IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LAURENS COUNTY
Court of Common Pleas

Frank R. Addy, Jr. Circuit Court Judge

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SC Court of Appeals

C.A. No. 2017-CP-30-0008
Appellate Case No. 2017-001831

MOSI BUNDU AND MALCOLM DJ WATTS..... Appellants,

v.

RICKY CHASTAIN, AS LAURENS COUNTY SHERIFF, MICHAEL GAINEY, SOCRATES D. LEDDA, AS LAURENS CITY POLICE CHIEF, JOHN DOE(S), LAURENS COUNTY SHERIFF'S DEPARTMENT, LOGAN KANIPE, AND LAURENS CITY POLICE DEPARTMENT..... Respondents.

INITIAL BRIEF OF RESPONDENTS LEDDA, GAINEY, KANIPE, AND LAURENS CITY POLICE DEPARTMENT

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Anderson, South Carolina
Date: May 15, 2018

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STATEMENT OF ISSUES ON APPEAL

Did the circuit court err in dismissing the Plaintiff's case for failure to state a cause of action and/or because no summons was ever served in connection with the case?

STATEMENT OF THE CASE

On or about January 4, 2017, the Appellant Mosi Bundu, appearing *pro se*, filed a document entitled "Summons and Complaint" with the Clerk of Court for the County of Laurens, State of South Carolina. (Complaint) Appellant alleged that, after responding to a 911 hangup call at or near 200 Mock Street in Laurens, S.C., Sgt. Michael Gainey and Officer Logan Kanipe, who were officers with the Laurens City Police Department, "entered and searched" 206B Mock Street "without cause and unlawfully." (Complaint, R. p. _____)[1] The Complaint did not include a date for the alleged incident. On February 16, 2017, an Answer was filed on behalf of the City Respondents, wherein it was admitted that Sgt. Gainey and Officer Kanipe entered the residence at 206B Mock Street on or about January 5, 2015. The Answer affirmatively alleges that entry was made with the permission of the occupant, Appellant Malcolm Watts, after the officers heard a gunshot. (Answer, R. p. ____) At the same time, the City Respondents also filed a Motion to Dismiss under 12(b)(6).[2] (Motion to Dismiss, R. p. _____)

On or about June 1, 2017, a hearing on the City Respondents' Motion to Dismiss was held before the Honorable Frank Addy, Jr. (6/1/17 Transcript, R. p. ____) Appellants did not appear at the hearing. By a Form 4 "Judgment in a Civil Case" dated and filed on June 1, 2017, Judge Addy rendered the following decision:

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[1] The Complaint named the following Laurens Police Department employees as defendants: Officer Logan Kanipe, Sgt. Michael Gainey, and Chief Socrates D. Ledda ("City Respondents"). The Complaint also included Ricky Chastain, who was the Laurens County Sheriff, and alleged that the "county claims that they were there in support of the city."

[2] In the Motion to Dismiss, the City Respondents argued that Chief Ledda, Sgt. Gainey and Officer Kanipe, who were employees of the City of Laurens, were sued only in their individual capacities and were entitled to dismissal based on the personal immunity granted by the S.C. Tort Claims Act.

> Case is dismissed for failure to state a cause of action and no summons was ever served in connection with the case.

(Form 4 dated 6/1/17, R. p. ____) The transcript indicates that the dismissal was based on Rule 12(b)(6) and Rule 4. (6/1/17 transcript, R. p. ____) The Appellants filed a request/motion to vacate the dismissal on June 2, 2017 (Motion to Vacate, R. p. ____). Following a lengthy hearing on August 1, 2017, Judge Addy denied the motion and entered a Form 4 order dated and filed August 1, 2017 (8/1/17 Transcript, R. p. ____; Form 4 dated 8/1/17, R. p. ____).

Appellants filed a Notice of Appeal on August 31, 2017 (Notice of Appeal, R. p. ____), and an Amended Notice of Appeal on September 13, 2017 (Amended Notice of Appeal, R. p. ____).

STATEMENT OF FACTS[3]

The Appellants allege the following in their Complaint (quoted as is):

> That the city responded to what they described as a" 911 hangup from a verizon (9116436081) number, with GPS placing the call at 200 Mock Street" "Approximately 1 sic after being on the scene Before making contact with 200 mock street, Sgt. Gainey and PTL Kanipe heard a gunshot in the immediate area" The county claims that they were there in support of the city. We believe that 206B was entered and searched without cause and unlawfully when no other places were entered on the report, which caused tremendous trauma to Malcolm DJ Watts and Mosi A. Bundu. No one on mock street said a gunshot was heard or fired, not at 200 mock street or to the left or right of 206B mock street.

(Complaint, R. p. ____)

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[3] Only the allegations of the Complaint (R. p. ____) are included herein, because "the trial court must base its ruling based solely on the allegations set forth in the complaint" and "the appellate court applies the same standard of review." *Doe v. Marion,* 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citing *Spence v. Spence,* 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006); *Williams v. Condon,* 347 S.C. 227, 553 S.E.2d 496 (Ct.App.2001)) (See Argument I hereinbelow.)

ARGUMENT

I. THE DISMISSAL WAS PROPER BECAUSE THE APPELLANTS DID NOT STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION.

As summarized in *Doe v. Marion,* 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007), the general rules regarding review of the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, are as follows:

> In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on the allegations set forth in the complaint. *Spence v. Spence,* 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal under Rule 12(b)(6) is improper. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato,* 318 S.C. 297, 457 S.E.2d 601 (1995). 'The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.' *Gentry v. Yonce,* 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).

However,

> [w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (internal citations omitted). "[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action." *Id.* (citing 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235–236 (3d ed.2004)

Following a hearing on June 1, 2017, the Trial Court granted the City Respondents' Motion to Dismiss based on the Appellants' "failure to state a cause of

action."[4] (Form 4 dated 6/1/17, R. p. ____) "In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief." *Spence v. Spence*, *supra* at 628 S.E.2d 874 (citing *Gentry v. Yonce,* 337 S.C. 1, 522 S.E.2d 137 (1999)). The Court's ruling must be based "solely on the allegations set forth in the complaint."[5] *See Doe v. Marion, supra*. The Complaint does not even include a date that the alleged claim arose. It is not at all clear exactly who the Appellants are including as named defendants.[6] In addition, the only allegations in the "body" of the Complaint are against Sgt. Gainey and Officer Kanipe. As argued in the Memorandum submitted in support of the City Respondents' Motion to Dismiss, these defendants have personal immunity pursuant to §15-78-70(a) and (b). (Memorandum in Support, R. p. ____) Based on the allegations of the Complaint, the Appellants failed to state facts sufficient to constitute a valid cause of action and the Respondents were entitled to dismissal under Rule 12(b)(6) as granted by the trial court.

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[4] The Court's dismissal was also based on the County's argument that "no summons was ever served in connection with the case," as discussed further in Argument II hereinbelow. (Form 4 dated 6/1/17, R. p. ____)

[5] Therefore, the additional "facts" and "allegations" included in Appellants' other pleadings, including the Appellants' Initial Brief, are not to be taken into consideration.

[6] In the Respondents' Memorandum in Support of Motion to Dismiss (Memorandum in Support, R. ____), the City Respondents argued that the only named defendants were Chief Ledda, Sgt. Gainey, and Officer Kanipe, who had personal immunity under the S.C. Tort Claims Act. The Appellants have never responded to or refuted this argument and made no efforts to correct the confusion related to their intended defendants.

II. THE DISMISSAL WAS PROPER BECAUSE THE APPELLANTS DID NOT FILE AND SERVE THE REQUIRED SUMMONS.

The South Carolina Rules of Civil Procedure require the filing and service of a summons AND complaint. *See* SCRCP 3(a).[7] In fact, not only does a court generally obtain personal jurisdiction by the service of a summons, "a judgment is void ... if a court acts without [personal] jurisdiction." *See BB&T v. Taylor*, 369 S.C. 548, 633 S.E.2d 501 (2006); *Ex parte S.C. Dept. of Revenue*, 350 S.C. 404, 566 S.E.2d 196 (Ct.App.2002). *See also Whaley v. CSX Transp., Inc.* 362 S.C. 456, 609 S.E.2d 286 (2005) ("Jurisdiction ... is the power of a court to decide a case.") As indicated by SCRCP 4(a):

> The summons shall be signed by the plaintiff or his attorney, contain the name of the State and county, the name of the court, the file number of the action, and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.

Although the Appellants filed a document labeled as "Summons & Complaint" with the Laurens County Clerk of Court on January 4, 2017, this document did not include the required information, specifically "the time within which these rules require the defendant to appear and defend" or that "in case of his failure to do so judgment by default will be rendered against him." (Complaint, R. p. ____) Because a proper Summons was never filed or served, the trial court had no personal jurisdiction over the Respondents and dismissal of the case was proper and should be affirmed. See SCRCP 4, 12. *See also Louden v. Moragne,* 327 S.C. 465, 486 S.E.2d 525

[7] The rule requires that both be served either within the statute of limitations period or within 120 days after filing.

(Ct.App.1997) ("A court may not enter a valid judgment against an individual over whom the court lacks personal jurisdiction.")

III. THE DISMISSAL WAS WITHOUT PREJUDICE, BUT APPELLANTS WAIVED THEIR RIGHT TO FILE AN AMENDED COMPLAINT BY FILING THE APPEAL.

On June 1, 2017, Appellants failed to appear at the initial hearing on the Respondents' Motion to Dismiss but then almost immediately filed a Motion to Vacate the dismissal. (6/1/17 transcript, R. p. ____; Motion to Vacate, R. p. ____) Despite the fact that they failed to appear at the initial hearing, a second hearing was held on August 1, 2017, wherein the Appellants were given ample opportunity to explain their position.[8] At this second hearing, the Judge specifically stated that the dismissal was not with prejudice and that the Plaintiffs could bring another action, assuming there was no statute of limitation issue. (8/1/17 transcript, p. 17, l. 12-16, R. p. ____) The Judge strongly – and repeatedly - recommended that the Plaintiff retain an attorney if he wanted to re-file the action and specifically advised that a Summons would need to be included. (8/1/17 transcript, p. 18, l. 7-11; p. 19, l. 21 – p. 20, l. 4; p. 21, l. 6 – p. 22, l. 1, R. p. ____)

A dismissal of a case "without prejudice" means that the plaintiff can reassert the same cause(s) of action by curing the defects that led to dismissal. *Spence, supra*,

[8] At the hearing, Judge Addy specifically explained that "one of the reasons I wanted to give you an opportunity to speak is just to sort of have kind of a new rehearing on the question of whether the suit should be dismissed so that I could get your side of the story and your side concerning what should have to this litigation." (8/1/17 transcript, p. 9, l. 23 – p. 10, l. 3, R. p. ____)

(citing *Collins v. Sigmon*, 299 S.C. 464, 385 S.E.2d 835 (1989)).[9] Despite the fact that the trial court made it clear that the Appellants could/should make the necessary changes to the Complaint and serve the required Summons (and even recommended to the Appellants that they consult an attorney), the Appellants chose instead to file a Notice of Appeal on August 31, 2017. (Notice of Appeal, R. _____)

"W]hen a complaint is dismissed without prejudice and the plaintiff is given the opportunity to file and serve an amended complaint, but instead chooses to appeal, the plaintiff ordinarily waives the right to amend his complaint. The appellate court may affirm the dismissal with prejudice if it determines the lower court properly dismissed the complaint." *Spence, supra* (citing *Arkansas Dept. of Environ. Quality v. Brighton*, 352 Ark. 396, 102 S.W.3d 458, 468 (2003)[10]). Here, the Appellants chose to appeal the trial court's ruling rather than amend their Complaint and file a Summons. Therefore, they have waived their right to make such amendments. The case should now be dismissed with prejudice. *See Spence, supra.* This is especially true considering that the two-year statute of limitations provided by the S.C. Tort Claims Act expired on January 5, 2017 and any three-year statute of limitation that the Appellants could try to argue applies expired on January 5, 2018.

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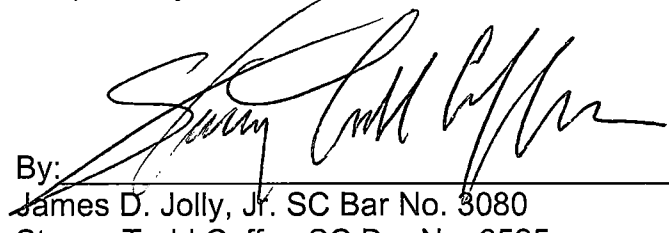
[9] The Appellants attempted to file a document entitled "Amended Complaint" on or about February 25, 2018, after the case was on appeal. (Amended Complaint, R. p. ____) However, this "Amended Complaint" still did not correct the previous deficiencies and did not include a Summons.

[10] "When a complaint is dismissed under Rule 12(b)(6) for failure to state facts upon which relief can be granted, the dismissal should be ... without prejudice. The plaintiff then has the election to either plead further or appeal. When the plaintiff chooses to appeal, he or she waives the right to plead further, and the complaint will be dismissed with prejudice." Internal citations omitted.

CONCLUSION

Based on the fact that the Appellants' Complaint did not state facts sufficient to constitute a cause of action, the Appellants did not file or serve a Summons on the Respondents, the Appellants chose to appeal rather than amend their Complaint (thereby waiving their right to amend), and the Appellants failed to file an Amended Complaint and Summons within either a two-year or three-year statute of limitations, the City Respondents are entitled to dismissal of this action with prejudice.[11]

Respectfully submitted,



By: _____

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[11] Under the "two issue rule," where a lower court's decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds or if any one of the grounds requires affirmance. *See Jones v. Lott,* 387 S.C. 339, 692 S.E.2d 900 (2010).

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Initial Brief of Respondents Ledda, Gainey, Kanipe, and Laurens City Police Department was served by first class mail, postage prepaid this 15th day of May 2018, upon the following:

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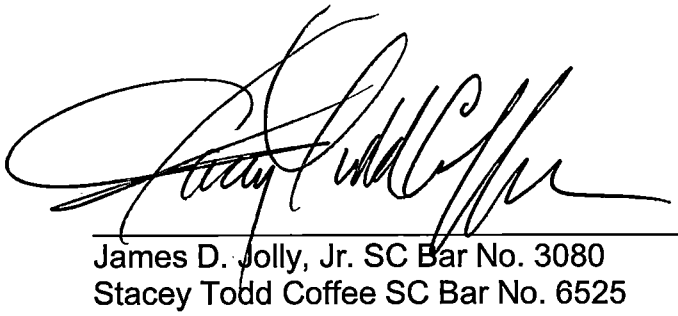

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Case No. 2017-CP-30-0008
Appellate Case No. 2017-001831

Dear Ms. Kitchings:

Please find enclosed for filing the Respondent's Initial Brief, Designation of Matter to be Included in the Record of Appeal, and the Certificate of Service in the above referenced matter. Please return a clocked in copy of the same to me in the enclosed self-addressed stamped envelope.

If you have any questions, please do not hesitate to contact me.

With kind regards, I remain,

Yours very truly,

Logan, Jolly & Smith, LLP

Stacey Todd Coffee

STC:hgc
Enclosure
cc: Mosi Bundu
Malcolm DJ Watts
Russell W. Harter, Jr.

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