CAUSED BY RESPONDENTS' ALLEGED ABUSE OF PROCESS

McAllister's Complaint alleges that Respondents' alleged abuse of process proximately caused her damages because she briefly went to prison as a result of not paying the complete restitution. (R. p. ___) (Compl. ¶27). As noted above, the October 24, 2013 hearing was initiated

by the SC Department of Probation, Parole, and Pardon Services, not by the Respondents. Even if Cato did not attend the March 24, 2013 hearing, the court would have learned, through the Department of Probation, Parole, and Pardon Services that McAllister had not made all of her ordered restitution payments to CAPA. Even without Cato's confirmation, the court still would have revoked McAllister's probation and sentenced her to time in prison. Accordingly, Cato's statement could not have, as McAllister contends, proximately caused her to briefly go to prison.

Further, the Court of Appeals ultimately reversed the circuit court's revocation of McAllister's probation, finding that failure to pay restitution, without a finding of willful failure to pay, cannot by itself support probation revocation. According to the Court of Appeals, regardless of what Cato said at the hearing (true or untrue, supported or unsupported, appropriate or inappropriate), McAllister's probation should not have been revoked. Therefore, Cato's statements at the March 24, 2013 hearing could not, as a matter of law, have proximately cause McAllister any damages.

While the Trial Court did not recite the failure of proximate cause as a supporting ground for its Order granting the Motion to Dismiss, this Court is free to do so here. 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."); Sims v. Amisub of S.C., Inc., 408 S.C. 202, 214, 758 S.E.2d 187, 194 (Ct. App. 2014), aff'd, 414 S.C. 109, 777 S.E.2d 379 (2015).

CONCLUSION

McAllister stole over \$60,000 from CAPA and, when Cato truthfully told the court that McAllister had not made all of her required restitution payments, McAllister sued CAPA and Cato for abuse of process. For the reasons stated above, McAllister's Complaint failed to allege facts that could support her abuse of process cause of action. Respondents respectfully request that this Court

affirm the Trial Court's Order granting their Motion to Dismiss.



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Attorneys for Respondents

Dated: March 14, 2018
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas

MAR 16 2018
SC Court of Appeals

Honorable Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2017-002013

Trial Court Case No. 2016-CP-07-02253

Tonja McAllister,

Appellant,

v.

Susan Cato and CAPA of Beaufort,

Respondents.

PROOF OF SERVICE

I certify that I served the Initial Brief of Respondents on Appellant by depositing a copy of it in the United States Mail, postage prepaid, on March 14, 2018, addressed to its counsel of record Brooks Derrick, Esquire at address 224 NE Main Street, Simpsonville, SC 29681.

Lindsey Perkins
Legal Assistant



Jeffrey M. Bogdan, Esquire
JBogdan@barnwell-whaley.com

March 14, 2018

RECEIVED
MAR 16 2018
SC Court of Appeals

2026.079

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Tonja McAllister v. Susan Cato and CAPA of Beaufort
Appellate Case No.: 2017-002013

Dear Ms. Kitchings:

Enclosed please find an original and one copy of Respondent's Initial Brief and Designation of Matter regarding the above matter. Upon filing the originals, please return the clocked copies to me in the envelope enclosed for your convenience. Also enclosed is a Proof of Service on Appellant. Please do not hesitate to contact me with any questions or concerns.

Yours truly,

A handwritten signature in black ink, appearing to read "Jeffrey M. Bogdan", is written over a horizontal line.

Jeffrey M. Bogdan

JMB/lap

Enclosures

cc: M. Brooks Derrick (w/enclosure)

{00781643.DOCX.1}

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REPRESENTING CLIENTS IN ALL COURTS IN SOUTH CAROLINA AND NORTH CAROLINA AND IN THE UNITED STATES PATENT AND TRADEMARK OFFICE



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