THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Case No. 2016-001525

Alliance Biomedical Research, LLC,

Appellant,

v.

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

Respondents.

FINAL BRIEF OF APPELLANT

January 31, 2017

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

SECONDARY AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. Did the Court of Common Pleas err in granting Respondents' Motion for Summary Judgment respecting Appellant's claims for Abuse of Process and Malicious Prosecution Causes of Action for lack of evidence concerning Respondents' liability to Appellant?

STATEMENT OF THE CASE

The Lower Court action was commenced on March 20, 2014, when Appellant filed a Summons and Complaint initiating claims for Abuse of Process and Malicious Prosecution against Respondent Judith H. Parham, Personal Representative of the Estate of David Michael Parham, Deceased (hereinafter "Parham") in the Pickens County Court of Common Pleas seeking damages, along with attorneys' fees and costs, arising as a result of alleged wrongdoings in a medical malpractice action captioned John L. Bruce and Marilyn Bruce v. Greenville Pharmaceutical Research, Inc. and Alliance Biomedical Group, filed in the Court of Common Pleas for Greenville County, Thirteenth Judicial Circuit, case number 2011-CP-23-6967. On May 4, 2012, a Stipulation of Dismissal of Appellant with Prejudice was entered.

On June 19, 2014, Appellant filed an Amended Complaint naming Gerald H. Sokol, M.D., as a Defendant as to Fraud and Negligence Per Se causes of action. Respondent Parham served Appellant with a Motion to Dismiss on or about July 31, 2014. Appellant was served with Defendant Sokol's Motion to Dismiss on August 6, 2014 and his Amended Motion to Dismiss on August 14, 2014. On October 2, 2014, Appellant filed a Notice of Motion and Motion to Amend Complaint and Appellant's Memorandum in Opposition to Respondents' Motions to Dismiss. A hearing on the Motions to Dismiss was held on October 2, 2014 before the Honorable Steven H. John. An Order dated October 15, 2014 by the Honorable Steven H. John denying Parham's Motion to Dismiss, finding Parham & Smith, LLC ("P&S") an indispensable party, and allowing Appellant to amend. Appellant was served with Respondent Parham's Answer to the First Amended Complaint on or about October 17, 2014, along with Respondent Parham's First Interrogatories and First Requests for Production to Appellant. Appellant's Second Amended Complaint was filed on November 3, 2014, adding P&S as a

Defendant. Respondents served their Answer to the Second Amended Complaint on December 19, 2014.

Respondents' discovery sought information protected by attorney client and work product privileges, which were objected to by the Appellant. Appellant served its Responses to Interrogatories and Responses to Request for Production on Respondents on April, 17, 2015. On September 29, 2015, Respondents served Appellant with their Motion to Compel. Respondents took Gregory J. Feldman, M.D.'s deposition on December 16, 2015. Respondents' Requests for Admission were served on Appellant on January 13, 2016, with Appellant's responses provided on February 17, 2016. After negotiations an agreement was reached by the parties respecting discovery and a Consent Order was provided to the Court on February 4, 2016.

A Motion for Summary Judgment was served by Respondents on Appellant on February 11, 2016. Appellant served Respondents with its Amended Responses to Respondents' Requests for Production on March 9, 2016. On March 17, 2016, Appellant's served Respondents with its Second Amended Responses to Respondents' Requests for Production, Second Amended Responses to Respondents' Interrogatories, and Responses to Respondents' Second Requests for Production. Appellant turned over its entire case file, including emails, to Respondents and said documents were sent to a professional legal copying service to be bate-stamped, scanned, and copied onto a disc for ease of production. The service, on behalf of Appellant's, provided Respondents with a disc containing Appellant's documents bate-stamped ABR0001-ABR1282.

Respondents' Memorandum in Support of Motion for Summary Judgment was served on March 29, 2016. This matter was mediated on April 1, 2016. Appellant's Memorandum in Opposition to Respondents' Motion for Summary Judgment was provided to Respondents on April 8, 2016, along with Affidavits by Holly Jo Mann and Gregory J. Feldman, M.D. On June

3, 2016, Appellant was served with Respondents' Reply to Appellant's Memorandum in Opposition to Respondents' Motion for Summary Judgment. A hearing was held before the Honorable Perry H. Gravely on June 6, 2016, respecting Respondents' Motion for Summary Judgment. The Honorable Perry H. Gravely filed an Order granting Respondents Motion for Summary Judgment on June 29, 2016. It is from the Order of the Honorable Perry H. Gravely entered June 29, 2016, granting Respondents' Motion for Summary of Judgment that Appellant appeals.

ARGUMENT

1. The Court of Common Pleas erred in granting Respondents' Motion for Summary Judgment respecting Appellant's claims for Abuse of Process and Malicious Prosecution Causes of Action due to triable issues of disputed facts, including lack of probable cause and Respondents' actions being outside the scope of representations, and Appellant's supporting evidence being sufficient to withstand Respondents' Motion for Summary Judgment.

Alliance Biomedical Research, LLC, which is a South Carolina limited liability corporation. Its Members are Gregory J. Feldman, MD, Joseph A. Boscia, III, MD, Anna Buice, Steve Clemons, and Haley Williams ("ABR"). The Respondents are the Estate of attorney Mike Parham ("Parham") and his law firm, Parham & Smith ("P&S"). This action arises out of alleged conduct by Parham as counsel in a prior lawsuit captioned John L. Bruce and Marilyn Bruce v. Greenville Pharmaceutical Research, Inc. and Alliance Biomedical Group, ("underlying action" or "Bruce litigation") filed on October 20, 2011 in the Court of Common Pleas for Greenville County, Thirteenth Judicial Circuit, case number 2011-CP-23-6967. On May 4, 2012, the underlying action ended by a Stipulation of Dismissal with Prejudice of ABR. Appellants' Second Amended Complaint is comprised of two causes of action, abuse of process and malicious prosecution.

The Lower Court was provided with the following facts and citations within the record in opposition to Respondents' Motion for Summary Judgment:

Following the pre-suit period of time, on October 20, 2011, Parham signed and filed the underlying litigation. (R. p 27, ¶ 11) (R. pp. 14-18)

In the Bruce litigation, John L. Bruce and Marilyn Bruce ("Bruces"), through their attorney, Parham, alleged that Greenville Pharmaceutical Research, Inc. ("GPR") and Alliance Biomedical

Research Group, LLC, failed "to possess the degree of care, competence and skill ordinarily and customarily possessed by similar healthcare providers in similar circumstances or failing to exercise that degree of care, competence and skill ordinarily and customarily exercised by similar health-care providers under similar circumstances and in deviating from ordinary and customary standards of medical care", and acted in a fashion of "negligence, carelessness, recklessness, willfulness and wantonness", which caused the Plaintiffs to suffer real and immediate injury. (R. p. 27, ¶ 12) (R. pp. 14-18)

Within the underlying action, Parham alleged on behalf of the Bruces: "Upon information and belief, Alliance Biomedical Research, LLC, is a corporation whose principal place of business is in the County of Spartanburg, State of South Carolina. Alliance Biomedical Research, LLC is the parent company of Greenville Pharmaceutical Research, Inc. At all times herein mentioned, the Defendant Alliance Biomedical Research, LLC, acted by and through its subsidiary Greenville Pharmaceutical Research, Inc. together with its servants, agents and employees." (R. p. 27, ¶ 13) (R. pp. 14-18)

Parham sought actual and punitive damages arising out of the underlying action for the Bruces against Appellant for GPR's alleged conduct. (R. p. 27, ¶ 14) (R. pp. 14-18)

On April 16, 2012, Mr. Bruce testified in his deposition within the underlying action that he had never spoken with anyone from the Appellant; did not know of any meetings with anyone from the Appellant; and had never had contact with anyone from the Appellant. (R. p. 28, ¶ 15) (R. p. 294, p. 19, lines 3-23)

The underlying litigation was purely at the insistence of Parham, as his client in the underlying case had no knowledge of the Appellant. (R. p. 28, ¶ 16) (R. p. 294, p. 19, lines 3-23)

Prior to the suit being filed, Parham was placed on notice by GPR's attorney that there was a complete lack of ownership between GPR and the Appellant. (R. p. 28, ¶ 17) (R. pp. 99-101)

Filing suit against the Appellant was merely an effort to include another party, irrespective of the lack of liability, to have leverage against GPR in an effort to overcome its meritorious defenses. (R. p. 28, ¶ 18) (R. p. 320, p. 86, line 15-p. 87, line 4)

In response to the underlying action, the Appellant filed a Motion to Dismiss on November 17, 2011, which stated that the Bruce litigation failed to state a cause of action. (R. p. 28, ¶ 19) (R. pp. 19-20)

As a result of the Motion to Dismiss, Parham was reminded, yet again, that he had included a party without any business relationship with his client. (R. p. 28, ¶ 20) (R. p. 19-20)

Appellant's Answer, filed on November 23, 2011, further placed Parham on notice that there was a complete absence of liability on the part of the Appellant due to a lack of ownership by the Appellant of GPR, not business relationship of any kind with his client. (R. p. 28, ¶ 21) (R. pp. 21-23)

Within Appellant's Answer in the Bruce litigation, the Appellant reaffirmed the absence of any relationship between itself and GPR nor business relationship with his clients. (R. p. 28, ¶ 22) (R. pp. 21-23)

On November 10, 2011, the Appellant served Interrogatory Answers clearly stating that "Defendant Alliance Biomedical Research, LLC has no knowledge of Plaintiffs John L. Bruce and/or Marilyn Bruce". (R. p. 29, ¶ 23)(R. pp. 504-512)

Further, the Appellant's Interrogatory answers stated that:

"Defendant Alliance Biomedical Research, LLC has knowledge that Greenville Pharmaceutical Research, Inc. is a South Carolina corporation, duly registered with the Secretary

of State. Defendant Alliance Biomedical Research, LLC is a South Carolina limited liability company, duly registered with the Secretary of State. Neither entity has any ownership interest in the other. Defendant Greenville Pharmaceutical Research, Inc. provides no services to Defendant Alliance Biomedical Research, LLC. Defendant Alliance Biomedical Research, LLC provides no training or administrative management services to Defendant Greenville Pharmaceutical Research, Inc. Defendant Alliance Biomedical Research, LLC does provide legal services to Defendant Greenville Pharmaceutical Research, Inc."

"Defendant Alliance Biomedical Research, LLC has no knowledge of John L. Bruce and thus no physician/patient relationship, no business relationship, nor any relationship, in any form or fashion, existed between the Appellant John L. Bruce and Defendant Alliance Biomedical Research, LLC." (R. p. 29, ¶ 24)(R. pp. 504-512)

The continuation of the underlying lawsuit against Appellant was done for ulterior purposes to pressure GPR with Parham repeatedly being advised of the deficiencies of the Bruce litigation in that the Appellant had no ownership interest in GPR nor relationship with his clients. (R. p. 29, ¶ 25) (R. p. 320, p. 86, line 15-p. 87, line 4)

Due to the Appellant's inclusion in the Bruce litigation, it was involved in no less than ten (10) depositions, resulting in time, effort, and costs, including travel costs to and from Florida. (R. p. 29, ¶ 26) (R. pp. 683-688)

On April 16, 2012, Parham further set out his scheme by sending a letter to counsel "to give [them] a heads up" he may be filing a Motion to Amend the Complaint to include a study sponsor and important business partner with GPR. Glaxo-Smith Kline ("GSK"). (R. p. 29, ¶ 27) (R. pp. 559-561)

The letter was an attempt to extort settlement monies by threat to include another innocent third party business partner of GPR and in an effort to coerce Appellant to act upon Parham's behalf. (R. p. 30, ¶ 28) (R. p. 330, p. 129, line 1-p. 130, line 21)

Parham sent the letter with the full knowledge that John Bruce was never accepted as a volunteer for a GSK research study; that John Bruce "screen failed" and thus never participated in the GSK study at issue, never had any procedures performed and never took the GSK study medicine. (R. p. 30, ¶ 29) (R. p. 276, p. 39, lines 7-10)

Parham's letter was sent as a threat in order to extort monies from the Appellant and GPR by intentionally interfering with a business relationship between GPR and GSK, an innocent third party, in order to blackmail a settlement from GPR. (R. p. 30, ¶ 30) (R. p. 330, p. 129, line 1-R. p. 331, p. 130, line 21)

Parham instituted and/or continued the underlying judicial proceeding in instituting such proceeding and by a lack of probable cause, which resulted in injury and/or damage to the Appellant. (R. p. 30, ¶ 31) (R. p. 327, p. 114, lines 6-24)

Once Parham recognized that Appellant would not be extorted into a nuisance settlement or that his efforts would not affect the GPR case, he dismissed this Appellant from the lawsuit, turning his attention to different tactics to apply pressure to GPR and the owners of Alliance Biomedical Research, LLC. (R. p. 30, ¶ 34) (R. p. 24)(R. pp. 559-561)

The Bruce litigation terminated in the favor of the Appellant on May 4, 2012, by a Stipulation of Dismissal with Prejudice. (R. p. 30, ¶ 35) (R. p. 24)

Parham brought suit against the Appellant in an effort to affect the litigation as it concerned GPR. (R. p. 31, ¶ 36) (R. p. 320, p. 86, line 15-p. 87, line 4).

The inclusion of Appellant in the underlying lawsuit was intended to apply pressure towards the owners of GPR because of the overlap of some individual owners between the two entities and affect the outcome of the claims against GPR. (R. p. 31, ¶ 37) (R. p. 320, p. 86, line 15-p. 87, line 4)

At all times material, the lawsuit against Appellant was a sham and never intended to establish liability against Alliance Biomedical Research, LLC. (R. p. 31, ¶ 38) (R. p. 327, p. 114, line 6-line 24)

Parham lacked probable cause in initiating the lawsuit and possessed a reckless indifference at the inception of the lawsuit by his failure in determining the association between the entities. (R. p. 31, ¶ 39) (R. pp. 99-101)

Parham was informed prior to the filing of the underlying lawsuit, and was repeatedly put on notice, that the Appellant did not carry liability insurance. (R. p. 31, ¶ 40) (R. p. 99-101) (R. pp. 504-512)

As such, the owners were fully and wholly responsible and liable to cover the litigation expenses, which Parham willingly used to cause an economic drain and thereby serving as economic coercion on the Appellant's owners to settle, regardless of liability. (R. p. 31, ¶ 41) (R. pp. 99-101)

Parham was driven by greed for his own monetary gain because of the contingency fee contract with his client. (R. p. 31, ¶ 42) (R. p. 320, p. 86, line 15-p. 87, line 4)

Filing suit against the Appellant was purely a scheme to include an innocent party in an effort to extract money for the benefit of his own personal gain by attempting to affect another Defendant. (R. p. 31, ¶ 43) (R. p. 320, p. 86, line 15-p. 87, line 4)

"Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Thomas Sand Co. v. Colonial Pipeline Co.,* 563 S.E.2d 109, 112 (S.C. Ct. App. 2002). Summary Judgment is appropriate when it is clear from the pleadings, depositions, answers to interrogatories, and admissions on file, along with any affidavits, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *BPS, Inc. v. Worthy,* 608 S.E.2d 155 (S.C.App. 2005); *Belton v. Cincinnati Inc. Co.,* 360 S.C. 575, 602 S.E.2d 389 (2004); *McCall v. State Farm Mut Auto Ins. Co.,* 359 S.C. 372, 597 S.E.2d 181 (Ct.App. 2004); Rule 56(c), SCRCP; *see also Higgins v. Medical Univ. of South Carolina,* 326 S.C. 592, 486 S.E.2d 269 (Ct.App. 1997) (noting that when ruling on motion for summary judgment, trial judge must consider all of the documents and evidence within the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits.) "Under Rule 56(c), the party seeking summary judgment has the initial burden of proof of demonstrating the absence of a genuine issue of material fact." *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.,* 563 S.E.2d 331 (S.C. 2002); *Baughman v. American Tel. and Tel. Co.,* 306 S.C. 101, 410 S.E.2d 537 (1991).

"In determining whether any triable issue of fact exists, the trial court must view the evidence and all reasonable inferences that may be drawn therefrom in the light most favorable to the party opposing summary judgment. *Brockbank v. BestCapital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000)." "If triable issues exist, those issues must go to the jury." *Rothrock v. Copeland,* 305 S.C. 402, 409 S.E.2d 366 (1991). "Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is a disagreement concerning the conclusion to be drawn from those facts." *Lanham v. Blue Cross and Blue Shield of South Carolina, Inc.,* 563 S.E.2d 331 (S.C. 2002); *Moriarty v. Garden Sanctuary Church of God,* 341 S.C. 320, 534 S.E.2d 672 (2000).

"In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co., Inc.,* 673 S.E.2d 801, 803 (S.C. 2009). "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Pallares v. Seinar,* 407 S.C. 359, 756 S.E.2d 128 (S.C., 2014). *Schmidt v. Courtney*, 357 S.C. 310, 592 S.E.2d 326 (Ct.App.2003) held "summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law or when there is a dispute as to the conclusions and inferences to be drawn from the facts; the purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder." (quoting, *Pallares v. Seinar,* 407 S.C. 359, 756 S.E.2d 128 (S.C., 2014)).

The elements of abuse of process are an ulterior purpose and a willful act in the use of the process not proper in the conduct of the proceeding. *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967). "The first element, an 'ulterior purpose,' exists if the process is used to secure an objective that is 'not legitimate in the use of the process.'" *Pallares v. Seinar, 407 S.C. 359, 756 S.E.2d 128 (S.C., 2014).* "The second element, a 'willful act,' 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 v. American Medical Intern, Inc.*, 492 S.E.2d 103, 107, 328 S.C. 128, 136 (S.C., 1997).] 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. v. United Food & Commercial Workers Inter. Union*, 567 S.E. 2d 251, 254 351 S.C. 65, 71 (S.C.App. 2002)] (citations omitted)." *Id.*

The mere filing of a lawsuit does not give rise to a cause of action for an abuse of process claim. "Hence, to sustain a claim for the tort, a party must allege facts sufficient to show not only that the lawsuit was brought for an ulterior purpose, i.e. for collateral reasons, but that willful acts were taken through which the process was misapplied or abused." *Food Lion, Inc. v. United Food & Commercial Workers Inter. Union*, 567 S.E.2d 251, 351 S.A. 65 (S.C.App. 2002). "To withstand a motion for Summary Judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt. Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801,803 (2009)." Froneberger v. Smith, 406 S.C. 37, 748 S.E.2d 625 (S.C. App., 2013).* Appellant's Second Amended Complaint alleges, in great detail, the depths the Respondents conducted themselves with cites to factual support. Appellant respectfully submits that there exists for more than the mere scintilla of evidence required to withstand Respondents' Motion for Summary Judgment.

In the June 29, 2016, Order of the Honorable Perry H. Gravely, it states "[H]ere, Plaintiff has not presented any evidence to show that the Defendant attorneys acted out of personal or malicious motives." (R. p. 10) "[T]he tort of abuse of process contains neither an element of intent to harm, nor actual malice. ... Similarly, there is no required element of actual malice." *Swicegood v. Lott*, 665 S.E. 2d 211, 379 S.C. 346 (S.C. App., 2008).

Later, the *Palleres* court states, as to an abuse of process claim, "[T]he 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, by the use of the process as a threat or club. [*D.R. Horton v. Westcott Land Co.*, 730 S.E.2d 340, 352 , 398 S.C. 528, 551 (S.C. App., 2012)](citations omitted); *see also Hainer*, 328 S.C. at 136, 492 S.E.2d at 107 (stating **the improper purpose usually takes**

the form of coercion to obtain a collateral advantage)" (emphasis added) *Id.* "Moreover, no action lies where a person has an incidental or concurrent motive of spite or **merely seeks to gain a collateral advantage from the process**" *Id.* (emphasis added) "Therefore, it is the use of the process to coerce or extort that is the abuse, and need not be accompanied by any ill will." *Swicegood v. Lott*, 665 S.E. 2d 211, 379 S.C. 346 (S.C. App., 2008).

In the Lower Court's Order, it stated "[A]s such, Plaintiff has not advanced any evidence to show Defendants were doing anything other than attempting to gain leverage for a larger settlement for the Bruces..." (R. p. 11) Appellant asserts that naming an innocent third party in a lawsuit in an effort to "gain leverage for a larger settlement" from another Defendant shows the Respondents were merely seeking to gain a collateral advantage from the process and using Appellant to accomplish their efforts.

Further, in the In the Honorable Perry H. Gravely's Order of June 29, 2016, page 4, it states:

> Generally, in South Carolina, a third party may not sue a lawyer for acts and omissions done while acting as counsel for his/her client. Stiles v. Ororato, 318 S.C. 297, 300, 457 S.E.2d 601, 602, (1995). An attorney who acts in good faith with the authority of his client is not liable to a third party in an action for malicious prosecution. Gaar v. N. Myrtle Beach Realty Co., Inc., 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (Ct. App. 1986). The South Carolina Supreme Court has held that an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of **and with the knowledge of his client**. Argoe v. Three Rivers Behavioral Center and Psychiatric Solutions, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010). (emphasis added)
>
> ...
>
> Alliance seems to rely on Mr. Bruce's deposition testimony in the Bruce Litigation as evidence to prove that Defendants were acting outside of the scope of their professional representation of the Bruces. Alliance appears to be relying on the following excerpt from Mr. Bruce's deposition transcript to support this case:
>
> **Q: Now, there's a company called Alliance Biomedical Group. Do you recall ever talking with anyone from a group named Alliance Biomedical Group?**
> **A. No, sir.**

Q: If you met somebody that worked with that group, you didn't know it, do you?
A: No, sir, I don't.

Mr. Bruce's deposition testimony from the Bruce Litigation is a far cry from evidence that Defendants were acting outside of the scope of their representation of the Bruce's when they included Alliance as a Defendant in the Bruce Litigation.

(R. p. 11)

Appellant respectfully points out that the Lower Court's Order granting Summary Judgment clearly points out in the *Argoe* case quoted above, that an attorney is immune from liability to third persons "arising from the performance of his professional activities as an attorney on behalf of **and with the knowledge of his client.**" (R. p. 10) In Mr. Bruce's deposition testimony, his attorney (Parham) asked, "Okay. And you've not had any contact with Alliance Biomedical Group at any time, but surely non since January of 2010?" Mr. Bruce replied to his attorney (Parham), "No, sir. I have not had any contact with anyone from that group as I know of." (R. p. 294, p. 19, lines 19-23) Appellant argues that the deposition testimony of Mr. Bruce, which was in response to his attorney's (Parham) questions, is evidence that the Respondents were acting outside the scope of their representation. Further, Mr. Bruce, Appellants' client in the underlying Bruce litigation, did not sign a Verification to the Complaint. The deposition testimony by Mr. Bruce and the lack of Verification signed by Mr. Bruce provides, at a minimum, a scintilla of evidence required to withstand Defendants' Motion for Summary Judgment and/or creates a triable issue for the jury.

"'[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings, (2) by or at the instance of the defendant; (3) termination of such proceedings in [the] plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage.' *Law v. S.C.*

Dep't of Corr., 386 S.C. 424, 435, 629 S.E.2d 642, 648 (2006)(first alteration in original)(citations omitted). 'An action for malicious prosecution fails if the plaintiff cannot prove each of the required elements by a preponderance of the evidence, **including malice and lack of probable cause'.**" (emphasis added) *Pallares v. Seinar*, 407 S.C. 359, 756 S.E.2d 128 (S.C., 2014).

"'Malice is defined as 'the deliberate[,] intentional doing of an act without just cause or excuse.' *Id.* at 437, 629 S.E.2d at 649 (quoting *Eaves v. Broad River Elec. Coop., Inc.* 277 S.C. 475, 479 289 S.E.2d 414, 416 (1982)). 'Malice does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition, although such an attitude certainly may indicate malice.' *Id.* '**In an action for malicious prosecution, malice may be inferred from a lack of probable cause to institute the prosecution.**' *Id.*" (emphasis added) *Pallares v. Seinar*, 407 S.C. 359, 756 S.E.2d 128 (S.C., 2014). "'Probable cause in this context does not turn upon the plaintiff's guilt or innocence, but rather upon whether the facts within the prosecutor's knowledge would lead a reasonable person to believe the plaintiff was guilty of the crimes charged.' *Kinton v. Mobile Home Indus., Inc.* 274 S.C. 179, 181, 262 S.E.2d 727, 728 (1980). Where a plaintiff bases the claim on an opponent's institution of civil causes of action, probable cause exists if the facts and circumstances would lead a reasonable person of ordinary intelligence to believe that the plaintiff committed one or more of the acts alleged in the opponent's complaint. *Broyhill v. Resolution Mgmt. Consultants, Inc.*, 401 S.C. 466, 475, 736 S.E.2d 867, 871-872 (Ct.App.2012)." *Pallares v. Seinar*, 407 S.C. 359, 756 S.E.2d 128 (S.C., 2014). "whether probable cause exists is ordinarily a jury question, but it may be decided as a matter of law when the evidence yields only one conclusion. *Law*, 368 S.C. at 436, 629 S.E.2d at 649 (citing *Parrott v. Plowden Motor Co.*, 246 S.C. 318 323, 143 S.E.2d 607, 609 (1965))." *Pallares v. Seinar,* 407 S.C. 359, 756 S.E.2d 128 (S.C., 2014). The Lower Court Order states, "... even if Defendants did not have probable

cause to assert claims against Alliance in the Bruce Litigation, that is not a basis for Alliance's current claim under the Gaar analysis." (Gravely Order, June 29, 2016, p. 5) Appellant argues that whether or not probable cause existed is a triable issue for the jury to decide.

In *Gaar v. N. Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528-29, 339 S.E.2d 887, 889 (Ct. App. 1986), the court goes on to state, "an attorney who acts **in good faith with the authority of his client** is not liable to a third party in an action for malicious prosecution. See *W.D.G., Inc. v. Mutual Mfg. & Supply Co.*, 5 Ohio Op. 3d 397 (1976)." Based upon the allegations set forth in Appellant's Second Amended Complaint, Mr. Bruce's deposition testimony, and lack of Verification, Appellant contends that Respondents acted, neither in good faith nor with the authority of their client. As such, the Lower Court's Order granting Summary Judgment should be overturned given there are facts within the record establishing a triable issue.

The Lower Court further quoted *Gaar*, in granting Respondents' Motion for Summary Judgment in statin "[E]ven if the attorney who initiates civil proceedings for his client has no probable cause to do so, he is still not liable if he acts primarily for the purpose of aiding his client in obtaining a **proper** adjudication of the client's claim." (emphasis added) *Gaar v. N. Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 339 S.E.2d 887, (Ct. App. 1986). However, "[A] number of jurisdictions recognize that an attorney may be held liable where he acts in bad faith or for his own personal motivations. See generally Annotation 97 ALR 3rd 688 (attorney's liability for abuse of process); Annotation 46 ALR 4th 249 (attorney's liability for malicious prosecution). See also RESTATEMENT (SECOND) OF TORTS § 674, comment d (**attorney who acts without probable cause for an improper purpose is subject to same liability for the wrongful use of civil proceedings as any other person**)." (emphasis added) *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (S.C., 1995). The Lower Court Order states, "... even if Defendants did not have

probable cause to assert claims against Alliance in the Bruce Litigation, that is not a basis for Alliance's current claim under the Gaar analysis." (R. p. 12) Appellant continues to assert that the claims against Alliance Biomedical Research, LLC were not in good faith with the authority of their client, nor within the scope of their representation, nor with the knowledge of their client, nor were they advanced for proper adjudication of their client's claims. The purpose of filing suit against Alliance Biomedical Research, LLC was to pressure Greenville Pharmaceutical Research, Inc. into settling or for a larger pay-out. Further, "causing process to issue without justification is an essential element of malicious prosecution, but not for abuse of process." *Pallares v. Seinar,* 407 S.C. 359, 756 S.E.2d 128 (S.C., 2014).

Additionally, the Lower Court takes issue with the fact "[D]iscovery is now closed and Alliance did not even attempt to uncover any evidence." (R. p. 11) Appellant addressed this matter, through its attorney at the hearing:

> Mr. Mann: No discovery has been taken. I would also tell Your Honor that our memorandum is not just a simple rendition of our Complaint. Our memorandum, which I would like to incorporate herein by reference if I may, Your Honor.
>
> Court: Yeah.
>
> Mr. Mann: It goes through every single allegation within the Complaint and cites to specific depositions or pleadings that support the allegations as they were advanced in this case. Nothing was left out. Your Honor, there was no discovery necessary in this case. My clients have expended as much money as they want to on this. Also, as Mr. Bogdan said, very accurately, unfortunately Mr. Parham is no longer with us. I don't think Parham & Smith did anything wrong. I don't need to go take their depositions. All the documents are in the record from the underlying case. I can't take Mr. Bruce's deposition. So we've proceeded forth and we've cited the support for every single allegation that is made in the Complaint.

(R. p. 490, line 11-R. 491, line 10)

Appellant's reference to specific evidence in the Memorandum, addressing each allegation of the Complaint, defeats the Lower Court's claim that "Plaintiff simply pointed to allegations it

made in its Complaint in an efforts to defeat Respondents' Motion for Summary Judgment, which is inappropriate. *Blumenthal Mills*, 365, S.C. at 220, 616 S.E.2d at 730." (R. p. 11)

Finally, the Lower Court stated "Plaintiff admitted at the hearing that, while Alliance and Greenville Pharmaceutical Research were not connected to each other, there was common ownership between Alliance and Greenville Pharmaceutical Research." (R. p. 12) Appellant stated, on the record, [T]here is a generality of ownership but there is no legally-recognized corporate ownership between the two entities. That was established from day one." (R. p. 494, lines 22-25) More specifically, all of the Shareholders of Greenville Pharmaceutical Research were Members of Alliance, but not all Members of Alliance were Shareholders of Greenville Pharmaceutical.

Appellant contends that the Lower Court erred in granting Respondents' Motion for Summary Judgment in light of the aforementioned wealth of evidence and triable issues of disputed facts, including lack of probable cause and whether Respondents' actions were outside the scope of representation of Mr. Bruce and are liable for Appellant's damages. Thus, Appellant requests that the Court of Common Pleas Order be reversed and this matter be remanded for a trial on the merits.

CONCLUSION

For the reasons stated above, Appellant requests that the Court of Common Pleas Order granting Respondents' Motion for Summary Judgment be reversed and this matter be remanded for a trial on the merits.

Respectfully submitted,

January 31, 2017

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

The Honorable Perry H. Gravely, Circuit Court Judge

Case No. 2016-001525

Allience Biomedical Research, LLC, Appellant,

v.

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

CERTIFICATE OF COUNSEL

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

January 31, 2017

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