

The State of South Carolina
In the Court of Appeals

RECEIVED
MAY 24 2018
SC Court of Appeals

Appeal from Beaufort County
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case Number: 2017-002013

Tonja McAllister,

Appellant,

v.

Susan Cato and CAPA of Beaufort,

Respondents.

Record on Appeal

M. Brooks Derrick
Law Office of M. B. Derrick, LLC
224 NE Main Street
Simpsonville, SC 29681

Jeffrey M. Bogdan
Barwell Whaley Patterson & Helms, LLC
288 Meeting Street, Suite 200
Charleston, SC 29401

Attorney and Counselor for Appellant

Attorney and Counselor for Respondents

Index

Order dated July 3, 2017	2
Form 4 Order dated August 22, 2017	10
Appellant's Complaint filed October 24, 2016	13
Respondent's Motion to Dismiss filed March 6, 2017	18
Appellant's Memorandum in Opposition to Defendants' Motion to Dismiss filed June 20, 2017	53
Appellant's Rule 59(e) Motion to Alter or Amend the Court's Judgement filed July 13, 2017	74
Transcript of Hearing on June 22, 2017	78

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

TONJA McALLISTER,

Plaintiff,

v.

SUSAN CATO and CAPA OF BEAUFORT,

Defendants.

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

C.A. NO.: 2016-CP-07-02253

ORDER

This matter came before the Court on Defendants' Motion to Dismiss the Plaintiff's Complaint under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. Defendants filed their Motion to Dismiss on March 3, 2017. Plaintiff filed her Memorandum in Opposition on June 20, 2017. A hearing was held on June 22, 2017 at the Beaufort County Courthouse. Jeff Bogdan was present and argued on behalf of the Defendants. Brooks Derrick was present and argued on behalf of the Plaintiff. For the reasons set forth below, Defendants' Motion to Dismiss is GRANTED.

BACKGROUND

In January 2008, Plaintiff was arrested for embezzling approximately \$66,000 from Defendant CAPA of Beaufort (Child Abuse Prevention Association), a non-profit charitable organization who at the time was Plaintiff's employer.¹ Plaintiff 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,

¹ Some of these facts were presented as background for the Court and are outside of the Complaint. The Court does not believe that its consideration of these facts, which are a matter of public record, is necessary to grant Defendants' Motion to Dismiss under Rule 12(b)(6).

and \$58,097.50² in restitution to CAPA. Neither of the Defendants here were parties to that criminal case.

On October 24, 2013, days before Plaintiff's five-year probation period was scheduled to expire, she appeared before the court on a hearing to revoke her probation. Neither of the Defendants called for or instituted this hearing. Plaintiff claims that the only issue before the court was whether she satisfied the part of her sentence that required her to pay CAPA restitution. Plaintiff claims that Defendant Susan Cato, who at the time was CAPA's executive director, informed the court that Plaintiff had not satisfied the restitution payments. Specifically, Plaintiff claims that Defendant 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 unfortunate that she hasn't been able to pay it. But, that doesn't diminish the fact that she still owes the money." The Court then revoked Plaintiff's probation and sentenced her to two years in prison, or to pay the remainder of the restitution, which was converted to a Civil Judgment.

Plaintiff appealed the court's decision to revoke her probation and the Court of Appeals reversed and remanded based on case law stating that probation cannot be revoked for simply failing to pay restitution, unless there is a finding of a willful failure to pay as well as inadequate alternative methods of punishment. On remand, Plaintiff's probation and outstanding restitution were discharged and she became and remains a free woman.

Now, on the three-year anniversary of the October 24, 2013 hearing, Plaintiff filed this action against Susan Cato and CAPA alleging abuse of process as the sole cause of action. Plaintiff bases her abuse of process claim on the statement that Defendant Cato made at the October 24,

² The original balance of the restitution was \$66,610.58, but Plaintiff paid a portion of it at her sentencing.

2013 hearing. Plaintiff takes issue with the fact that Ms. Cato informed the Court that Plaintiff had not paid all of the restitution she owed. Plaintiff does not contend that she had paid all of the restitution, or that Defendant Cato said anything that was not true. Instead, Plaintiff claims that, since CAPA had been made whole by receiving benefits from its own insurance carrier, plus partial restitution from the Plaintiff, Defendant Cato's act of telling the Court that Plaintiff had not entirely paid her ordered restitution amounts to an abuse of process. Plaintiff claims that her restitution obligation should have been set-off by the amount CAPA received from its own insurance carrier, and Ms. Cato should have informed the Court that the restitution obligation was therefore satisfied.

Defendants responded to the Plaintiff's Complaint by filing a Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

LAW/ANALYSIS

Rule 12(b)(6) provides the defense of "failure to state facts sufficient to constitute a cause of action."

The abuse of process cause of action allows relief for a party damaged by another's misuse of the legal system. 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).

As a threshold matter, Plaintiff cannot maintain this suit because neither of the Defendants initiated the legal process that Plaintiff claims they abused. Plaintiff did not cite to any South Carolina case that endorsed an abuse of process cause of action against a witness to a legal proceeding who did not initiate, prosecute, or maintain the proceeding. Instead, 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 claim 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 alleging plaintiff was mentally ill and in need of a mandatory mental evaluation and by filing for 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 Sheriff who had plaintiff arrested that resulted in an eighteen hour imprisonment); 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, was the criminal proceeding that the State of South Carolina initiated and prosecuted. Neither of the Defendants initiated or maintained the criminal case against Plaintiff, and Plaintiff's Complaint does not allege that they did. The more specific legal process was the October 24, 2013 hearing regarding Plaintiff's 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 Defendants called for this hearing, and Plaintiff's Complaint does not allege that they did. Defendant Cato was merely a victim witness at the October 24, 2013 hearing. Since the Defendants did not initiate the process that Plaintiff claims they abused, Defendants cannot be liable for abusing that process. Accordingly, Plaintiff's Complaint fails to set forth facts that, if accepted as true, would support her sole abuse of process cause of action. Therefore, Plaintiff's Complaint must be dismissed in its entirety.

Alternatively, Plaintiff's Complaint fails to allege facts to satisfy the two necessary elements of an abuse of process tort. A plaintiff alleging abuse of process in South Carolina must

assert two essential elements: 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). As to the first element, “[a]n ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process.” First Union Mortgage Corp. v. Thomas, 317 S.C. 63, 74, 451 S.E.2d 907, 914 (Ct. App. 1994). An allegation that a defendant had a bad motive of an ulterior purpose is insufficient, standing alone, to support an abuse of process claim. Palleres, 407 S.C. at 371, 756 S.E.2d at 233. Further, if a defendant has an incidental or concurrent motive of spite or simply seeks to gain a collateral advantage from the process, there is no abuse of process. Id. “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. Id. 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, 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).

Here, Plaintiff claims that Defendants abused the process because Susan Cato told the Court that Plaintiff still owed restitution to CAPA, even though CAPA had already been made whole by another source. Plaintiff believes that her restitution should have been set off by the amount CAPA received from its own insurance carrier, such that she did not owe CAPA any more restitution as of the October 2013 hearing. The Court need not decide whether Plaintiff was

entitled to a set-off or whether she still owed restitution. The purpose of the October 2013 hearing was to determine what restitution Plaintiff owed. According to Plaintiff's Complaint, Defendant Cato simply told the court that Plaintiff still owed restitution. Even if that statement was false, and even if Ms. Cato knew it was false, the statement does not amount to an abuse of process. A determination of restitution was the exact objective of the hearing. It was the court's function to determine what, if any, restitution Plaintiff still owed. Ms. Cato's statement was just one factor for the court to consider. Ms. Cato's statement that Plaintiff still owed restitution, even if false, was still not aimed at an illegitimate objective. Accordingly, Plaintiff's Complaint fails to set forth facts that, if accepted as true, would support its sole abuse of process cause of action. Therefore, it must be dismissed in its entirety.

Finally, the Court does not agree that Plaintiff was entitled to set off her restitution obligation by the amount CAPA received from its own insurer. 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 of South Carolina discussed the interplay between criminal restitution awards and civil recoveries. The Court of Appeals adopted the reasoning that "[u]like 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. Morgan argued that because *his* insurance carrier paid a civil settlement to the victim and the victim executed a covenant not to

execute any judgment against Morgan, the circuit court could not require Morgan to pay the victim restitution. The Court of Appeals disagreed, and allowed the restitution order to stand, finding that “the constructs of restitution and civil damages are separate and distinct.” *Id.* at 344, 790 S.E.2d at 30. In a footnote, the Court of Appeals suggested that Morgan may be entitled to a restitution set-off in the amount paid by *his own* insurance carrier.

Here, Plaintiff was not responsible, either personally or through another source, for tendering an amount of money to CAPA that exceeded the restitution due. Instead, CAPA was compensated partly by the Plaintiff, but mostly by its own insurance carrier as a result of insurance coverage for which CAPA paid premiums. Plaintiff 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. 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 v. Hicks, 284 S.C. 456, 327 S.E.2d 342 (1985) (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). Further, relieving the Plaintiff or her court-imposed restitution payments because CAPA received benefits from its own insurance carrier would circumvent the second purpose of restitution: to serve the rehabilitative, deterrent, and retributive goals of the criminal justice system.

CAPA had a right to the entire restitution amount from the Plaintiff, regardless of the amount they had already collected from their own insurance carrier. Accordingly, Ms. Cato’s statement was not an abuse of process and Plaintiff’s Complaint must be dismissed.

IT IS HEREBY ORDERED THAT Defendants’ Motion to Dismiss is GRANTED.



Beaufort Common Pleas

Case Caption: Tonja Mcallister VS Susan Cato , defendant, et al
Case Number: 2016CP0702253
Type: Order/Dismissal

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2017-07-03 10:58:13 page 8 of 8

STATE OF SOUTH CAROLINA
 COUNTY OF BEAUFORT
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NO. 2016 CP-07-02253

Tonja McAllister
 PLAINTIFF(S)

Susan Cato et, al.
 DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT:** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

MOTION TO ALTER OR AMEND THE COURT'S JUDGMENT PURSUANT TO RULE 59(e) is DENIED. NO FORMAL ORDER IS REQUESTED.

This order ends does not end the case.

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

	2155	
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of _____, 20____ to attorneys of record or to parties (when appearing pro se) as follows:

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.



Beaufort Common Pleas

Case Caption: Tonja Mcallister VS Susan Cato , defendant, et al
Case Number: 2016CP0702253
Type: Order/Form 4

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2017-08-22 09:29:05 page 3 of 3

State of South Carolina

County of Beaufort

Tonja McAllister,

Plaintiff,

v.

Susan Cato and CAPA of Beaufort,

Defendant.

Court of Common Pleas
Fourteenth Judicial Circuit

Case No.: 2016-CP-__ -__

Complaint
(Abuse of Process)

Jury Trial Demanded

JERRI ANN ROSEHEAVY
BEAUFORT COUNTY, S.C.
CLERK OF COURT

2016 OCT 24 PM 2:36

Plaintiff Tonja McAllister brings this action against Defendant Susan Cato based on the allegations set forth below.

Parties, Jurisdiction, and Venue

1. Plaintiff is a resident of Beaufort County, South Carolina.
2. Upon information and belief, Defendant Cato is a resident of Beaufort County, SC.
3. Defendant CAPA of Beaufort is a non-profit charitable organization located in Beaufort County, SC.
4. At all times relevant to these allegations, Defendant Cato was an employee of the charitable organization and acting with the scope of her employment.
5. This Court has jurisdiction over the parties to and the subject matter of this action, and venue is proper in Beaufort County under § 15-7-30 of the Code of

Laws of South Carolina in that the most substantial part of the alleged acts or omissions giving rise to the cause of action occurred in Beaufort County.

Facts

6. Plaintiff incorporates the allegations of paragraphs 1 through 5 above.
7. On or about October 27, 2008, Plaintiff was sentenced to five years' probation and to pay restitution.
8. Plaintiff's probation was set to end on October 27, 2013.
9. On or about October 24, 2013, Plaintiff appeared before the Honorable Carmen T. Mullen for a hearing regarding the potential revocation of her probation.
10. The only issue before the court on the revocation was Plaintiff's alleged outstanding restitution. As the probation officer stated, "[I]t was just the monetary obligation."
11. During the hearing, the court requested Defendant Cato's position regarding restitution.
12. She stated the following, "Well, I'm disappointed that probation can't be extended, because she does owe that money. . . . So, you know, she does owe the money. She stole the money. So, it's just unfortunate that she hasn't been able to pay it. But, that doesn't diminish the fact that she still owes the money."
13. Following a break, the court returned and found that Plaintiff had violated her parole and sentenced her to two years in prison.

14. In response to the court's findings, Defendant Cato asked the court, "Can you explain to me what just happened?"

15. "I just put her in prison for two years," the court responded.

16. Defendant Cato stated, "Thank you."

17. The court further stated, "There's nothing else I can do. Again, I can't get money out of her. I don't have the power to extend it. If I could, I would. I wish I could put her on probation for the next 20 years, because I would love to get you paid back, but unfortunately, my hands are tied."

18. Following the revocation, James Arthur Brown, Jr. appealed the decision, and on December 3, 2014 the Court of Appeals reversed and remanded the revocation.

19. As a result of the revocation, Plaintiff was incarcerated for 31 days and lost her job.

20. Then, at Plaintiff's rehearing on February 10, 2015, Plaintiff learned that Defendant CAPA of Beaufort in fact had been made whole and received money in excess of the \$66,610.58 original balance.

21. Upon information and belief, Defendant Cato received the following payments:

- a. \$8,000.00 from Plaintiff at the time of her sentencing;
- b. Approximately \$17,075.00 in restitution payments throughout her probation; and

c. \$50,000.00 from Defendant CAPA of Beaufort's insurance policy.

22. Upon information and belief, Defendant CAPA of Beaufort ultimately received approximately \$9,000.00 in excess of the amount that it originally lost.

First Cause of Action
(Abuse of Process)

23. Plaintiff incorporates the allegations of paragraphs 1 through 22 above.

24. Defendant Cato acted with an ulterior purpose, one not legitimate in the use of the process, when she used Plaintiff's probation to extract money in excess of the amount that was lost by Defendant Cato.

25. Defendant Cato acted willfully at the revocation hearing when the court asked for her position on the restitution, and she stated that the balance was still outstanding.

26. This act was aimed at the illegitimate collateral objective of extracting more money from Plaintiff.

27. As a direct and proximate result of Defendant Cato's negligent, reckless, willful, and grossly negligent actions, Plaintiff suffered damages, including—but not limited to—time in prison, loss of job, depression, and anxiety.

28. Therefore, Plaintiff is entitled to actual, consequential, and punitive damages.

Jury Demand

29. Pursuant to Rule 38 of the South Carolina Rules of Civil Procedure, Plaintiff respectfully requests a trial by jury.

Prayer for Relief

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment against Defendants and that Plaintiff be awarded:

- A. Actual damages;
- B. Consequential damages;
- C. Punitive damages;
- D. Post-judgment interest;
- E. Reasonable attorneys' fees and costs of this action; and
- F. Such other and further relief as this Court deems just and appropriate.

Law Office of M. Brooks Derrick, LLC

M. Brooks Derrick

M. Brooks Derrick (S.C. Bar No.: 76330)
224 NE Main Street
PO Box 967
Simpsonville, SC 29681
Office: (864) 881-2281
Fax: (864) 729-3680
bderrick@derricklawoffice.com

Attorney and Counselor for Plaintiff

*by Cary Jacarun
with permission*

October 24, 2016

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

TONJA McALLISTER,

Plaintiff,

v.

SUSAN CATO and CAPA OF BEAUFORT,

Defendants.

IN THE COURT OF COMMON PLEAS

FOURTEENTH JUDICIAL CIRCUIT

C.A. NO.: 2016-CP-07-02253

**NOTICE OF MOTION AND MOTION TO
DISMISS**

PLEASE TAKE NOTICE that the Defendants Susan Cato and CAPA of Beaufort (hereinafter "Defendants") by and through their undersigned counsel will move before the Presiding Judge of the Fourteenth Judicial Circuit, at such time and place as counsel may be heard, for an Order dismissing Plaintiff's Complaint pursuant to South Carolina Rules of Civil Procedure 12(b)(6) because the Plaintiff failed to state facts sufficient to constitute an abuse of process cause of action, which is the only cause of action advanced in her Complaint. To the extent that matters outside of the pleadings are presented to and not excluded by the Court, the Defendants request that the Court treat this Motion as one for summary judgment and grant it based on Rule 56 of the South Carolina Rules of Civil Procedure.

INTRODUCTION

Plaintiff, a former employee of Defendant Child Abuse Prevention Association (hereinafter "CAPA"), a non-profit organization, was arrested, charged with, and pleaded guilty to stealing money from the charitable organization. She was sentenced to three years in prison, but her jail time was suspended so long as she completed five years' probation and paid CAPA over \$60,000 in restitution. Plaintiff attended a hearing days before her five-year probation

period expired where Defendant Susan Cato, then-executive director of CAPA, truthfully answered the Court's inquiry by stating that Plaintiff had not paid CAPA the full amount of restitution. The Court revoked Plaintiff's probation and sentenced her to two years in prison. Plaintiff appealed the Court's revocation, and the Court of Appeals reversed and remanded, finding that probation cannot be revoked for failure to pay restitution, unless the failure to pay was willful. On remand, Plaintiff's probation and outstanding restitution were discharged.

Plaintiff now has sued Susan Cato and CAPA for truthfully informing that Court that she had not paid all of her required restitution. Plaintiff alleges that these statements were an abuse of process because Defendant CAPA had already been repaid the full amount that Plaintiff stole from it - - through the partial restitution payments Plaintiff did make and from the proceeds from a claim that CAPA submitted to *its* insurance carrier.

Defendants request that the Court dismiss the Plaintiff's Complaint because it fails on its face to allege facts that support an abuse of process cause of action. Specifically, Plaintiff's Complaint does not allege: (1) an ulterior purpose, (2) a willful act, or (3) that the alleged abuse of process proximately caused any damages.

FACTS

In January 2008, Plaintiff was arrested for embezzling approximately \$60,000 from CAPA, who at the time was Plaintiff's employer. See printout from online case file from State v. McAllister, Case No. I260686, attached hereto as Exhibit A.¹ Plaintiff was charged with Breach of Trust with Fraudulent Intent in an amount greater than \$5,000 and, after pleading guilty, was

¹ Defendants present these facts and exhibits as background for the Court. Defendants do not believe the Court's consideration of these facts or exhibits are necessary to grant Defendants' Motion to Dismiss under Rule 12(b)(6). However, should the Court find them necessary, resulting in consideration of material outside of the pleadings, Defendants request that the Court convert this Motion to Dismiss to a Motion for Summary Judgment and grant it under Rule 56.

sentenced to three years in prison, suspended on five years' probation and payment of costs, assessments, and \$58,097.50² in restitution to CAPA. Id. Neither of the Defendants here were parties to that criminal case.

On October 24, 2013, days before Plaintiff's five-year probation period was scheduled to expire, she appeared before the court on a hearing to revoke her probation. Compl. ¶9. Neither of the Defendants called for or instituted this hearing. Plaintiff claims that the only issue before the court was whether she satisfied the part of her sentence that required her to pay CAPA restitution. Compl. ¶10. Plaintiff claims that Defendant Cato informed the court that Plaintiff had not satisfied the restitution payments. Comp. ¶12. The Court then revoked Plaintiff's probation and sentenced her to two years in prison, or to pay the remainder of the restitution, which was converted to a Civil Judgment. Compl. ¶13; see also Order dated 10/24/13, attached as Exhibit B and Civil Judgment dated 10/24/13, attached as Exhibit C.

Plaintiff appealed the court's decision to revoke her probation and the Court of Appeals reversed and remanded based on case law stating that probation cannot be revoked for simply failing to pay restitution, unless there is a finding of a willful failure to pay as well as inadequate alternative methods of punishment. Compl. ¶18. See State v. McAllister, 2014-UP-433 (December 3, 2014), attached hereto as Exhibit D. On remand, Plaintiff's probation and outstanding restitution were discharged. See 2/10/15 Order, attached hereto as Exhibit E.

Before filing this suit against the Defendants, Plaintiff 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. Plaintiff claimed that her damages included "time in prison, loss of job, depression, and anxiety." After the defendant attorney filed

² The original balance of the restitution was \$66,610.58, but Plaintiff paid a portion of it at her sentencing. Compl. ¶20.

a Motion to Dismiss, Plaintiff agreed to dismiss that case with prejudice. See Complaint, Motion to Dismiss, and Stipulation of Dismissal with Prejudice, attached hereto collectively as Exhibit F.

Now, on the three-year anniversary of the October 24, 2013 hearing, Plaintiff filed this action against Susan Cato and CAPA for abuse of process. Plaintiff bases her abuse of process claim on the statement that Defendant Cato, who at the time was an employee of CAPA, made at the October 24, 2013 hearing. Compl. ¶¶ 24-26. Plaintiff takes issue with the fact that Ms. Cato informed the Court that Plaintiff had not paid all of the restitution she owed. Compl. ¶¶ 12-17. Plaintiff does not contend that she had paid all of the restitution, or that Defendant Cato said anything that was not true. Instead, Plaintiff seems to claim that, since CAPA had been made whole by receiving insurance proceeds plus partial restitution from the Plaintiff, Defendant Cato's act of telling the Court that Plaintiff had not entirely paid her ordered restitution amounts to an abuse of process. Compl. ¶¶ 20-21. Plaintiff claims that her damages include "time in prison, loss of job, depression, and anxiety." Compl. ¶27.

LAW/ANALYSIS

The abuse of process cause of action allows relief for a party damaged by another's misuse of the legal system. 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). A plaintiff alleging abuse of process in South Carolina must assert two essential elements: 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).

1. PLAINTIFF'S COMPLAINT DOES NOT PROPERLY ALLEGE AN ULTERIOR PURPOSE

As to the first element, "[a]n ulterior purpose exists if the process is used to gain an objective not legitimate in the use of the process." First Union Mortgage Corp. v. Thomas, 317

S.C. 63, 74, 451 S.E.2d 907, 914 (Ct. App. 1994). An allegation that a defendant had a bad motive of an ulterior purpose is insufficient, standing alone, to support an abuse of process claim. Palleres v. Seiner, 407 S.C. 359, 371, 756 S.E.2d 128, 233 (2014). Further, if a defendant has an incidental or concurrent motive of spite or simply seeks to gain a collateral advantage from the process, there is no abuse of process. Id. “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. Id.”

Plaintiff alleges that the Defendants’ ulterior purpose was to “use Plaintiff’s probation to extract money in excess of the amount that was lost by Defendant Cato.” Compl. ¶24. In other words, Plaintiff claims that the Defendants’ ulterior purpose was to collect the full amount of the restitution that the court ordered Plaintiff 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. As an initial matter, the statements that Defendant Cato made, as quoted in the Plaintiff’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, Defendant Cato truthfully informed the court that Plaintiff still owed the restitution money. According to the Complaint, Defendant Cato did not say that the Defendants demanded that Plaintiff make full payment of the entire restitution award. Plaintiff does not dispute that she still owed restitution money and, therefore, Defendant Cato was simply responding truthfully to the court’s inquiry.

Next, even if Defendant Cato told the Court that Plaintiff still owed restitution money *and* demanded that Plaintiff pay all of it, such a statement would not rise to an abuse of process. Despite the fact that CAPA had already recovered more than what Plaintiff stole from it –

approximately \$25,000 from Plaintiff herself and another \$50,000 from CAPA's own insurance policy – CAPA was still entitled to collect the remaining restitution award from Plaintiff. 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. §16-3-110(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 of South Carolina discussed the interplay between criminal restitution awards and civil recoveries. The Court of Appeals adopted the reasoning that “[u]like 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. Morgan argued that because his insurance carrier paid a civil settlement to the victim and the victim executed a covenant not to execute any judgment against Morgan, the circuit court could not require Morgan to pay the victim restitution. The Court of Appeals disagreed, and allowed the restitution order to stand, finding that “the constructs of restitution and civil damages are separate and distinct.” Id. at 344, 790 S.E.2d at 30.

Here, the Court properly awarded CAPA restitution. That order of restitution is separate and distinct from any amount of money that CAPA may collect from Plaintiff by way of a civil

proceeding. Id. Certainly, the restitution is separate and distinct from any money CAPA may collect from a collateral source that is wholly unrelated to the Plaintiff, such as CAPA's *own* insurance carrier. Plaintiff 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. 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 v. Hicks, 284 S.C. 456, 327 S.E.2d 342 (1985) (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).

CAPA had a right to the entire restitution amount from the Plaintiff, 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 Plaintiff alleges was said, would have been a legitimate statement made in the course of the October 24, 2013 hearing. This statement cannot support the first element of an abuse of process claim and, therefore, the claim must fail as a matter of law.

2. PLAINTIFF'S COMPLAINT DOES NOT PROPERLY ALLEGE A WILLFUL ACT

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, 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).

Plaintiff alleges that Defendants' willful act was when Defendant Cato told 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 the Plaintiff. 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, Defendant Cato's act of telling the court that Plaintiff still owed restitution, even if done for the purpose of collecting the full amount of restitution despite the fact that CAPA had already recovered the full amount that Plaintiff stole, was not unauthorized or aimed at an illegitimate collateral objective. Therefore, Plaintiff cannot satisfy the second prong of an abuse of process claim and it must fail as a matter of law.

Further, Plaintiff's claim for abuse of process must fail because the Defendants did not initiate the process that Plaintiff claims they abused. The Defendants were not a party to Plaintiff's criminal action, and did not call for or institute the probation hearing (the process that Plaintiff claims the Defendants abused) contained therein. That hearing 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"). Defendant Cato was merely a victim witness at the October 24, 2013 hearing. Since the Defendants did not initiate the process that Plaintiff claims they abused, Defendants cannot be liable for abusing that process.

3. PLAINTIFF'S COMPLAINT DOES NOT PROPERLY ALLEGES THAT HER DAMAGES WERE PROXIMATELY CAUSED BY DEFENDANTS' ALLEGED ABUSE OF PROCESS

Plaintiff alleges that Defendants' alleged abuse of process proximately caused her damages because she briefly went to prison as a result of not paying the complete restitution.

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

Further, the Court of Appeals ultimately reversed the circuit court's revocation of Plaintiff'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 Defendant Cato said at the hearing, Plaintiff's probation should not have been revoked. Accordingly, Defendant Cato's statements at the March 24, 2013 hearing did not proximately cause Plaintiff any damages.

CONCLUSION

Plaintiff's Complaint fails to allege facts to support her sole cause of action for abuse of process. It fails to properly allege an ulterior purpose, a willful act, or proximate causation of any damages. Defendants did not even initiate the legal process that Plaintiff claims they abused. Accordingly, the Defendants respectfully request that the Court dismiss Plaintiff's Complaint pursuant to Rule 12 or, alternatively grant summary judgment pursuant to Rule 56.

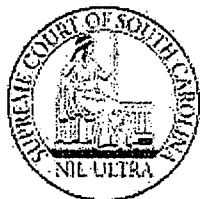
[Signature line on following page]

BARNWELL WHALEY PATTERSON & HELMS, LLC

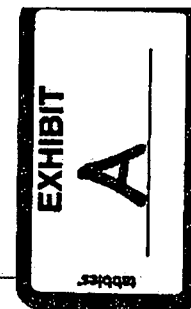
By: s/Jeffrey M. Bogdan
M. Dawes Cooke, Jr.
Jeffrey M. Bogdan
P.O. Drawer H (29402)
288 Meeting Street, Suite 200
Charleston, SC 29401
jbogdan@barnwell-whaley.com
Telephone: 843-577-7700
Facsimile: 843-577-7708

Attorneys for Defendants

March 3, 2017



Beaufort County Fourteenth Judicial Circuit Public Index



Beaufort County Home Page [South Carolina Judicial Department Home Page](#) [SC.GOV Home Page](#)

Switch View

The State of South Carolina VS Tonja Kerrin Mcallister

Case Number:	I260686	Court Agency:	Beaufort County General Sessions	Filed Date:	01/15/2008
Case Type:	Criminal-Clerk	Case Sub Type:			
Status:	Disposed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court	Disposition Judge:	Mullen, Carmen Tevis
Disposition:	Pled Guilty				
Disposition Date:	10/27/2008	Date Received:	01/15/2008	Arrest Date:	01/14/2008
Law Enf. Case:		True Bill Date:	03/20/2008	No Bill Date:	
Prosecutor Case:		Indictment Number:	2008GS0700248	Waiver Date:	
Probation Case:					

Case Parties Charges Sentencing Associated Cases Actions Financials Bonds

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
McAllister, Tonja Kerrin	Order/Defendant is not subject to Civil Judgement	Order		03/25/2016-14:55		
McAllister, Tonja Kerrin	Form 9	Filing		02/10/2015-00:00		
McAllister, Tonja Kerrin	Order/From Court Of Appeals	Order		12/22/2014-11:00		
McAllister, Tonja Kerrin	Appeal/Notice of Appeal	Action		11/25/2013-15:35		
McAllister, Tonja Kerrin	Bond Form - Appeal Bond	Filing		11/22/2013-14:15		
McAllister, Tonja Kerrin	Bond/Bond Paperwork	Filing		11/22/2013-10:57		
McAllister, Tonja Kerrin	Amended Petition for Appeal Bond	Filing		11/22/2013-08:30		
McAllister, Tonja Kerrin	Filing/Filing Ofn Petition For Appeal Bond	Filing		11/21/2013-09:21		
McAllister, Tonja Kerrin	Appeal/Notice of Appeal	Action		11/05/2013-16:43		
McAllister, Tonja Kerrin	Order Denying Motion to Reconsider Probation Revocation	Order		11/01/2013-09:12		
McAllister, Tonja Kerrin	Motion to Reconsider Probation Revocation	Motion		10/31/2013-09:52		
McAllister, Tonja Kerrin	Affidavit of Indigency (No	Filing		10/24/2013-		

	Fee)			11:15		
Mcallister, Tonja Kerrin	Order/Appointment Of Attorney	Order		10/24/2013-10:00		62
Mcallister, Tonja Kerrin	Form 9	Filing		08/26/2010-13:35		
Mcallister, Tonja Kerrin	Form 9	Filing		10/29/2009-09:28		
Mcallister, Tonja Kerrin	Active - Probation	Filing		10/27/2008-10:01		
Mcallister, Tonja Kerrin	Arraignment Packet	Filing		01/15/2008-16:07	10/27/2008-00:00	
Mcallister, Tonja Kerrin	MCALLISTER, TONJA KE-FILING	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA KE-FILING	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA KE-ARRPKT	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA KE-ACTPRB	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA-AMENDA	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA-APPNOA	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA-OAPATY	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA-INDFEE	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA-FILING	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA-BONDPW	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA-BONDPW	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA-OCIVJUD	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA-FORM9	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA-MOFREE	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA-ORDER	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA-APPNOA	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA-FORM9	Filing				
Mcallister, Tonja Kerrin	MCALLISTER, TONJA-OOCTAP	Filing				



Beaufort County Fourteenth Judicial Circuit Public Index



Beaufort County Home Page [South Carolina Judicial Department Home Page](#) [SC.GOV Home Page](#)

Switch View

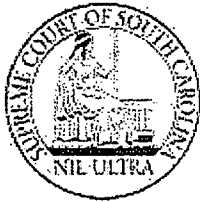
The State of South Carolina VS Tonja Kerrin Mcallister

Case Number:	I260686	Court Agency:	Beaufort County General Sessions	Filed Date:	01/15/2008
Case Type:	Criminal-Clerk	Case Sub Type:			
Status:	Disposed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court	Disposition Judge:	Mullen, Carmen Tevis
Disposition:	Pled Guilty				
Disposition Date:	10/27/2008	Date Received:	01/15/2008	Arrest Date:	01/14/2008
Law Enf. Case:		True Bill Date:	03/20/2008	No Bill Date:	
Prosecutor Case:		Indictment Number:	2008GS0700248	Waiver Date:	
Probation Case:					

Case Parties Charges Sentencing Associated Cases Actions Financials Bonds

Name	Charge Code - Charge Description	Original Charge Code - Original Charge	Disposition Date
Mcallister, Tonja Kerrin	0421-Breach / Breach of trust with fraudulent intent, value \$5,000 or more	0421-Breach / Breach of trust with fraudulent intent, value \$5,000 or more	10/27/2008

CMSWeb 6.1 © 2013 South Carolina Judicial Department • All rights reserved



Beaufort County Fourteenth Judicial Circuit Public Index



Beaufort County Home Page [South Carolina Judicial Department Home Page](#) [SC.GOV Home Page](#)

Switch View

The State of South Carolina VS Tonja Kerrin Mcallister

Case Number:	I260686	Court Agency:	Beaufort County General Sessions	Filed Date:	01/15/2008
Case Type:	Criminal-Clerk	Case Sub Type:			
Status:	Disposed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court	Disposition Judge:	Mullen, Carmen Tevis
Disposition:	Pled Guilty				
Disposition Date:	10/27/2008	Date Received:	01/15/2008	Arrest Date:	01/14/2008
Law Enf. Case:		True Bill Date:	03/20/2008	No Bill Date:	
Prosecutor Case:		Indictment Number:	2008GS0700248	Waiver Date:	
Probation Case:					

Case Parties Charges Sentencing Associated Cases Actions Financials Bonds

And/Or	Description	Amount	Units	Begin Date	End Date	Completion Date	Consecutive or Concurrent
	3 years SCDC the balance is suspended with probation for 5 years + costs and assessments. Credit for time served. PTUP after 2 years. \$58,097.50 restitution.						
	Probation is reduced to time served under supervision and the defendant is discharged from supervision on this date. 02/10/2015. No Civil Judgement						

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

County of Beaufort
STATE VS.

Indictment Number: 2008 -GS- 07 - 248
Probation C/W #s: C-07-13-0023

Tonja McAllister 10/24 PM 4:53
AKA: _____
Race: Blk Sex: F ROSENEAU
DOB: _____ BEAUFORT COUNTY, S.C.
SSN: _____
SID#: _____

Name of Original Offense: BOT w/ Fraud Intent
Original A/W #: I 260686
Date of Original Offense: 8-2-2007
Conviction S.C. Code §: 16-13-0230(B)(7)
Conviction CDR Code #: 0141211
Original Sentence: 3yrs Susp, 5yrs Probation

ORDER

The above named defendant has been charged with violating the conditions of probation ordered on 10/18/2008 in the Court of General Sessions of Beaufort County, and/or the additional conditions ordered by the Court in probation continuation order(s) issued on 10-29-09 and 8-20-10, as set forth in the attached warrant(s) or citation(s) dated 7-9-10 and 10-20-09. After hearing the evidence and being duly advised, in the (presence/absence) of the defendant, I find that the above named defendant has violated the following condition(s) of probation: (List by number or indicate special conditions as provided in the affidavit)

Therefore, IT IS ORDERED that:

- the suspended sentence be revoked and the above named defendant be required to serve 2 months/years the remainder of the original sentence, and/or pay \$ CJ.
- the suspended sentence be revoked and the above named defendant be required to serve _____ months/years of the original sentence and/or pay \$ _____; thereupon to be reinstated on probation, subject to the conditions set forth in the attached order and not inconsistent with this order.
- the above named defendant is continued on probation as provided for in the original sentence, subject to the conditions set forth therein and not inconsistent with this order.
- probation is reduced to time served under supervision and the defendant is discharged from supervision on this date.
- the above named defendant is placed on active electronic monitoring pursuant to §23-3-540 (mandatory if convicted of first degree criminal sexual conduct with a minor or lewd act, discretionary if convicted of any other applicable sex offense against a minor).

Financial Obligations: Order satisfies: Department fees (arrearage) Civil judgment: Department fees
 Fines and other fees (arrearage/balance) Fines and other fees
 Restitution (and 20%) (arrearage/balance) Restitution (and 20%)

Additional Conditions ordered by the Court:
Revoke 2yrs with CJ.

- The defendant is given credit for pre-revocation hearing detention time on current probation violation to be calculated and applied by the SC Department of Corrections.
- The defendant has previously served _____ months/years on this sentence. (split sentence time and/or prior partial revocation time)
- The defendant was previously placed on active electronic monitoring pursuant to §23-3-540.



This 24th day of October, 2013,
Beaufort, SC

[Signature]
Presiding Judge 14th Judicial Circuit

You are hereby advised that under the law the Court may at any time revoke or modify any condition of this probation; impose any lawful conditions it deems proper; or extend your period of probation not to exceed five (5) years. At any time within the period of your probation, the Court may require you to serve any part of the original sentence imposed.

This is to certify that I have read, or have had read to me, the order and the conditions set out therein. I agree to comply with such conditions and the conditions of my attached probation order during the period of my probation. I have received a copy of this Court's order and all attachments.

Offender's Signature [Signature]
Signed this 24th day of October, 2013, at _____
Day Month Year

Witnessed by [Signature]
_____ at Beaufort SC
City

STATE OF SOUTH CAROLINA

COUNTY OF

Beaufort

STATE
V.

DEFENDANT

Tonja McAllister

Hearing Date:

10, 24, 2013

IN THE COURT OF GENERAL SESSIONS

2013 CP-07-2809

NO. 2008-GS-07-248

1260656

CIVIL JUDGMENT

13 OCT 24 PM 4:53
CLERK OF COURT
BEAUFORT COUNTY, S.C.

This matter came before me on the above mentioned date, pursuant to a motion to require the defendant to show cause why the defendant's default in paying fines and restitution (strike inapplicable) should not be treated as a civil judgment and a judgment lien attached. After hearing the evidence, I find that no cause was shown why judgment should not be entered for the unpaid balance of fines and restitution (strike inapplicable). I find the unpaid balance of the fine and restitution (Strike inapplicable) due and the payee to be as stated below.

It is therefore ordered adjudged and decreed that the payee, shall have judgment against the defendant in the sum stated below. It is further ordered that the clerk of court enter this judgment in the civil judgment records of the court. All of which is ordered pursuant to S. C. Code Ann. 17-25-323.

Payee's Name	Susan Cato		
Payee's Address	Child Abuse Prevention Association		
Street	P.O. Box 531		
City	Beaufort, SC	State	Zip 29901

The Defendant is ordered to pay to the Payee the sum of
\$ 41,809.14

EXHIBIT
C

Presiding Judge's Signature	Date
<i>[Signature]</i>	10/24/2013
Judge's Name Printed	Beaufort s. 93
Cornel T. Muller	

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

The State, Respondent,

v.

Tonja McAllister, Appellant.

Appellate Case No. 2013-002401

Appeal From Beaufort County
Carmen T. Mullen, Circuit Court Judge

Unpublished Opinion No. 2014-UP-433
Submitted October 1, 2014 – Filed December 3, 2014

REVERSED AND REMANDED

James Arthur Brown, Jr., of Law Offices of Jim Brown,
P.A., of Beaufort, for Appellant.

Matthew C. Buchanan, of South Carolina Department of
Probation, Parole and Pardon Services, of Columbia, for
Respondent.

PER CURIAM: Reversed pursuant to Rule 220(b), SCACR, and the following
authorities: *Bearden v. Georgia*, 461 U.S. 660, 668-69 (1983) (holding a trial
court cannot revoke probation solely because the probationer failed to pay



restitution unless the trial court finds the probationer willfully failed to pay and alternative methods of punishment are inadequate); *Barlet v. State*, 288 S.C. 481, 483, 343 S.E.2d 620, 622 (1986) ("Probation may not be revoked *solely* on the ground the probationer failed to pay fines or to make restitution. The [trial court] must determine on the record that the probationer failed to make a bona fide effort to pay." (alteration added)); *State v. Hamilton*, 333 S.C. 642, 649, 511 S.E.2d 94, 97 (Ct. App. 1999) (holding a trial court is justified in using imprisonment as punishment for failure to pay restitution only when there is a willful failure to pay, and a court must make a finding of willfulness in addition to finding sufficient factual evidence of a probation violation); *State v. Spare*, 374 S.C. 264, 269, 647 S.E.2d 706, 708-09 (Ct. App. 2007) (holding a willful failure to pay is a "voluntary, conscious and intentional failure" and the trial court may infer willfulness "where a probationer has the ability to pay . . . but does not do so" (internal quotation marks omitted)); *Nichols v. State*, 308 S.C. 334, 337, 417 S.E.2d 860, 862 (1992) (holding a probationer's due process rights are violated by the deprivation of conditional freedom unless the trial court determines the probationer has not made a bona fide effort to pay); *State v. Coker*, 397 S.C. 244, 245-46, 723 S.E.2d 619, 620 (Ct. App. 2012) (reversing and remanding for the trial court to make the following findings required by *Spare*: (1) the State presented sufficient evidence to establish that the probationer violated the conditions of his probation; (2) the probationer made a willful choice not to pay in that he had the ability to pay and chose not to do so, or lacked the ability to pay and did not make a bona fide effort to acquire the necessary funds; and (3) if the court finds the probationer could not pay despite bona fide efforts to acquire the resources to do so, the court must make a finding that alternate measures are inadequate to meet the State's interests in punishment and deterrence before imprisoning the probationer (citations omitted)).

REVERSED AND REMANDED.¹

FEW, C.J., and THOMAS and LOCKEMY, JJ., concur.

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

STATE OF SOUTH CAROLINA

IN THE COURT OF GENERAL SESSIONS

County of Beaufort

2008 -GS- 07-248 Indictment Number:

STATE VS.

Probation C/W#s: C-07-13-0023

Tonia McAllister

Name of Original Offense: BOT w/ Fraudulent Intent

AKA: _____

Original A/W#: I 260686

Race: B Sex: F

Date of Original Offense: 8-2-07

DOB: 3-13-

Conviction S.C. Code §: 16-13-0230(B)(3)

SSN: _____

Conviction CDR Code #: 01 41 21 1

SID#: 01765061

Original Sentence: 3 yrs SS 5 yrs. Probation

ORDER

The above named defendant has been charged with violating the conditions of probation ordered on 10/27/08 in the Court of General Sessions of Beaufort County, and/or the additional conditions ordered by the Court in probation continuation orders(s) issued on 8/26/10; 10/29/09, as set forth in the attached warrant(s) or citation(s) dated 10/15/13. After hearing the evidence and being duly advised, in the (presence) of the defendant, I find that the above named defendant has violated the following condition(s) of probation: (List by number or indicate special conditions as provided in the affidavit)
Special Conditions

Therefore, IT IS ORDERED that:

- the suspended sentence be revoked and the above named defendant be required to serve _____ months/years, the remainder of the original sentence, and/or pay \$ _____.
- the suspended sentence be revoked and the above named defendant be required to serve _____ months/years of the original sentence and/or pay \$ _____; thereupon to be reinstated on probation, subject to the conditions set forth in the attached order and not inconsistent with this order.
- the above named defendant is continued on probation as provided for in the original sentence, subject to the conditions set forth therein and not inconsistent with this order.
- probation is reduced to time served under supervision and the defendant is discharged from supervision on this date.
- the above named defendant is placed on active electronic monitoring pursuant to §23-3-540 (mandatory if convicted of first degree criminal sexual conduct with a minor or lewd act, discretionary if convicted of any other applicable sex offense against a minor).
- Financial Obligations: Order satisfies:
 - Department fees (arrearage)
 - Fines and other fees (arrearage/balance)
 - Restitution (and 20%) (arrearage/balance)
- Civil Judgment:
 - Department fees
 - Fines and other fees
 - Restitution (and 20%)

Additional Conditions ordered by the Court:

NO Civil Judgment

- The defendant is given credit for pre-revocation hearing detention time on current probation violation to be calculated and applied by the SC Department of Corrections.
- The defendant has previously served _____ months/years on this sentence.
(split sentence time and/or prior partial revocation time)
- The defendant was previously placed on active electronic monitoring pursuant to §23-3-540.

EXHIBIT
E

This 10 day of February, 2015
Beaufort, SC

Presiding Judge 1413 Judicial Circuit

You are hereby advised that under the law the Court may at any time revoke or modify any condition of this probation; impose any lawful conditions it deems proper; or extend your period of probation not to exceed five (5) years. At any time within the period of your probation, the Court may require you to serve any part of the original sentence imposed.

This is to certify that I have read, or have had read to me, the order and the conditions set out therein. I agree to comply with such conditions and the conditions of my attached probation order during the period of my probation. I have received a copy of this Court's order and all attachments.

Offender's Signature: A. Scott Anderson

Witnessed by: A. Ford

Signed this 10 day of February, 2015, at Beaufort SC

of the Code of Laws of South Carolina in that the most substantial part of the alleged acts or omissions giving rise to the cause of action occurred in Charleston County.

6. The contemporaneous filing requirement of § 15-36-100(B) of the Code of Laws of South Carolina does not apply because there is a good faith basis to believe that the period of limitation will expire within 10 days of the date of filing, and the affidavit of an expert could not be prepared.

FACTS

7. Plaintiff incorporates the allegations of paragraphs 1 through 6 above.

8. On or about October 24, 2013, Plaintiff appeared before the Honorable Carmen T. Mullen for a hearing for the revocation of her probation.

9. Plaintiff's probation was set to end on October 27, 2013, but Plaintiff still owed money for the balance of her restitution.

10. Prior to the hearing, Defendants did not prepare the proper documents or Plaintiff for the hearing.

11. During the hearing, Defendants failed to adequately represent Plaintiff and made no legal arguments as to why Plaintiff's parole should not be revoked.

12. As a result of Defendants' acts and omissions, Judge Mullen revoked Plaintiff's parole and sentenced her to two years.

13. Following the revocation, James Arthur Brown, Jr. appealed the decision, and on December 3, 2014 the Court of Appeals reversed and remanded the revocation.

FOR A FIRST CAUSE OF ACTION
(Negligence)

14. Plaintiff incorporates the allegations of paragraphs 1 through 13 above.

15. Defendants owed a duty of care to Plaintiff.

16. Defendants breached this duty by failing to adequately and reasonably represent Plaintiff.

17. As a direct and proximate result of Defendants' breach, Plaintiff suffered damages, including—but not limited to—time in prison, loss of job, depression, and anxiety.

18. Therefore, Plaintiff is entitled to actual and consequential damages.

JURY DEMAND

19. Pursuant to Rule 38 of the South Carolina Rules of Civil Procedure, Plaintiff respectfully requests a trial by jury.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment against Defendants and that Plaintiff be awarded:

A. Actual damages;

- B. Consequential damages;
- C. Post-judgment interest;
- D. Reasonable attorneys' fees and costs of this action; and
- E. Such other and further relief as this Court deems just and appropriate.

Law Office of M. Brooks Derrick, LLC

Brooks Derrick BY: *Casaj Jacarson*
M. Brooks Derrick (S.C. Bar No.: 76330) *with permission*
224 NE Main Street
PO Box 967
Simpsonville, SC 29681
Office: (864) 881-2281
Fax: (864) 729-3680
bderrick@derricklawoffice.com

Attorney and Counselor for Plaintiff

Greenville, South Carolina
October *26*, 2015

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF Beaufort)

Tonya McAllister)

Plaintiff(s))

CIVIL ACTION COVERSHEET

2015-CP - 07- 02555

vs.)

Jessica Saxon, Jane Roe, and John Doe,)

Defendant(s))

Submitted By: M. Brooks Derrick
Address: 224 NE Main Street
PO Box 967
Simpsonville, SC 29681

SC Bar #: 76330
Telephone #: (864) 881-2281
Fax #: (864) 729-3680
Other:
E-mail: bderrick@derricklawoffice.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint. NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|---|---|--|
| <p>Contracts</p> <ul style="list-style-type: none"> <input type="checkbox"/> Constructions (100) <input type="checkbox"/> Debt Collection (110) <input type="checkbox"/> Employment (120) <input type="checkbox"/> General (130) <input type="checkbox"/> Breach of Contract (140) <input type="checkbox"/> Other (199) | <p>Torts - Professional Malpractice</p> <ul style="list-style-type: none"> <input type="checkbox"/> Dental Malpractice (200) <input checked="" type="checkbox"/> Legal Malpractice (210) <input type="checkbox"/> Medical Malpractice (220) Previous Notice of Intent Case #
20 -CP- _____ <input type="checkbox"/> Notice/ File Med Mal (230) <input type="checkbox"/> Other (299) | <p>Torts - Personal Injury</p> <ul style="list-style-type: none"> <input type="checkbox"/> Assault/Slander/ Libel (300) <input type="checkbox"/> Conversion (310) <input checked="" type="checkbox"/> Motor Vehicle Accident (320) <input type="checkbox"/> Premises Liability (330) <input type="checkbox"/> Products Liability (340) <input type="checkbox"/> Personal Injury (350) <input type="checkbox"/> Wrongful Death (360) <input type="checkbox"/> Other (399) | <p>Real Property</p> <ul style="list-style-type: none"> <input type="checkbox"/> Claim & Delivery (400) <input type="checkbox"/> Condemnation (410) <input type="checkbox"/> Foreclosure (420) <input type="checkbox"/> Mechanic's Lien (430) <input type="checkbox"/> Partition (440) <input type="checkbox"/> Possession (450) <input type="checkbox"/> Building Code Violation (460) <input type="checkbox"/> Other (499) |
| <p>Inmate Petitions</p> <ul style="list-style-type: none"> <input type="checkbox"/> PCR (500) <input type="checkbox"/> Mandamus (520) <input type="checkbox"/> Habeas Corpus (530) <input type="checkbox"/> Other (599) | <p>Administrative Law/Relief</p> <ul style="list-style-type: none"> <input type="checkbox"/> Reinstate Drv. License (800) <input type="checkbox"/> Judicial Review (810) <input type="checkbox"/> Relief (820) <input type="checkbox"/> Permanent Injunction (830) <input type="checkbox"/> Forfeiture-Petition (840) <input type="checkbox"/> Forfeiture--Consent Order (850) <input type="checkbox"/> Other (899) | <p>Judgments/Settlements</p> <ul style="list-style-type: none"> <input type="checkbox"/> Death Settlement (700) <input type="checkbox"/> Foreign Judgment (710) <input type="checkbox"/> Magistrate's Judgment (720) <input type="checkbox"/> Minor Settlement (730) <input type="checkbox"/> Transcript Judgment (740) <input type="checkbox"/> Lis Pendens (750) <input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760) <input type="checkbox"/> Confession of Judgment (770) <input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780) <input type="checkbox"/> Other (799) | <p>Appeals</p> <ul style="list-style-type: none"> <input type="checkbox"/> Arbitration (900) <input type="checkbox"/> Magistrate-Civil (910) <input type="checkbox"/> Magistrate-Criminal (920) <input type="checkbox"/> Municipal (930) <input type="checkbox"/> Probate Court (940) <input type="checkbox"/> SCDOJ (950) <input type="checkbox"/> Worker's Comp (960) <input type="checkbox"/> Zoning Board (970) <input type="checkbox"/> Public Service Comm. (990) <input type="checkbox"/> Employment Security Comm (991) <input type="checkbox"/> Other (999) |
| <p>Special/Complex /Other</p> <ul style="list-style-type: none"> <input type="checkbox"/> Environmental (600) <input type="checkbox"/> Automobile Arb. (610) <input type="checkbox"/> Medical (620) <input type="checkbox"/> Other (699) <input type="checkbox"/> Pharmaceuticals (630) <input type="checkbox"/> Unfair Trade Practices (640) <input type="checkbox"/> Out-of State Depositions (650) <input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660) <input type="checkbox"/> Sexual Predator (510) | | | |

Submitting Party Signature:

Brooks Derrick

Date:

10/26/15

By: Casey Jacobson with permission

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

FOR MANDATED ADR COUNTIES ONLY

Aiken, Allendale, Anderson, Bamberg, Barnwell, Beaufort, Berkeley, Calhoun, Charleston, Cherokee, Clarendon, Colleton, Darlington, Dorchester, Florence, Georgetown, Greenville, Hampton, Horry, Jasper, Kershaw, Lee, Lexington, Marion, Oconee, Orangeburg, Pickens, Richland, Spartanburg, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

You are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA

) COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

) THE 14TH JUDICIAL CIRCUIT

) CASE No.: 2015-CP-07- 02555

TONJA McALLISTER,

)

)

PLAINTIFF,

)

)

SUMMONS

v.

)

)

JESSICA SAXON, JANE ROE, and
JOHN DOE,

)

)

DEFENDANTS.

)

JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

2015 OCT 26 PM 4:38

TO DEFENDANTS NAMED ABOVE:

You are summoned and required to answer the Complaint in this action served upon you. A copy of your answer to the Complaint must be served on Defendants' lawyers at their offices located at 224 NE Main Street, PO Box 967, Simpsonville, South Carolina 29681, within 30 days after your receipt of this Summons. If you fail to answer this Complaint within the specified time, a judgment by default will be rendered against you for the relief demanded within this Complaint.

///

///

(Signature block on following page.)

Law Office of M. Brooks Derrick, LLC

Brooks Derrick By: *Casa Jacaruse*
M. Brooks Derrick (S.C. Bar No.: 76330)
224 NE Main Street
PO Box 967
Simpsonville, SC 29681
Office: (864) 881-2281
Fax: (864) 729-3680
bderrick@derricklawoffice.com
with permission

Attorney and Counselor for Plaintiff

Greenville, South Carolina
October 21st, 2015

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF BEAUFORT

2016 MAR 15 PM 3:10

Civil Action No. 2015-CP-07-02555

Tonya McAllister,

JERRI ANN RUDE BEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

PLAINTIFF,

v.

Motion to Dismiss

Jessica Saxon, Jane Roe, and John Doe,

DEFENDANTS.

TO: M. BROOKS DERRICK, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendant, Jessica Saxon ("Defendant") by and through her undersigned attorneys, will move before the Presiding Judge of Court of Common Pleas for the Fourteenth Judicial Circuit, Beaufort County, on the tenth (10th) day of service hereof, or as soon thereafter as counsel may be heard, for:

An Order of this Court dismissing this suit on the grounds that the Defendant, Jessica Saxon, at the time alleged in the complaint was acting within the course and scope of her employment with Beaufort County as a governmental employee and therefore the individual should be dismissed in accordance with SC Code Ann 15-78-70 as amended, and

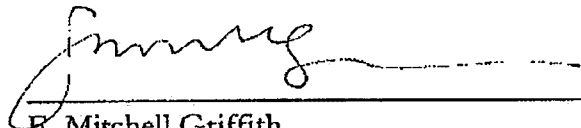
An Order of this Court dismissing this suit pursuant to SC Code Ann. 15-36-100, on the grounds that this matter alleges professional negligence against a licensed attorney that is admitted to practice in the state of South Carolina while she is in the scope of her profession as an attorney and the Plaintiff failed to file an expert affidavit as required by SC Code Ann. 15-36-100(B) as amended; and while the complaint alleges SC Code 15-36-100(C) applies, SC Code 15-36-100(C) as amended requires that the Plaintiff has 45 days after filing the

complaint to supplement the pleading with the required affidavit. Since the pleading was filed on October 26, 2015, the Plaintiff would have until December 10, 2015 to supplement the pleading with the required affidavit; however, based on a review of the Beaufort County Clerk of Court's file as on March 8, 2016, more than 130 days have elapsed and no affidavit has been filed.

This motion will be further based on the case law, statutes or other evidence that may be presented at the hearing of this motion.

GRIFFITH SHARP & LIIPFERT, LLC

By:



E. Mitchell Griffith
Hillary G. Jones
600 Monson Street
PO Drawer 570
Beaufort, SC 29901
843-521-4242
843-521-4247 (fax)
mgriffith@griffithsharp.com
hjones@griffithsharp.com

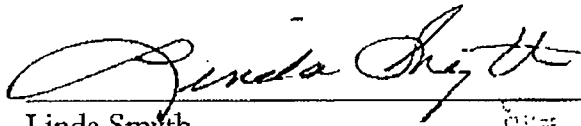
ATTORNEYS FOR DEFENDANTS

March 16, 2016
Beaufort, South Carolina

CERTIFICATE OF SERVICE

On March ~~8~~ 11 2016, I served *Motion to Dismiss* pursuant to Rule 5, SCRPC by depositing it in the United States mail, with postage prepaid, and addressed as follows:

M. Brooks Derrick
Law Office of M. Brooks Derrick, LLC
PO Box 967
Simpsonville, SC 29681


Linda Smyth

Beaufort, South Carolina

2016 MAR 15 PM 3:10
RECORDED & INDEXED
CLERK OF COURT
BEAUFORT COUNTY, S.C.

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

COUNTY OF BEAUFORT)

2016 MAR 15 PM 3:10 CASE NO.: 2015-CP-07-02555

Tonya McAllister

JERRI LAM PRO BEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

vs.

Jessica Saxon, Jane Roe, and John Doe

Defendant.)

Plaintiff's Attorney: <u>M. Brooks Derrick</u> Address: <u>PO Box 967</u> <u>Simpsonville, SC 29681</u> Phone: <u>(864) 881-2281</u> Fax <u>(864) 729-3680</u> E-mail: <u>bderrick@derricklawoffice.com</u>	Defendant's Attorney: <u>E. Mitchell Griffith, Bar No. 2287</u> Address: <u>PO Box 570</u> <u>Beaufort, SC 29901</u> Phone: <u>(843) 521-4242</u> Fax <u>(843) 521-4247</u> E-mail: <u>mgriffith@griffithsharp.com</u>
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
SECTION I: Hearing Information	
Nature of Motion: <u>Motion to Dismiss</u> Estimated Time Needed: <u>15 min</u> Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
SECTION II: Motion/Order Type	
<input type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
Signature of Attorney for <input type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant Date submitted _____	
SECTION III: Motion Fee	
<input checked="" type="checkbox"/> PAID - AMOUNT: \$ 25.00 <input type="checkbox"/> EXEMPT: (check reason)	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____	
JUDGE'S SECTION	
<input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
CLERK'S VERIFICATION	
Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____	



GRIFFITH SHARP LIIPFERT
ATTORNEYS AT LAW

E. Mitchell Griffith
Griffith, Sharp & Lippert, LLC
600 Monson Street
PO Box 570
Beaufort, SC 29901
P (843) 521-4242
F (843) 521-4247
W griffithsharp.com
E mgriffith@griffithsharp.com

E. MITCHELL GRIFFITH+
MARY E. SHARP+*
O. EDWORTH LIIPFERT III+
MICHAEL D. FREEMAN+
KELLY DENNIS DEAN
HILLARY G. JONES

+ certified mediator
* also admitted in NC

March 11, 2016

The Honorable Jerri Ann Roseneau
Beaufort County Clerk of Court
PO Box 1128
Beaufort, SC 29901-1128

2016 MAR 15 PM 3:10
JERRI ANN ROSENEAU
CLERK OF COURT
BEAUFORT COUNTY, SC

RE: McAllister v. Saxon, et al.
Civil Action No: 2015-CP-07-02555
GS&L File No: 1011-096

Dear Jerri:

Please find enclosed the original and one copy of the *Motion to Dismiss* and *Motion Coversheet* in this case. Also enclosed is our \$25 check for the filing fee. I would appreciate you filing the original and returning the clocked copy to me in the enclosed envelope.

Thank you for your assistance. If you have any questions, please do not hesitate to contact me.

With kindest regards, I remain

Very truly yours,

E. Mitchell Griffith

EMG/ljs
Enclosures

cc: Jessica Saxon, Esq.
M. Brooks Derrick, Esq.

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

Tonya McAllister,

PLAINTIFF,

v.

Jessica Saxon, Jane Roe, and John Doe,

DEFENDANTS.

IN THE COURT OF COMMON PLEAS

2016 MAY 25 PM 3:22

Civil Action No. 2015-CP-07-02555

CLERK OF COURT
BEAUFORT COUNTY, S.C.

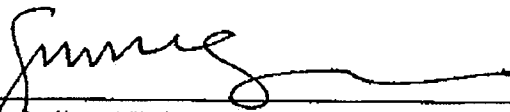
**STIPULATION OF DISMISSAL WITH
PREJUDICE**

The above-entitled action was instituted by the Plaintiff against the Defendants, and the parties have subsequently reached an agreement.

NOW, THEREFORE, by stipulation, E. Mitchell Griffith of Griffith Sharp & Liipfert, LLC, Attorneys for Defendant, Jessica Saxon; and M. Brooks Derrick of Law Office of M. Brooks Derrick, LLC, Attorneys for the Plaintiff;

IT IS STIPULATED, pursuant to Rule 41(a)(1) of the South Carolina Rules of Civil Procedure, that the above-entitled action is hereby dismissed with prejudice and forever ended.

WE SO STIPULATE:
GRIFFITH SHARP & LIIPFERT, LLC



E. Mitchell Griffith
600 Monson Street
PO Box 570
Beaufort, SC 29901-0570
(843) 521-4242
Attorney for Defendant

WE SO STIPULATE:
LAW OFFICE OF M. BROOKS
DERRICK, LLC



M. Brooks Derrick
224 NE Main St
PO Box 967
Simpsonville, SC 29681
(864) 881-2281
Attorney for Plaintiff

FORM 4

**STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP0702555**

Tonja Mcallister	Tonya Mcallister	Jessica Saxon John Doe	Jane Roe
------------------	------------------	---------------------------	----------

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: M Brooks Derrick	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
---------------------------------------	---

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

Stipulation of Dismissal with Prejudice

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the **25th day of May, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on the **25th day of May, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

Michael Brooks Derrick PO Box 967 Simpsonville, SC
29681

Ernest Mitchell Griffith PO Drawer 570 Beaufort, SC 29901

Hillary Grace Meyer PO Box 570 600 Monson St Beaufort,
SC 29901

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Marlene Kinard - Judicial Clerk

Court Reporter

Jerri Ann Roseneau - Clerk of Court

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

State of South Carolina

County of Beaufort

Tonja McAllister,

Plaintiff,

v.

Susan Cato and CAPA of Beaufort,

Defendants.

Court of Common Pleas
Fourteenth Judicial Circuit
Case No.: 2016-CP-07-2253

**Plaintiff's Memorandum in
Opposition to Defendants' Motion
to Dismiss**

Plaintiff Tonja McAllister opposes Defendants' Motion to Dismiss because Defendants perverted and abused the process by pursuing and attempting to exact more money than they lost.

Motion to Dismiss Standard

In deciding a motion to dismiss pursuant to 12(b)(6) of the South Carolina Rules of Civil Procedure, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint. *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). A 12(b)(6) motion should not be granted if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Id.* The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in the plaintiff's behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

Moreover, “pleadings in a case should be construed liberally so that substantial justice is done between the parties. Further, a judgment on the pleadings is considered to be a drastic procedure by our courts.” *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991).

Brief Statement of Facts

On October 27, 2008, McAllister was sentenced to five years’ probation and to pay restitution (compl. ¶ 7), and McAllister’s probation was set to end on October 27, 2013 (compl. ¶ 8).

On October 24, 2013, McAllister appeared before the Honorable Carmen T. Mullen for a hearing regarding the potential revocation of her probation. (Compl. ¶ 9.) The only issue before the court was the remaining monetary obligation. (Compl. ¶ 10.) During the revocation hearing, the court requested Defendant Cato’s position regarding restitution. (Compl. ¶ 11.) She stated the following, “Well, I’m disappointed that probation can’t be extended, because she does owe that money. . . . So, you know, she does owe the money. She stole the money. So, it’s just unfortunate that she hasn’t been able to pay it. But, that doesn’t diminish the fact that she still owes the money.” (Compl. ¶ 12.)

Following a break, the court returned and found that McAllister had violated her parole and sentenced her to two years in prison. (Compl. ¶ 13.) In response to the court’s ruling, Defendant Cato asked the court, “Can you explain to me what just happened?” (Compl. ¶ 14.) “I just put her in prison for two years,” the court

responded. (Compl. ¶ 15.) And, Defendant Cato stated, “Thank you.” (Compl. ¶ 16.)

The court further stated, “There’s nothing else I can do. Again, I can’t get money out of her. I don’t have the power to extend it. If I could, I would. I wish I could put her on probation for the next 20 years, because I would love to get you paid back, but unfortunately, my hands are tied.” (Compl. ¶ 17.)

The Court of Appeals ultimately reversed and remanded McAllister’s revocation, but because of Defendant Cato’s statements, McAllister was incarcerated for 31 days and lost her job. (Compl. ¶ 19.)

On February 10, 2015 at McAllister’s rehearing, McAllister learned that Defendant CAPA of Beaufort in fact had been made whole and received money in excess of the \$66,610.58 original balance. (Compl. ¶ 20.)

Argument

1. The Court should deny Defendants’ Motion to Dismiss.

“The abuse of process tort provides a remedy for one damaged by another’s perversion of a legal procedure for a purpose not intended by the procedure.”

Food Lion v. United Food & Commercial Workers Int’l Union, 351 S.C. 65, 69, 567

S.E.2d 251 (S.C. App. 2002). The elements for a cause of action for 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.” *Id.* at 71, 567 S.E.2d 251

(quoting *Hainer v. Am. Med. Int'l, Inc.*, 328 S.C. 128, 136, 492 S.E.2d 103, 107 (1997)).

The first element, or an improper or ulterior purpose, exists if the process is used to gain an objective not legitimate in the use of the process. *Id.*; see also *Hainer v. American Medical Int'l, Inc.*, 492 S.E.2d 103, 108, 328 S.C. 128, 136 (S.C. 1997) (“The improper purpose usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself.”) The willful act element requires some definite act not authorized by the process or aimed at an objective not legitimate in the use of the process. *Hainer*, 328 S.C. 128, 136, 492 S.E.2d at 107.

1.1 Defendants perverted and abused the process by pursuing and attempting to exact more money than they lost.

Section 16-3-1110(12) of the South Carolina Code of Laws provides the following:

“Restitution” means payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender’s criminal conduct. It includes, but is not limited to:

- (i) medical and psychological counseling expenses;
- (ii) specific damages and economic losses;
- (iii) funeral expenses and related costs;
- (iv) vehicle impoundment fees;
- (v) child care costs; and

- (vi) transportation related to a victim's participation in the criminal justice process.

Restitution does not include awards for pain and suffering, wrongful death, emotional distress, or loss of consortium.

Restitution orders do not limit any civil claims a crime victim may file.

The Code also provides the following language:

Any award made pursuant to this article [Article 13, Compensation of Victims of Crime, S.C. Code Ann. §§ 16-3-1110 to 16-3-1360] may be reduced by or set off by the amount of any payments received or to be received as a result of the injury (a) from or on behalf of the person who committed the crime, (b) from any other private or public source, including an award of workers' compensation pursuant to the laws of this State or (c) as an emergency award pursuant to Section 16-3-1150; provided, that private sources shall not include contributions received from family members, or persons or private organizations making charitable donations to a victim.

S.C. Code Ann. § 16-3-1190 (emphasis added).

Although not explicit, the interplay between the two statutes is also present in the case relied on primarily by Defendants, *State v. Morgan*, 417 S.C. 338, 790 S.E.2d 27 (Ct. App. 2016). That case, much like § 16-3-1110(12) of the South Carolina Code of Laws stands for the proposition that “civil settlements and criminal restitution are distinct remedies with differing considerations.” *Id.* at 343, 790 S.E.2d at 30. The facts of that case differ starkly from the facts of this case and lend an understanding of the court's analysis.

The question before the *Morgan* Court was whether a settlement and covenant not to execute between a victim and defendant prior to sentencing precluded

restitution. *Id.* at 342, 790 S.E.2d at 29. In *Morgan*, the defendant caused an automobile collision where he caused sustained significant injuries, including a broken arm, a broken hip, and broken ribs. Because of the collision, the defendant was convicted of a felony DUI, which generated a civil claim for damages and a criminal prosecution. *Id.* at 339, 790 S.E.2d at 28.

Prior to the defendant's conviction, the victim and the defendant's insurance company entered into a Covenant Not to Execute and the insurance company agreed to pay the victim \$25,000.00. Then, at the defendant's restitution hearing, the trial court ordered restitution of \$238,660.10 for outstanding medical bills related to the victim's treatment. *Id.* at 340-341, 790 S.E.2d at 29.

The *Morgan* Court—relying on *Kirby v. State*, 863 So.2d 238, 240 (Fla. 2003)¹—held “[b]ecause civil settlements and criminal restitution are distinct remedies with differing considerations, we hold that a settlement and release of liability on a civil claim for damages between private parties does not prohibit the trial court from fulfilling its mandatory obligation to order restitution in the criminal case.” *Morgan*, 417 S.C. at 343, 790 S.E.2d at 30.

Although it could be argued that *Morgan* forecloses McAllister's claims, the footnote appended to the court's holding provides additional insight to the court's conclusion:

¹ *Kirby v. State*, 863 So.2d 238, 240 (Fla. 2003) is included as **Exhibit 1** to this memorandum for reference.

The *Kirby* decision provides for offset in the case of a civil settlement, noting: “the amount of restitution shall be set off against any civil recovery, reflecting the Legislature’s recognition that although the restitution obligation is primary, the victim should not receive a double recovery.” [*Kirby*, 863 So.2d at 243; see Fla. Stat. § 775.089(8) (“An order of restitution hereunder will not bar any subsequent civil remedy or recovery, but the amount of such restitution shall be set off against any subsequent independent civil recovery.”)]. South Carolina law does not contain a provision requiring offset but as restitution is an equitable remedy, it would be reasonable to award an offset of the \$25,000 paid by the liability carrier. Here, however, the medical bills remain outstanding. Victim’s civil attorney did not negotiate with the providers, and the medical liens had not been addressed at the time of the restitution hearing.

Morgan, 417 S.C. at 344, 790 S.E.2d at 31 n.1.

Here, it is uncontroverted that Defendants received \$50,000.00 from a private insurance policy, and based on § 16-3-1190 of the South Carolina Code of Laws and *Morgan*, McAllister was entitled to a setoff or reduction of her restitution. Moreover, this setoff or reduction comports with the notions of fairness and common sense.²

Conclusion

At this stage, the Court should be hesitant to dismiss a complaint because of the low standards for pleading a cause of action, and McAllister properly alleged

² The Attorney General of South Carolina reached an analogous result regarding the State Office of Victim Assistance’s ability to recover money it provided to a victim when the victim later received money from a settlement. Op. S.C. Att. Gen. (September 24, 2013) (citing S.C. Code Ann. § 16-3-1190). The Attorney General’s Opinion is included as **Exhibit 2** to this memorandum for reference.

the “ulterior purpose” and “willful act” elements.³ And, this court should not accept Defendants’ invitation to condone their perverted use of the rights of victims.

Law Office of M. Brooks Derrick, LLC
/s M. Brooks Derrick
M. Brooks Derrick (S.C. Bar No.: 76330)
224 NE Main Street
Simpsonville, SC 29681
Office: (864) 881-2281
Fax: (864) 729-3680
bderrick@derricklawoffice.com

Attorney and Counselor for Plaintiff

Greenville, South Carolina
June 20, 2017

³ In addition to the factual allegations, the Complaint’s abuse of process cause of action is plead as follows:

24. Defendant Cato acted with an ulterior purpose, one not legitimate in the use of the process, when she used Plaintiff’s probation to extract money in excess of the amount that was lost by Defendant Cato.

25. Defendant Cato acted willfully at the revocation hearing when the court asked for her position on the restitution, and she stated that the balance was still outstanding.

26. This act was aimed at the illegitimate collateral objective of extracting more money from Plaintiff.

27. As a direct and proximate result of Defendant Cato’s negligent, reckless, willful, and grossly negligent actions, Plaintiff suffered damages, including—but not limited to—time in prison, loss of job, depression, and anxiety.

28. Therefore, Plaintiff is entitled to actual, consequential, and punitive damages.

State of South Carolina

County of Beaufort

Tonja McAllister,

Plaintiff,

v.

Susan Cato and CAPA of Beaufort,

Defendants.

Court of Common Pleas
Fourteenth Judicial Circuit
Case No.: 2016-CP-07-2253

Exhibit 1
Kirby v. State, 863 So.2d 238, 240
(Fla. 2003)

863 So.2d 238

Gary Kent KIRBY, Petitioner,
v.
STATE of Florida, Respondent.

No. SC02-1511.

Supreme Court of Florida.

October 9, 2003.

District's decision in *Vandonick* to the extent that it is inconsistent with this opinion.

FACTS

On November 20, 1999, police officer Gary Kent Kirby caused a traffic accident, generating both a civil claim for damages by the injured victim and a criminal prosecution against Kirby for driving under the influence resulting in serious bodily injury to another. On April 7, 2000,² independent of the criminal case, the victim and Kirby executed a settlement agreement. This written settlement agreement released Kirby of any liability that may have resulted from the November 20, 1999, incident. The consideration for the settlement was the payment by Kirby's insurance company of \$25,000—the insurance policy limits.³

Kirby proceeded to trial in the criminal prosecution on February 23, 2001, and the jury found Kirby guilty of DUI with serious bodily injury as charged. The trial court adjudicated Kirby guilty and sentenced him to five years' probation, a downward departure from the permissible

[863 So.2d 239]

James B. Gibson, Public Defender, and Lyle Hitchens, Assistant Public Defender,

[863 So.2d 240]

Seventh Judicial Circuit, Daytona Beach, FL, for Petitioner.

Charles J. Crist, Jr., Attorney General, and Judy Taylor Rush, Assistant Attorney General, Daytona Beach, FL, for Respondent.

PARIENTE, J.

We have for review *State v. Kirby*, 818 So.2d 689 (Fla. 5th DCA 2002), which expressly and directly conflicts with *State v. Vandonick*, 800 So.2d 239 (Fla. 2d DCA 2001), on the issue of whether a settlement and release of liability between a victim and a defendant on a civil claim for damages prior to the disposition of a criminal case based on the same incident prohibits the trial court as a matter of law from ordering restitution.¹ Because civil settlements and criminal restitution are distinct remedies with differing considerations, we hold that a settlement and release of liability on a civil claim for damages between private parties does not prohibit the trial court from fulfilling its mandatory obligation to order restitution in the criminal case. For the reasons that follow, we approve the Fifth District's decision in *Kirby*, and disapprove the Second

[863 So.2d 241]

guidelines sentence of fifty-one months' incarceration. As justification for the downward departure, the trial court concluded that "the need for payment of restitution to the victim outweigh[ed] the need for a prison sentence" and that "the offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse."⁴ The trial court ordered restitution, reserving jurisdiction to determine the amount.

The trial court subsequently held a restitution hearing. The State requested that the trial court award the victim restitution for the out-of-pocket medical expenses, deductibles, and lost wages that exceeded the \$25,000 he received pursuant to the

settlement agreement. Kirby opposed restitution based on the fact that the settlement agreement contained a release of liability. The State conceded that the settlement agreement contained a release of all liability, but argued that because the State was not a party to the agreement the victim could not prevent the State from exercising its statutory right to seek restitution. The trial court disagreed and denied restitution based on the release and the decision in *Vandonick* that the right to restitution is foreclosed by a settlement and release in a civil case. See *Kirby*, 818 So.2d at 690.

On appeal, the Fifth District disagreed with the Second District's decision in *Vandonick* and agreed with the view expressed in Judge Northcutt's dissenting opinion in that case that, because restitution serves significant societal purposes other than compensating the victim, a sentencing court should not be bound by a civil settlement and release when the State was not a party to the transaction. See *Kirby*, 818 So.2d at 690 (citing to *Vandonick*, 800 So.2d at 240-41 (Northcutt, J., dissenting)). Accordingly, the Fifth District reversed the trial court and held that "[t]he settlement between the victim and the defendant in a civil proceeding did not bar the state from seeking restitution." *Id.* at 691.

ANALYSIS

The issue presented in this case is whether the victim and defendant may foreclose the trial court's obligation to impose restitution by entering into a settlement agreement that contains a release of liability in a civil action prior to the disposition of the criminal case involving the same incident. As this issue presents a pure question of law, we review it de novo. See *Barnhill v. State*, 834 So.2d 836, 843 (Fla.2002), cert. denied, ___ U.S. ___, 123 S.Ct. 2281, 156 L.Ed.2d 134 (2003); *State v. Glatzmayer*, 789 So.2d 297, 301-02 n. 2 (Fla.2001).

We begin with the language of Florida's restitution statute, which is the source of the trial court's authority to order restitution. Section 775.089, Florida Statutes (2002),⁵ states in relevant part:

(1)(a) In addition to any punishment, *the court shall order the defendant to make restitution to the victim for:*

1. *Damage or loss caused directly or indirectly by the defendant's offense; and*

2. *Damage or loss related to the defendant's criminal episode,*

unless it finds clear and compelling reasons not to order such restitution.... The court shall make the payment of

[863 So.2d 242]

restitution a condition of probation....

....

(2)(a) When an offense has resulted in bodily injury to a victim, a restitution order entered under subsection (1) shall require that the defendant:

1. Pay the cost of necessary medical and related professional services and devices relating to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a recognized method of healing.

2. Pay the cost of necessary physical and occupational therapy and rehabilitation.

3. Reimburse the victim for income lost by the victim as a result of the offense.

....

(8) ... An order of restitution hereunder will not bar any subsequent civil remedy or recovery, but the amount of such restitution shall be set off against any subsequent independent civil recovery.

(Emphasis supplied.)

Section 775.089(1)(a) requires the trial court to order a defendant to make restitution for damage or loss caused by the defendant's offense or related to the defendant's criminal episode unless the trial court finds clear and compelling reasons not to order restitution. See § 775.089(1)(a).⁶ When probation is imposed, the statute also requires the court to order restitution as a condition of probation. See § 775.089(1)(a)(2).⁷

In light of the statutory requirement that restitution be imposed, the legal question becomes whether a settlement and release of liability by the victim of "any and all claims" against the defendant executed prior to the disposition of the criminal case constitutes a clear and compelling reason not to order restitution as a matter of law. We conclude that it does not, because of both the unique purposes of restitution and the clear legislative intent as expressed in the restitution statute.

The criminal sanction of restitution and the civil remedy of damages further distinct societal goals. We have recognized that unlike civil damages, restitution is a *criminal sanction*. See *Spivey v. State*, 531 So.2d 965, 967 (Fla. 1988). In contrast, a civil claim for damages is a method for the orderly resolution of a dispute between the defendant and the victim. Unlike 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. See *Glaubius v. State*, 688 So.2d 913, 915 (Fla.1997); *Spivey*, 531 So.2d at 967.

[863 So.2d 243]

Consistent with this twofold purpose of restitution, we have recognized that "[w]hile the victim's wishes concerning restitution are relevant, they are not dispositive—it is the judge, not the victim, who must weigh society's competing needs." *Banks v. State*, 732 So.2d 1065, 1069 (Fla.1999). To this end, we agree with the discussion in *People v. Bernal*, 101 Cal.App.4th 155, 123 Cal.Rptr.2d 622 (2002), regarding the distinctive purpose restitution serves in the criminal justice system compared to settlement agreements in civil cases:

Restitution is an effective rehabilitative penalty because it forces the defendant to confront, in concrete terms, the harm his actions have caused. Such a penalty will affect the defendant differently than a traditional fine, paid to the State as an abstract and impersonal entity, and often calculated without regard to the harm the defendant has caused. Similarly, the direct relation between the harm and the punishment gives restitution a more precise deterrent effect than a traditional fine.

While a settlement agreement with, and release of, a defendant's insurance company may reflect a victim's willingness to accept the amount paid in full satisfaction

for all civil liability, it does not reflect the willingness of the People to accept that sum in satisfaction of the defendant's rehabilitative and deterrent debt to society. A restitution order pursuant to a defendant's plea is an agreement between the defendant and the state. The victim is not party to the agreement, and a release by the victim cannot act to release a defendant from his financial debt to the state any more than it could terminate his prison sentence.

Id. at 627 (citations, quotation marks, and footnotes omitted).

In addition to the distinct purposes served by restitution, we note that section 775.089(8) contemplates the coexistence of criminal restitution and a civil recovery. *See State v. Williams*, 689 So.2d 1233, 1234 (Fla. 2d DCA 1997). The statute provides that the amount of restitution shall be set off against any civil recovery, reflecting the Legislature's recognition that although the restitution obligation is primary, the victim should not receive a double recovery. Although section 775.089(8) assumes that restitution will precede a civil recovery, as the Fourth District has recognized, the sequence is not determinative.

[B]y the plain terms of this statute, the amount of restitution is set off against the wrongful death recovery, while in this case defendant argues that the wrongful death recovery should be set off against the amount of restitution. Nevertheless, the purpose of the statute is clear ...: to prevent the victim from forcing the defendant to pay twice....

Weinstein v. State, 745 So.2d 1085, 1086 (Fla. 4th DCA 1999). In *Weinstein*, the Fourth District reversed for an evidentiary hearing on whether a settlement for the policy limits encompassed all the damages suffered as a result of a wrongful death. *Id.* at 1087.

Although the restitution statute does not permit a double recovery of the same damages, the damages recoverable through restitution may include elements of damages not necessarily recoverable in a civil action, such as investigative expenses incurred to uncover the criminal activity. *See Glaubius*, 688 So.2d at 915. Additionally, restitution ordered as part of a criminal sanction includes coercive elements not available in the enforcement of a civil judgment, *see Vereen v. State*, 703 So.2d 1193, 1194 (Fla. 4th DCA 1997), and may also take into consideration the timing of repayment:

[863 So.2d 244]

A restitution award may take into consideration that the timing of repayment may cause the victim to suffer additional loss. A final judgment in a civil case speaks instantly; it fixes the amount due and compensates a plaintiff for a delay in payment by including an award of post-judgment interest. Although a restitution order may be enforced in the same manner as a civil judgment, recovery in this manner is unusual; restitution is more likely to occur when it is made a condition of a criminal sentence.

J.K. v. State, 695 So.2d 868, 869 (Fla. 4th DCA 1997) (footnote omitted). Thus, the award of restitution can include installment payments enforceable as a condition of probation—a remedy not available in a civil

lawsuit. *See State v. Hitchmon*, 678 So.2d 460, 462 (Fla. 3d DCA 1996).

Civil damages and criminal restitution are distinct remedies, both of which are available to the victim regardless of whether an enforceable civil obligation exists prior to sentencing. We agree with Judge Northcutt's well-reasoned dissent on this point in *Vandonick*, wherein he stated:

When assessing the victim's damage or loss, [a] prior settlement with the defendant would be a relevant consideration if the settlement amount reflected the true value of the victim's claim. But a variety of circumstances might induce a victim to settle [a] claim for less than [the] actual damages—problems of proof, for example, or her immediate financial need, or the inadequacy of the defendant's liability insurance policy limits. Such considerations should have no bearing on the court's statutory duty to order restitution for the damage or loss caused by the defendant's criminal conduct. Where, as here, the settlement was for a sum which was less than the victim's damage or loss, an order imposing restitution based solely on the amount of the settlement would violate the clear requirements of the statute.

Vandonick, 800 So.2d at 241 (Northcutt, J., dissenting).

Because ordering restitution and setting a restitution amount are nondelegable judicial responsibilities, the defendant cannot defeat the trial court's statutory obligation to impose restitution as part of the criminal

sanction by virtue of a settlement agreement and release in the civil case.⁸ Of course, the amount of the settlement will be a relevant factor for the trial court to consider in determining the amount of restitution so as to prevent a

[863 So.2d 245]

double recovery, which would be contrary to section 775.089(8). *See Weinstein*, 745 So.2d at 1086.

THIS CASE

In this case, imposing a restitution obligation on Kirby will not give the victim a double recovery, which is precluded by the "setoff" requirement of section 775.089(8). In arguing for restitution, the prosecutor noted that the victim settled for the \$25,000 policy limit because he was unable to pay mounting medical bills. The prosecutor further explained that the victim's out-of-pocket expenses exceeded the policy limits and were related to medical bills, deductibles, and lost wages—all of which are recoverable under the restitution statute. Because the trial court denied an evidentiary hearing after concluding that *Vandonick* governed, the amounts of these items are not in the record.

Additionally, we note that in this case, Kirby received the benefit of a downward departure sentence of five years' probation rather than a prison term as specified in the sentencing guidelines based, in part, on the trial court's express finding that the need for "payment of restitution to the victim outweighed the need for a prison sentence."⁹ At the time of the sentencing hearing, the settlement and release had already been executed. Because we do not have a transcript of the sentencing hearing, we do not know if the settlement agreement was brought to the trial court's attention at this time. However, if it were Kirby's position that the settlement agreement precluded an award of restitution, it was incumbent on him to bring this to the

judge's attention. If the settlement agreement indeed precluded restitution, the victim's need for restitution could not serve as a basis for the downward departure.¹⁰

CONCLUSION

Based on the foregoing, we conclude that a settlement agreement between the victim and the defendant executed prior to the disposition of a criminal case does not constitute a clear and compelling reason for the trial court not to order restitution as a matter of law. We therefore approve *Kirby* and disapprove *Vandonick* to the extent that it is inconsistent with this decision. We remand this case for proceedings consistent with this decision, including a full evidentiary hearing pursuant to the restitution statute.

It is so ordered.

ANSTEAD, C.J., and WELLS, LEWIS,
QUINCE, CANTERO, and BELL, JJ., concur.

Notes:

1. We have jurisdiction. *See* art. V, § 3(b)(3), Fla. Const.

2. We note that the Fifth District's opinion contains a scrivener's error in that it incorrectly represents that the settlement agreement was signed on April 7, 2001. *See Kirby*, 818 So.2d at 690.

3. The release stated in pertinent part:

For the sole consideration of twenty-five thousand dollars (\$25,000), the receipt and sufficiency whereof is hereby acknowledged the undersigned hereby releases and forever discharges Lori Jo and Gary K. Kirby, his/her/their heirs, executors, administrators,

agents, assigns, employers, employees, firms and corporations (hereinafter all referred to as "releasees") liable or who might be claimed to be liable, none of whom admit any liability to the undersigned... from any and all claims, demands, damages, actions, cause of action or suits of any kind or nature whatsoever, ... which have resulted or may in the future develop from an accident which occurred on or about the 20th day of November, 1999

Except for the above stated releases, the undersigned reserves his/her/their right to bring legal action against and recover damages from any other person, firm, corporation or organization, inclusive but not limited to any personal injury protection insurance carrier, medical payment coverage insurer, group health insurance carrier or health care provider. This reservation does not include the parties released herein who are given a full and final release from any and all claims, demands, damages, actions, including all past, present and future claims for subrogation arising out of the above referenced accident.

4. Both of these findings are valid reasons for imposing a downward departure sentence pursuant to section 921.0026, Florida Statutes (1999).

5. Although the crime occurred in 1999, we note that the current version does not differ from the 1999 statute.

6. If the court does not order restitution, or orders restitution of only a portion of the damages, the court is required by statute to "state on the record in detail the reasons thereof." § 775.089(1)(b) 1.

7. In addition to section 775.089(1), section 948.03(1)(e), Florida Statutes (1999), also imposes this requirement.

948.03 Terms and conditions of probation or community control.—

....

(e) Make reparation or restitution to the aggrieved party for the damage or loss caused by his or her offense in an amount to be determined by the court. The court shall make such reparation or restitution a condition of probation, unless it determines that clear and compelling reasons exist to the contrary. If the court does not order restitution, or orders restitution of only a portion of the damages, as provided in s. 775.089, it shall state on the record in detail the reasons therefor.

8. Courts in other jurisdictions have also held that a release of liability cannot foreclose the State's ability to seek restitution if the State was not a party to the agreement. *See State v. Iniguez*, 169 Ariz. 533, 821 P.2d 194, 197 (Ct.App.1991)("[T]he distinction between civil damages and restitution means that the victim's release of *civil* liability does not prevent the court from ordering the criminal law remedy of restitution."). *See also Fore v. State*, 858 So.2d 982 (Ala.Crim.App. 2003) (same); *People v. Maxich*, 971 P.2d 268, 270 (Colo.Ct. App.1998) (same); *State v. Applegate*, 266 Kan. 1072, 976 P.2d 936, 938 (1999) (holding State not a party to settlement agreement and therefore a civil release of claims does not and cannot specifically preclude court-ordered restitution in a *criminal* case); *People v. Bernal*, 101 Cal.App.4th 155, 123 Cal.Rptr.2d 622, 627 (2002) (same); *State v. DeAngelis*, 329 N.J.Super. 178, 747 A.2d 289, 295 (Ct. App.Div.2000) (same); *State v. Belfry*, 416 N.W.2d 811, 813 (Minn.Ct.App.1987) (holding that "the state is not barred from seeking, or the court from imposing, reasonable restitution" even though the victims received a settlement); *Urias v. State*, 987 S.W.2d 613, 614 (Tex.App.1999) ("[T]he settlement on behalf of the injured party with the insurance company was not a bar to the trial court ordering restitution"); *Dupin v. State*, 524 N.E.2d 329, 331 (Ind.Ct.App.1988), *overruling on other grounds recognized by Walker v. State*, 582 N.E.2d 877, 881 n. 3 (Ind.Ct.App.1991) ("A partial civil settlement

is not a substitute for restitution in criminal proceedings.").

9. In this case, there was another legal basis for the court's downward departure sentence. However, if the trial court had been aware at the time of sentencing of Kirby's position that he was not obligated to pay restitution as a result of the settlement agreement and release, we do not know whether that fact might have influenced the trial court's decision to impose a downward departure sentence of probation.

10. A victim's need for restitution is a valid reason for a downward departure sentence only if competent, substantial evidence shows the victim's need outweighs the need for incarceration. *See* § 921.0026(2)(e), Fla. Stat. (2001); *Banks*, 732 So.2d at 1068-69; *Demoss v. State*, 843 So.2d 309, 312 (Fla. 1st DCA 2003), *review denied*, No. SC03-995, 858 So.2d 330 (Fla. Sept. 18, 2003).

State of South Carolina

County of Beaufort

Tonja McAllister,

Plaintiff,

v.

Susan Cato and CAPA of Beaufort,

Defendants.

Court of Common Pleas
Fourteenth Judicial Circuit
Case No.: 2016-CP-07-2253

Exhibit 2
Op. S.C. Att. Gen. (September 24,
2013)



ALAN WILSON
ATTORNEY GENERAL

September 24, 2013

Dr. Larry Barker, Director
State Office of Victim Assistance
1205 Pendleton Street, Room 401
Columbia, South Carolina 29201

Dear Dr. Barker:

Attorney General Alan Wilson has referred your letter of April 15, 2013 to the Opinions section for a response. The following is our understanding of your question presented and the opinion of this Office concerning the issue based on that understanding.

Issue: Does the State Office of Victim Assistance (SOVA) have legal authority to recover money it provided to a Victim of a crime when the Victim later received money from a settlement for pain and suffering in connection with the crime?

Short Answer: This Office believes a court will likely conclude SOVA has the right to recover the assistance it provided to the Victim of a crime to the full amount from the Victim's recovery for pain and suffering.

Law/Analysis:

The South Carolina Code of Laws concerning compensation to Victims of a crime says:

- (A) No award may be made unless:
- (1) a crime was committed;
 - (2) the crime directly resulted in physical or psychic trauma to the victim;
 - (3) the crime was promptly reported to the proper authority and recorded in police records; and
 - (4) the claimant or other award recipient has fully cooperated with all law enforcement agencies and with the South Carolina Victim's Compensation Fund.
- (B) For the purposes of item (3) of subsection (A), a crime reported more than forty-eight hours after its occurrence is not "promptly reported", absent a showing of special circumstances or causes which justify the delay.

S.C. Code § 16-3-1170. For purposes of your question, this Office is going to assume all prerequisites have been met for the award given. As you provide in your letter, South Carolina law states:

Dr. Barker
Page 2
September 24, 2013

Any award made pursuant to this article [S.C. Code § 16-3-1110 to S.C. Code § 16-3-1360, Article 13, Compensation of Victims of Crime] may be reduced by or set off by the amount of any payments received or to be received as a result of the injury (a) from or on behalf of the person who committed the crime, (b) from any other private or public source, including an award of workers' compensation pursuant to the laws of this State or (c) as an emergency award pursuant to Section 16-3-1150; provided, that private sources shall not include contributions received from family members, or persons or private organizations making charitable donations to a victim.

S.C. Code § 16-3-1190 (1976 Code, as amended). The highlighted language in SOVA's form that every Victim must sign reads:

I agree to repay SOVA if I receive money from another source, up to the amount paid on my behalf. This includes any payment I may receive from the offender, any insurance policy or settlements, judgments, or civil law suits.

While there are various theories a court could employ, this Office believes if the court does not authorize SOVA to recover its funds from the Victim pursuant to S.C. Code § 16-3-1190, the court will use a legal or equitable method such as unjust enrichment for SOVA to recover its funds.¹ Unjust enrichment is an action in equity. It means "one shall not be allowed to profit or enrich himself at the expense of another contrary to equity." Op. S.C. Atty. Gen., 1976 WL 4309 (March 24, 1976) (citing Restatement, Rest., § 1, et seq.). As quoted by the South Carolina Court of Appeals:

"A party may be unjustly enriched when it has and retains benefits or money which in justice and equity belong to another." Dema v. Tenet Physician Servs.-Hilton Head, Inc., 383 S.C. 115, 123, 678 S.E.2d 430, 434 (2009). The remedy for unjust enrichment is restitution. See Sauner v. Pub. Serv. Auth. of S.C., 354 S.C. 397, 409, 581 S.E.2d 161, 167 (2003) ("Restitution is a remedy designed to prevent unjust enrichment."). To recover restitution in the context of unjust enrichment, the plaintiff must show: (1) he conferred a non-gratuitous benefit on the defendant; (2) the defendant realized some value from the benefit; and (3) it would be inequitable for the defendant to retain the benefit without paying the plaintiff for its value. Campbell v. Robinson, 398 S.C. 12, 24, 726 S.E.2d 221, 228 (Ct.App.2012); Niggel Assocs., Inc. v. Polo's of N. Myrtle Beach, Inc., 296 S.C. 530, 532, 374 S.E.2d 507, 509 (Ct.App.1988).

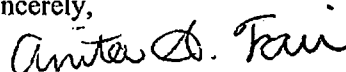
¹ Please see the opinion by this Office dated September 23, 2013 concerning a similar question from your office. That opinion addresses a question by SOVA as to whether or not it may recover money from a Victim who received settlement money from an automobile insurance company for the same crime the Victim received money from SOVA. It discusses statutory subrogation pursuant to S.C. Code § 16-3-1250 along with other forms of subrogation and recovery. Please note the conclusion reached here differs slightly from the conclusion in the other opinion in that the other opinion suggests recovery for SOVA after a Victim recovers 100% of actual losses and expenses pursuant to unjust enrichment, contractual subrogation, or statutory subrogation under S. C. Code Section § 16-3-1250. While this Office can only opine as to how a court will rule on these emerging questions, we feel optimistic a court will rule for SOVA regarding these questions.

Dr. Barker
Page 3
September 24, 2013

Inglese v. Beal, 403 S.C. 290, 742 S.E.2d 687 (Ct.App.2013). To put in plain terms, this Office does not believe the legislature intended for Victims of crime to be doubly reimbursed for expenses by SOVA and by a third party. SOVA, as an agency of the state government, has limited funds with which it is able to assist Victims of crimes. If a Victim receives funds sufficient to cover their losses, SOVA should be able to recover in equity for funds "had and received" based on unjust enrichment. Additionally, SOVA's contract with Victims makes it clear SOVA intends to be reimbursed if the Victim otherwise receives compensation for the crime.²

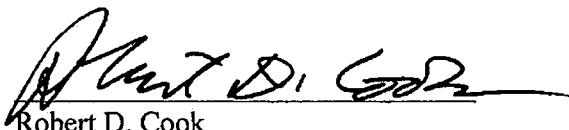
Conclusion: This Office believes a court will likely conclude SOVA [the State Office of Victim Assistance] has the right to recover (whether through unjust enrichment under the common law or through another method) the assistance it provided to the Victim of a crime. However, this Office is only issuing a legal opinion. Until a court or the legislature specifically addresses the issues presented in your letter, this is only an opinion on how this Office believes a court would interpret the law in the matter. If it is later determined otherwise or if you have any additional questions or issues, please let us know.

Sincerely,



Anita Smith Fair
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General

² Without knowing or determining the facts concerning your question, if the Victim owned a policy and recovered under health insurance coverage, it is possible that, pursuant to S.C. Code § 16-3-1250, SOVA may be able to subrogate in order to recover any funds paid by the health insurance company over and above one hundred percent reimbursement to the Victim. As an aside, the South Carolina Court of Appeals previously upheld the denial of equitable subrogation for a health insurance provider where the policy did not contractually give the right to subrogation. See Shumpert v. Time Ins. Co., 329 S.C. 605, 496 S.E.2d 653 (Ct.App.1998). The South Carolina Code concerning subrogation for insurers says:

Any policy or contract of accident and health insurance issued in this State may include provision for subrogation by the insurer to the insured's right of recovery against a liable third party for not more than the amount of insurance benefits that the insurer has paid previously in relation to the insured's injury by the liable third party. If the director or his designee, upon being petitioned by the insured, determines that the exercise of subrogation by an insurer is inequitable and commits an injustice to the insured, subrogation is not allowed. Attorneys' fees and costs must be paid by the insurer from the amounts recovered. This determination by the director or his designee may be appealed to the Administrative Law Judge Division as provided by law in accordance with Section 38-3-210.

State of South Carolina

County of Beaufort

Tonja McAllister,

Plaintiff,

v.

Susan Cato and CAPA of Beaufort,

Defendant.

Court of Common Pleas
Fourteenth Judicial Circuit
Case No.: 2016-CP-07-2253

Rule 59(e) Motion to Alter or Amend the Court's Judgment

Pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, Plaintiff moves this Court for an order altering or amending its July 3, 2017 order granting Defendants' Motion to Dismiss. Because the trial court's ruling is based on three errors, the Court should reconsider its ruling, deny the motion to dismiss, and permit this case to proceed to discovery.

Specifically, the grounds for this Motion are:

- **Initiation of the Process.** The trial court erred when it stated that, as a matter of law, an abuse of process cause of action requires the defendant to initiate the process that a plaintiff claims is being abused. The initiation of the process by a defendant is not an essential element of an abuse of process claim. In *Huggins v.*

Winn-Dixie Greenville, Inc., the court drew the following distinction:

To cause process to issue without justification is an essential element of malicious prosecution, but not of abuse of process. In the latter, the issuance of the process may be justified in itself; it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of

process.... [T]he distinction between an action for malicious prosecution and one for abuse of process is that a malicious prosecution consists in maliciously causing process to be issued, whereas an abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect--the improper use of a regularly issued process.

153 S.E.2d 693, 695, 249 S.C. 206, 209-210 (1967) (internal citations and quotations omitted).

Contrary to the Court's ruling, the abuse of process cause of action only requires two elements: (1) an "ulterior purpose" and (2) a "willful act in the use of the process not proper in the conduct of the proceeding," *Food Lion v. United Food & Commercial Workers Int'l Union*, 351 S.C. 65, 71, 567 S.E.2d 251 (S.C. App. 2002), and the addition of a third essential element was an error of law.

- **False Statements to the Court.** The Court erred when it ruled, as a matter of law, that even if the statements made to the court were false, and even if Defendants knew they were false, the statements do not amount to an abuse of process. This ruling is counterintuitive and effectively sanctioned an incorrect use of the restitution and probation process.

At the time of the probation revocation hearing, Defendants had received approximately \$10,000.00 more than the original balance, and they unjustifiably sought more. The transcript reveals that Defendants' actions caused the trial judge to revoke Plaintiff's probation. Had Defendants explained the complete financial recovery to the court, Plaintiff's losses could have been avoided, but Defendants chose to seek a windfall. These actions perverted and abused the

restitution process, and courts cannot sanction this type of behavior.

- **Set Off.** The Court erred when it ruled that, as a matter of law, Defendants had a right to the entire restitution amount from Plaintiff, regardless of the amount they had already collected from their own insurance carrier. This was incorrect.

First, the Court did not address or apply § 16-3-1190 of the South Carolina Code of Laws. That Section directly applies to the set-off of a restitution award and is contained within the same portion of the Code that defines restitution. It provides for a statutory set off “from or on behalf of the person who committed the crime” and “from any other private or public source.” S.C. Code Ann. § 16-3-1190.

If this Section was addressed, the Court would have ultimately reached a different conclusion, and this failure was an error of law and sanctioned a windfall recovery for Defendants.

This Motion is further based on applicable rules, statutes, case law, and any memorandum of law that may be submitted before a hearing on this matter.

Rule 11 Certification

Pursuant to Rule 11 of the South Carolina Rules of Civil Procedure, I certify that I did not communicate, orally or in writing, with opposing counsel because consultation would serve no useful purpose.

Law Office of M. Brooks Derrick, LLC

s/ M. Brooks Derrick

M. Brooks Derrick (SC Bar No. 76330)

224 NE Main Street

Simpsonville, SC 29681

(864) 757-0757

brooks@derricklawoffice.com

Attorney and Counselor for Plaintiff

July 13, 2017

1 STATE OF SOUTH CAROLINA)
) Court of Common Pleas
 2 COUNTY OF CHARLESTON) Case No. 2016-CP-10-2253
)
 3 _____)
)
 4 TONJA McALLISTER,)
)
) Plaintiff,)
)
 5 vs.) Transcript of Record
)
 6 SUSAN CATO AND)
)
 7 CAPA OF BEAUFORT,)
)
) Defendants.) DATE: June 22, 2017
)
 8 _____)
)
 9

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH

A P P E A R A N C E:

MICHAEL BROOKS DERRICK
Attorney for the Plaintiff

JEFFREY MICHAEL BOGDAN
Attorney for the Defendant

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

1 THE COURT: Glad to hear from you.

2 MR. BOGDAN: Your Honor, my name is Jeff Bogdan. I
3 represent the defendants in this case, Susan Cato and CAPA
4 Beaufort.

5 THE COURT: What is CAPA?

6 MR. BOGDAN: Child Abuse Prevention Association.
7 It's a nonprofit charitable organization that does pretty
8 much what the title says.

9 THE COURT: According to your brief, the abuse of
10 process came about when your client, Ms. Cato, answered a
11 question in court about restitution; is that correct?

12 MR. BOGDAN: Correct, Your Honor. And if I could,
13 I will run through some brief facts here.

14 THE COURT: Certainly.

15 MR. BOGDAN: The plaintiff, Ms. Tonja McAllister --
16 and this is Christina Wilson. She's the current director of
17 CAPA. Ms. Cato lives out of the country now and is no
18 longer employed with CAPA. That's why she's not here today.

19 The plaintiff, Ms. Tonja McAllister, was an
20 employee of CAPA. And during her employment, she embezzled
21 about \$66,000 from CAPA. She covered it up. She got
22 caught. She got arrested. She got charged. She pled
23 guilty. She was sentenced to three years in prison. That
24 sentence was suspended to five years probation and payment
25 of about \$66,000 in restitution to CAPA.

1 CAPA did not bring any civil suit against Ms.
2 McAllister. CAPA did not initiate the criminal proceeding.
3 That was the State of South Carolina.

4 She was -- in 2013, about the end of her five-year
5 probation, and the time for her to pay the restitution, she
6 was called in front of the court on a hearing to determine
7 the status of the restitution. That was in October of 2013.
8 Ms. Cato was present at that hearing. She wasn't a party to
9 the hearing. She was a witness at the hearing. And the
10 court asked Ms. Cato if Ms. McAllister had made restitution
11 payments. Ms McAllister had not made all the restitution
12 payments. She made some of them, not all of them. And Ms.
13 Cato was truthful to the court and told the court that the
14 restitution was not completely paid by Ms. McAllister.

15 So the Court revoked the probation and sentenced
16 Ms. McAllister to two years in prison. Ms. McAllister
17 appealed that probation revocation, and she was successful.
18 And the reason she was successful was because --

19 THE COURT: It wasn't a willful failure.

20 MR. BOGDAN: Right. The court didn't go through
21 that process to determine, was it a willful failure to pay.
22 So Ms. McAllister was released from prison and has not gone
23 back to prison. She was in prison about 30 days.

24 So on the eve of the statute of limitations
25 expiring for this civil suit against CAPA, about three years

1 after the October -- three years after the October 2013
2 hearing, she sues Ms. Cato and CAPA for abuse of process.
3 And her theory is that because Ms. Cato got up at that
4 hearing and answered the court's question by stating that
5 Ms. McAllister had not paid all the restitution, that she
6 abused the process. And the reason is because CAPA, once
7 the money was stolen from them, got a claim with its own
8 insurance carrier. And that insurance carrier paid benefits
9 to CAPA.

10 So if you take the benefits the carrier paid,
11 coupled with some of the restitution that Ms. McAllister did
12 make, CAPA was made whole. So it was true that they have
13 been made whole in the case. And, in fact, they've been
14 trying to return some of the money to the insurance carrier
15 that they were overpaid. I don't know the status of that at
16 this time, but that's in the process.

17 So the plaintiff's theory is that because CAPA was
18 made whole, somehow Ms. Cato's statement that she hadn't
19 paid all the restitution, amounts to an abuse of process.

20 Now, abuse of process, that tort, that's the only
21 cause of action in the complainant, provides for recovery
22 for misuse of the legal system. And there's two essential
23 elements. The first is an ulterior purpose, and the second
24 is a willful act.

25 Ulterior, that exists if the defendant uses the

1 legal process to gain an objective that is not legitimate in
2 the process. And that tort centers on actions that occur
3 outside of the legal process.

4 So if you look at what happened in this case
5 against the framework of that element, you've got my client,
6 who got up at a hearing on the restitution and said that
7 restitution hasn't been fully paid. Well, part of that
8 legal process, the criminal proceeding and the restitution,
9 was for the plaintiff to pay the restitution to my client
10 that she was ordered to pay. Regardless of whether my
11 client had recovered from another source, restitution is a
12 two-fold remedy. First, it is to compensate the victim of
13 the crime. And second, it is to serve the purpose of
14 criminal justice to rehabilitate the plaintiff.

15 So there's not an ulterior purpose in this case,
16 because the act of recovering restitution is one that is
17 absolutely legitimate in the legal process that was at
18 issue.

19 The Court of Appeals, *State v. Morgan* they
20 described the purpose of restitution as two-fold, as I just
21 explained. The court also found that restitution and civil
22 recoveries are two separate and distinct functions.

23 The willful act, the second element of an abuse of
24 process claim, again, it's similar to the ulterior purpose.
25 And it requires that the willful act must be an act not

1 authorized in the legal process or aimed at an object not
2 legitimate in the legal process. Again, here we've got Ms.
3 Cato standing up saying that restitution hasn't been fully
4 paid by Ms. McAllister. That recovery of restitution is
5 absolutely a legitimate purpose of legal process. And that
6 is a legitimate object that that process is aimed at
7 pursuing.

8 In the plaintiff's brief, which was filed two days
9 ago, she seems to claim that she was entitled to a setoff of
10 her restitution payment because of the money that CAPA
11 received from its own insurance carrier. And I suppose that
12 under that theory, she would go on to argue that, although
13 this isn't laid out clearly in the brief, that because she
14 was entitled to a setoff, that meant Ms. Cato should have
15 stood up and told the Court, well, she hasn't made all of
16 her restitution payments directly, but don't worry about
17 that, Your Honor, because we've been compensated from
18 somebody else.

19 Well, there's a couple of problems with that.
20 First of all, there's no setoff to restitution for a civil
21 recovery in the state of South Carolina. The plaintiff
22 cited three authorities in the brief. First is *State v.*
23 *Kirby*. That's a Florida case. And in Florida there is a
24 statute that specifically says the amount of restitution
25 shall be set off by civil recovery. South Carolina doesn't

1 have that statute.

2 The second authority they cite is *State v. Morgan*,
3 which is the case I cited in my brief, we talked just a
4 second ago. In *State v. Morgan*, there's a footnote that
5 discusses *State v. Kirby*. And in that footnote, the Court
6 of Appeals recognizes that South Carolina does not have the
7 same statute that Florida does. But then it found, and this
8 is in a footnote, and it's absolutely dicta, but it said:
9 It would be reasonable to award an offset of the \$25,000
10 paid by the criminal defendant's liability carrier.

11 Well, that is distinct from this case. We didn't
12 have Ms. McAllister's liability carrier paying CAPA. We
13 didn't have anybody on behalf of Ms. McAllister paying CAPA.
14 This was CAPA's own insurance carrier, a company they paid
15 premiums to that paid the insurance benefits in this case.

16 In the civil world, this is your classic collateral
17 source rule, where the payments from the insurance carrier
18 would not be a setoff in the criminal case. So I don't
19 think it can be a -- excuse me, in the civil case. It
20 shouldn't be a setoff in the criminal case either.

21 The third authority that the plaintiff cited is
22 South Carolina Code 16-3-1190, which says that awards made
23 by the Victim Compensation Fund may be reduced or set off by
24 payments from any private source. Well, that 16-3-1190 is
25 not applicable here, because that's payments -- awards made

1 by the Victim Compensation Fund. That's different than
2 restitution. And the *Morgan* court correctly noted that
3 South Carolina does not have a statute that provides for a
4 setoff for restitution.

5 So let's even assume that the plaintiff is correct
6 and that she does get a setoff for the restitution from the
7 payment made by CAPA's own insurance carrier. That still
8 doesn't get her to abuse of process here, because you have
9 to take the next step and first require Ms. Cato to
10 interpret an area of law that is not clear and for her to
11 get up and basically make an argument to the judge that,
12 well, we received some money from this source and some money
13 from this source, so I don't think that Ms. McAllister
14 really owes us any more money. Well, that is the judge's
15 job. The judge is supposed to collect the facts and
16 determine what money Ms. McAllister owes. The judge
17 gathered the facts at the hearing and sentenced Ms.
18 McAllister to prison because she hadn't paid.

19 Plaintiff also suggests that CAPA would be
20 enjoining a double recovery in this case if Ms. McAllister
21 would have ever paid her entire restitution. There would be
22 no -- well, there could possibly be a double recovery. But
23 just like in the civil world, that possibility is remediated
24 by the fact that CAPA's insurance carrier that paid the
25 benefits could have a lien on any possible recovery. And

1 CAPA would have to pay any overage back to the insurance
2 carrier.

3 Another point on a different level, when I sat down
4 and read the cases on abuse of process in South Carolina, I
5 couldn't find a single case where the defendant didn't
6 initiate the process. It's usually the defendant filed a
7 civil action and they filed a lis pendens or they filed an
8 involuntary commitment and the plaintiff accused them of
9 abusing the process by starting this process that was not
10 appropriate. That's not what we have here.

11 This is a witness to a criminal proceeding. My
12 clients didn't start the criminal proceeding. They never
13 filed a civil proceeding. They haven't pursued collecting
14 restitution from Ms. McAllister in any other way besides Ms.
15 Cato getting up and answering the court's question
16 truthfully. And the plaintiff doesn't dispute the fact that
17 what Ms. -- what Ms. Cato said at that hearing was
18 absolutely true.

19 My final point, Your Honor, is proximate cause.
20 Let's even go a step further and assume that Ms. Cato's
21 statements at that hearing were an abuse of process and
22 there would be liability under the tort --

23 THE COURT: Proximate cause is inherently factual,
24 isn't it?

25 MR. BOGDAN: It could be, Your Honor.

1 THE COURT: It is.

2 MR. BOGDAN: I will move on then. Just to sum up,
3 Your Honor, Ms. McAllister put my clients through a lot.
4 She was employed by them. My clients are a nonprofit
5 organization. Their money comes from raising funds. It's
6 difficult for them to raise those funds. Ms. McAllister
7 stole over \$60,000 from them. She covered it up. She got
8 caught. She pled guilty. She didn't pay all of her
9 restitution. And now she's turned around and sued my
10 clients for it.

11 These other three ladies behind me are from CAPA.
12 They've taken this matter very seriously. They've been
13 through enough. I think if anybody may have abused the
14 legal process, it would be the plaintiff in this case.

15 THE COURT: All right. Thank you, sir. Yes,
16 sir.

17 MR. DERRICK: Good morning, Your Honor. Brooks
18 Derrick for the plaintiff. We are here on a motion to
19 dismiss. And if we look at the four corners of the
20 document, of the complaint, Ms. McAllister pled abuse of
21 process claim. The key issue here is whether or not CAPA
22 was entitled to more money than they lost. And they believe
23 that they are entitled to that. The statute that Mr. Bogdan
24 quoted the victim's -- he stated it was only applicable to
25 the Victim Compensation Fund. That is not an accurate

1 description of that code.

2 I will read it to you. Says: Any award pursuant
3 to this article may be reduced by or set off by the amount
4 of any payments received or to be received as a result of
5 the injury from or on behalf of the person who committed the
6 crime, from or on behalf of the person -- I'm sorry, from
7 any other private or public source. That private source is
8 their insurance coverage. But she is entitled to that
9 setoff.

10 And to say that only CAPA was just capitulating to
11 what the judge requested, I think it's a misstatement of
12 what happened there. I mean, the judge was, in that
13 situation, was drawn to the fact that they had not yet been
14 repaid or the understanding that CAPA had not been repaid.
15 And that can't be proper. The judge said once she
16 revoked -- once the judge revoked the probation, CAPA
17 requested -- asked what just happened? And the judge says:
18 There's nothing else I can do. Again, I can't get money out
19 of her. I don't have the power to extend it. If I could, I
20 would. I wish I could put her on probation for the next 20
21 years, because I would love to get you paid back, but,
22 unfortunately, my hands are tied.

23 They had been paid back. They received all of the
24 money they were supposed to receive. But they stood up in
25 court and wanted more. And when they wanted more, my client

1 had to spend 31 days in jail after, based on all accounts,
2 she was exemplary through her whole process of the five
3 years of probation.

4 What she did is completely wrong. She has admitted
5 that and has suffered the consequences. But I don't think
6 she needed to suffer again. And at this stage of the
7 process, the pleadings on the four corners of them certainly
8 has alleged there was abuse of process in this situation.

9 Maybe the facts might undercover other things down
10 the road that we don't know. But right now, we are just at
11 a motion to dismiss stage. And I don't believe the Court
12 should allow folks to get more money than they lost. Thank
13 you.

14 THE COURT: Thank you. Anything further?

15 MR. BOGDAN: Very briefly, Your Honor. The statute
16 that Mr. Derrick's quoted and cited in his brief, he left
17 out the part that says: An award made pursuant to this
18 article, in his own brief, he put in there, Article 13,
19 compensation of victims of crime. That is the Victim
20 Compensation Fund.

21 THE COURT: Let me just say this. I mean, first,
22 process was started by probation and parole when she didn't
23 pay her restitution, or allegedly didn't pay her
24 restitution. The plaintiff -- the defendant, excuse me,
25 didn't initiate the process. There's been showing of

1 voluntary motive on ulterior motive. I think your motion is
2 correct. I'm going to grant it. Will you draft me an
3 order, please.

4 MR. BOGDAN: I will, Your Honor. Thank you.

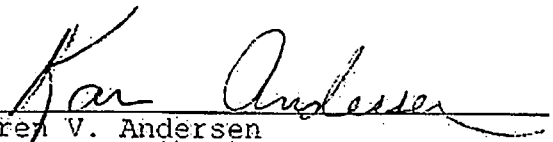
5 (Whereupon, proceedings are adjourned.)
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF REPORTER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, Karen V. Andersen, Registered Merit Reporter,
Certified Realtime Reporter for the State of South Carolina
at Large, do hereby certify that the foregoing transcript is
a true, accurate and complete Transcript of Record of the
proceedings.

I further certify that I am neither related to nor
counsel for any party to the cause pending or interested in
the events thereof.


Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter