THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Robin B. Stillwell, Circuit Court Judge
Edward W. Miller, Circuit Court Judge

Case No. 2016-CP-23-6547
Appellate Case No. 2017-002635

Harold Estes Blackwell, Jr.,.....Appellant,

v.

Toby Woodard,.....Respondent,

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. DID THE LOWER COURT CORRECTLY CONCLUDE THE APPLELLANT'S COMPLAINT FAILED TO STATE ANY CLAIM FOR WHICH RELIEF CAN BE GRANTED?

2. DID THE LOWER COURT CORRECTLY DECLINE TO RECUSE HIMSELF FROM SUBSEQUENT MATTERS IN THIS CASE?

3. DID THE APPELLANT ABANDON HIS ARGUMENTS REGARDING RECUSAL?

STATEMENT OF CASE

On November 9, 2016 Appellant filed suit against Respondent alleging defamation, negligence and outrage arising from a private message conversation on Facebook between Respondent and "Lynn Estes." (R.p. 28) On February 3, 2017 Respondent moved to dismiss the Complaint and to limit the scope of discovery. Those motions were heard before the Honorable Edward W. Miller. The court denied Respondent's Motion to Dismiss and granted his Motion to Limit Discovery. These orders are not on appeal. Subsequent to that order on April 17, 2017 the Appellant moved to recuse Judge Miller. (R.p. 162) On July 20, 2017, Judge Miller denied that motion and ordered sanctions against the Appellant. (R.p. 10) Appellant moved for the court to reconsider that motion. (R.p. 180) The court did not rule on the Motion for Reconsideration prior to dismissal of the case.

On May 2, 2017 Appellant moved to amend his Complaint, attaching a proposed Amended Complaint to his motion. (R.p. 60) In the amended Complaint Appellant admits that he is in fact "Lynn Estes" negating publication of any comments by the Respondent. The Motion to Amend was granted on September 8, 2017. (R.p. 326) On September 15, 2017 Appellant filed an Amended Complaint different than the one attached to his motion to amend. (R.p. 108) The filed Amended Complaint also alleges that the Appellant is "Lynn Estes," again negating publication. Respondent responded September 20, 2017 pursuant to Rule 12 with a Motion to Dismiss and a Motion to Strike. (R.p. 147) These Motions were heard before the Hon. Robin Stilwell on October 3, 2017 immediately subsequent to Appellant's Motion for Preliminary Injunction in the case of Harold Estes Blackwell, Jr. v. Miracle Hill Ministries Inc, et al. 2017-CP-23-3754

now also on appeal to this court. (R.p. 278) The Order granting Respondent's Motion to Dismiss was filed on November 9, 2017. (R.p. 1) Appellant filed a Rule 59(e) Motion to Reconsider 19 days later on November 28, 2017. (R.p. 180) This Motion was denied on December 11, 2017.

Appellant filed his Notice of Intent to Appeal on December 29, 2017. Appellant references three orders he is appealing in his Notice. The first two are Judge Stilwell's dismissal of the Amended Complaint and the refusal to reconsider that order. The third Order is the order Judge Miller entered July 20, 2017 wherein Judge Miller refused to recuse himself from Appellant's case.[1] In his initial brief Appellant only addressed issues regarding the dismissal of the Amended Complaint. Respondent will address herein the issues raised by Appellant in his initial brief.

STATEMENT OF FACTS

Respondent is a counselor in the Renewal program at Miracle Hill Ministries. Miracle Hill is a faith based program that provides many community services including the Renewal Program to help individuals overcome issues with addiction. (R.p. 242, ll.12-16) As alleged in the Complaint, Appellant's ex wife Anita Blackwell was a participant in the Renewal program. (R.p. 108) The Appellant in his original Complaint sued the Respondent alleging that the Respondent published defamatory statements in a private Facebook message to a "Lynn Estes." (R.p. 28) Appellant has now amended his Complaint admitting that "Lynn Estes" is a fictitious person whose identity the Appellant used and that the private Facebook messages were directed only to Appellant. (R.p. 108) Appellant alleges in his Amended Complaint that during his private

[1] Appellant moved for reconsideration of that order August 7, 2017 and no order has been issued on that motion.

Facebook communications with the Respondent that he was "using a false profile he had created on the website Facebook, under the name "Lynn Estes," to communicate with his then wife Anita M. Blackwell. (R.p. 110) He alleges that he intended to send his ex-wife private messages via Facebook and "deceived his wife, in an attempt to save her life and as she was again a practicing alcoholic." (R.p. 110) He also alleges that his ex wife was a notorious liar (R.p. 31), who was involved in a divorce action with Plaintiff, and is a known alcoholic, making no distinguishable progress in her recovery form alcoholism and with known animus toward Plaintiff. He alleges he did this "in an effort to learn what he could about his wife, as he feared (and still does) rightfully for her safety (R.p. 63).[2] Appellant's Amended Complaints negate on their face the publication requirement for defamation. Appellant alleges he was "defamed" when the Respondent told him that the believed him to be subject to a restraining order. (Appellant does allege in his Amended Complaint he was subject to a no trespass notice.) (R.p. 145)

In both Amended Complaints[3], Appellant attempts to broaden the scope of his alleged claims of defamation by making conclusory allegations that the Respondent defamed him to David Woodard, the Respondent's brother, and William Fisk, a mutual friend of the parties as well as other unidentified persons. Appellant does not allege what these defamatory statements are, when or how they were made.

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[2] Appellant has sued Anita Blackwell in the case of Harold Estes Blackwell, Jr. v. Miracle Hill Ministries Inc, et al. 2017-CP-23-3754 also on appeal to this court alleging all manner of horrible things as to her conduct.

[3] Appellant filed an Amended Complaint with his Motion to Amend and then a different Amended Complaint once that motion was answered. The court determined the Respondent's Motion to Strike the filed Amended Complaint as moot in light of the fact that the Amended Complaints were similar in all matters related to the Motion to Dismiss and neither stated a claim.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. See Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999); Stiles v. Onorato, 318 S.C. 297 at 300, 457 S.E.2d 601 at 602-03. In deciding whether the trial court properly granted the motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. See Gentry, 337 S.C. at 5, 522 S.E.2d at 139; see also Cowart v. Poore, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief).

The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law. Tatum v. Medical Univ. of South Carolina, 346 S.C. 194, 552 S.E.2d 18 (2001); see also Gray v. State Farm Auto Ins. Co., 327 S.C. 646, 491 S.E.2d 272 (Ct. App. 1997) (motion must be granted if facts and inferences reasonably deducible from them show that plaintiff could not prevail on any theory of the case).

"Dismissal of an action pursuant to Rule 12(b)(6) is appealable." Williams v. Conden, 347 S.C. 227 at 233, 553 S.E.2d at 496 at 500. Upon review of a dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard of review implemented by the trial court. Id. Flateau v. Harrelson, 355 S.C. 197, 202-203, 584 S.E.2d 413, 415-416, (2003).

Any party may move for a judgment on the pleadings under Rule 12(c), SCRCP. A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle plaintiff to judgment if resolved in plaintiff's favor. Russell v. Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Sapp v. Ford Motor Co., 386 S.C. 143, 146, 687 S.E.2d 47, 49 (2009).

A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party. Murphy v. Murphy, 319 S.C. 324, 461 S.E.2d 39 (1995). Such bias must stem from an extrajudicial source and result in decisions based on information other than what the judge learned from his participation in the case. It is not enough for a party seeking disqualification to simply allege bias. The party must show some evidence of bias or prejudice. Roper v. Dynamique Concepts, Inc., 316 S.C. 131, 447 S.E.2d 218 (Ct. App. 1994). If there is no evidence of judicial prejudice, a judge's failure to disqualify himself will not be reversed on appeal. Ellis v. Procter & Gamble Dist. Co., 315 S.C. 283, 433 S.E.2d 856 (1993). In the final analysis, while appellate courts will accord "great weight to the trial judge's assurances of his own impartiality, [they will] find a judge's impartiality might reasonably be questioned when his factual findings are not supported by the record." Id. at 433 S.E.2d at 857. Mallett v. Mallett, 323 S.C. 141, 145-146, 473 S.E.2d 804, 807 (1996).

I. APPELLANT'S AMENDED COMPLAINT FAILS TO STATE A CLAIM FOR DEFAMATION.

Appellant alleges that the Respondent defamed him in a private message on Facebook visible only to Appellant. Appellant goes on to speculate that Respondent has made other unspecified defamatory comments to other mostly unspecified persons, at other unspecified times and places.

To establish defamation, the Appellant must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Fleming v. Rose, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). McBride v. Sch. Dist. of Greenville County, 389 S.C. 546, 559-560, 698 S.E.2d 845, 852, (Ct. App. 2010). Appellant fails to allege facts sufficient to meet this test.

A. ALLEGED DEFAMATORY COMMENTS TO "LYNN ESTES."

Appellant alleges in his Amended Complaints that any statements made by Respondent were not made to "Lynn Estes" but to Appellant pretending to be a made up person designated as "Lynn Estes." Defamation requires publication to a third party. The alleged defamatory comments are not alleged to be to third party but to himself. The Appellant has suffered no damages as there has been no publication by the Respondent to a third person.

Furthermore, Respondent's statement to Appellant that Appellant was subject to a restraining order is neither false nor defamatory. Appellant concedes he was under

trespass notice where his now ex-wife was in rehab and attaches the police incident report to his Amended Complaint as exhibit C.[4]

The tort of defamation allows a Plaintiff to recover for injury to his or her reputation as the result of the defendant's communications to others of a false message about the Plaintiff. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 514 S.E.2d 126 (1999). The focus of defamation is not on the hurt to the defamed party's feelings, but on the injury to his reputation. See Wardlaw v. Peck, 282 S.C. 199, 318 S.E.2d 270 (Ct.App.1984). Murray v. Holnam, Inc., 344 S.C. 129, 138, 542 S.E.2d 743, 748 (Ct. App. 2001). Without publication, there can be no injury to Appellant's reputation. The only statements Appellant has plead with specificity were made to himself. His hurt feelings are not allowable damages.

B. ALLEGED DEFAMATION REGARDING WILLIAM FISK AND DAVID WOODARD.

Appellant attempts to get around the lack of publication by alleging in his Amended Complaints that he has been defamed to Fisk, David Woodard and unidentified persons without alleging the content, time, location or in most instances persons to whom he has been defamed.

Allegations which are conclusory rather than factual should be disregarded. Myrtle Apartments, Inc. v. Lumbermen's Mutual Casualty Co., 258 N.C. 49, 127 S.E.2d 759 (1962). Russell v. Columbia, 301 S.C. 117, 119, 390 S.E.2d 463, 464 (Ct. App.

[4] A copy of a document which is an exhibit to a pleading is a part of the pleading for all purposes if a copy is attached to such a pleading. Rule 10(c), SCRCP. Brazell v. Windsor, 384 S.C. 512, 516, 682 S.E.2d 824, 826 (2009)

1989). Appellant fails to allege when these allegedly defamatory statements were made, how these statements were made, any substance of the allegation itself, or specifically what was said. Without more, it is impossible to determine whether the legal test for defamation has been met.

The Appellant is required to allege the factual basis of his defamation claim with specificity. See McNeil v. S.C. Dep't of Corr., 404 S.C. 186, 195, 743 S.E.2d 843, 848, (Ct. App. 2013) where the Court dismissed the Appellant's claims where Appellant failed to allege with specificity the alleged false statements. Rule 12(b)(6), SCRCP, replaces the Code Pleading rules regarding demurrers and "retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules.") (citation omitted); Charleston County Sch. Dist. v. S.C. State Ports Auth., 283 S.C. 48, 50, 320 S.E.2d 727, 729 (Ct. App. 1984) ("A demurrer admits the facts well pleaded in the Complaint but does not admit the inferences drawn by the Appellant from the facts, nor does it admit conclusions of law."); Sease v. City of Spartanburg, 242 S.C. 520, 527, 131 S.E.2d 683, 687 (1963) (finding allegations in the Complaint which merely characterize the facts are mere conclusions which are not admitted by a demurrer). Charleston County Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 425-426, 559 S.E.2d 362, 365 (Ct. App. 2001). Appellant's conclusory allegations cannot survive a 12(b)(6) motion as they are not to be deemed admitted for consideration in a motion to dismiss.

Appellant seems to argue that Respondent made defamatory statements to the police. He does not allege this in either Amended Complaint. The police incident report attached to the filed Amended Complaint does not list the Respondent as the

Complainant nor does it contain his name. Appellant for the first time on appeal attempts to raise an issue he has not plead not supported by the exhibits to his filed pleadings.

II. NEITHER AMENDED COMPLAINT STATES A CLAIM FOR NEGLIGENCE.

In order to establish a claim for negligence the Appellant must prove the following elements: 1) a duty of care owed by the Respondent to the Appellant; 2) a breach of ***that*** duty by the Respondent's negligent act or omission; 3) the Appellant was damaged; and 4) the damages proximately resulted from the breach of the duty. Thomasko v. Poole, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). (emphasis added) "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the Respondent to the Appellant." Bishop v. S.C. Dep't of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998). The issue of whether the law recognizes a particular duty is an issue of law to be decided by the Court. Ellis by Ellis v. Niles, 324 S.C. 223, 479 S.E.2d 47 (1996).

This Respondent owes no duty to the Appellant. He was a counselor in a center where Appellant's now ex-wife was in treatment. Appellant alleges facts in paragraph 88 of his proposed Amended Complaint (R.p. 75) and in Paragraphs 121 – 123 of the filed Amended Complaint (R.p. 124) which he argues support his claim of duty. One of the changes between the Amended Complaint filed with Appellant's Motion to Amend and the one filed afterward is that Appellant expands the basis of his duty allegations in the filed Amended Complaint. He alleges that the Respondent owes him the duty based upon "foreseeable harm," a 30 minute telephone conversation the Respondent had with the Appellant regarding his ex-wife's admission into the renewal program, and the

"nature of Respondent's relationship with Appellant's wife." (R.p. 124) None of these allegations give rise to a legally recognized duty of care from Respondent to Appellant. None of these allegations bear any relation to the alleged breaches of duty, which all stems from the private Facebook message between the Appellant and Respondent. There is no basis in law for the creation of a duty under these facts. For reasons unknown, Appellant seeks to turn a defamation claim into a negligence claim unsupported by the facts of law.

III. THE PROPOSED AMENDED COMPLAINT AND THE FILED AMENDED COMPLAINT BOTH FAIL TO STATE A CLAIM FOR OUTRAGE.

The allegations of the filed Amended Complaint supporting the claim of outrage include allegations that the Respondent should be sued because of his "blatant refusal to adhere to the principles of Alcoholics Anonymous and the Bible." (R.p. 127) In each iteration of the Amended Complaint in this action, Appellant basically alleges that the Respondent accused him privately of something that he didn't do, essentially being the subject of a restraining order when in fact he was on trespass notice for stalking his now ex wife, the very activity he was involved in via the internet, when the was messaged by the Respondent.

In order to recover for the intentional infliction of emotional distress, a Appellant must establish that (1) the Respondent intentionally or recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct, Restatement (Second) of Torts § 46, Comment *i*; (2) the conduct was so 'extreme and outrageous' as to exceed 'all possible bounds of decency' and must be regarded as 'atrocious, and utterly intolerable in a civilized community,' Restatement (Second) of Torts § 46, Comment *d*; (3) the actions of the Respondent caused the

Appellant's emotional distress; and (4) the emotional distress suffered by the Appellant was 'severe' so that 'no reasonable man could be expected to endure it.' Restatement (Second) of Torts § 46, Comment *j*. Although 'severe' emotional distress is usually manifested by 'shock, illness or other bodily harm,' such objective symptomatology is not an absolute prerequisite for recovery of damages for intentional . . . infliction of emotional distress. Restatement (Second) of Torts § 46, Comment *k*." Ford v. Hutson, 276 S.C. 157, 162, 276 S.E.2d 776, 778-779 (1981)

Initially, the trial Court determines whether the Defendant's conduct was extreme and outrageous enough to permit recovery; the judge should submit the issue to the jury only where reasonable persons might differ on this issue. Shupe v. Settle, 315 S.C. 510, 445 S.E.2d 651 (Ct. App. 1994) (citing Holtzscheiter v. Thomson Newspapers, Inc., 306 S.C. 297, 411 S.E.2d 664 (1991)). Gattison v. South Carolina State College, 318 S.C. 148, 151-152, 456 S.E.2d 414, 416, (Ct. App. 1995).

"The law does not provide a remedy for every annoyance that occurs in everyday life." Kelley v. Post Publishing Company, 327 Mass. 275, 278, 98 N.E. (2d) 286, 287 (1951). The law protects normal sensibilities, not heightened sensitivity, however genuine. Id; Rycroft v. Gaddy, 284 S.C. 119, 314 S.E.2d 39 (Ct.App. 1984) (In an invasion of privacy case, Appellant must show a blatant and shocking disregard of his rights and serious mental injury or humiliation to himself as a result thereof). This Respondent would submit that like in an invasion of privacy case, whether the conduct in question meets this test is, in the first instance, a question of law for the Court. Snakenberg v. Hartford Casualty Ins. Co., 299 S.C. 164, 171-172, 383 S.E.2d 2, 6, (Ct. App. 1989). See Gattison, supra.

Nothing alleged in the Amended Complaint if taken as true rises to the level of outrage. Appellant alleges he was accused in a private message to himself of being subject to a restraining order when he was in fact under a no trespass order. His allegations fail as a matter of law to rise to the level of outrage.

IV. APPELLANT HAS ABANDONED ANY ARGUMENTS REGARDING JUDGE MILLER'S FAILURE TO RECUSE.

Judge Miller denied Appellant's Motion to Recuse after a hearing on July 20, 2017. No hearings in this matter subsequent to that date were assigned to Judge Miller for hearing. Appellant does not set forth any basis of error with regard to this order in his brief. Thus, he is deemed to have abandoned this issue. Matthews v. City of Greenwood, 305 S.C. 267, 407 S.E.2d 668 (Ct. App. 1991). Mere allegations of error are not sufficient to demonstrate an abuse of discretion. On appeal, the burden of showing abuse of discretion is on the party challenging the trial court's ruling. State ex rel. McLeod v. Wilson, 279 S.C. 562, 310 S.E.2d 818 (Ct. App. 1983). First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994). Appellant had the burden at the hearing on this motion to establish that Judge Miller had an extrajudicial source and that this source resulted in decisions based on information other than what the judge learned from his participation in the case. Appellant was extensively questioned about this by the court and introduced no such evidence in that hearing. (Transcript: Designated but not included in Record on Appeal)

V. THE COURT APPLIED THE APPROPRIATE STANDARD TO THE APPELLANT'S PRO SE PLEADINGS.

Appellant's argument that the he is not required to meet the legal test of the claims he alleges because he is pro se is without merit. Appellant's claims were

dismissed because the facts he alleged, viewed in a light most favorable to him did not meet the legal requisites of the causes of action he pursued. See Gaskins v. S. Farm Bureau Cas. Ins. Co., 343 S.C. 666, 671, 541 S.E.2d 269, 271 (Ct. App. 2000) (finding Rule 12(b)(6), SCRCP, replaces the Code Pleading rules regarding demurrers and "retains the Code Pleading standard . . . rather than the more lenient notice pleading standard found in the federal rules.") (citation omitted); Charleston County Sch. Dist. v. S.C. State Ports Auth., 283 S.C. 48, 50, 320 S.E.2d 727, 729 (Ct. App. 1984) ("A demurrer admits the facts well pleaded in the complaint but does not admit the inferences drawn by the plaintiff from the facts, nor does it admit conclusions of law."); Sease v. City of Spartanburg, 242 S.C. 520, 527, 131 S.E.2d 683, 687 (1963) (finding allegations in the complaint which merely characterize the facts are mere conclusions which are not admitted by a demurrer). Charleston County Sch. Dist. v. Laidlaw Transit, Inc., 348 S.C. 420, 425-426, 559 S.E.2d 362, 365 (Ct. App. 2001)

VI. THE COURT CORRECTLY CONCLUDED THE TWO AMENDED COMPLAINTS WERE SUFFICIENTLY SIMILAR TO DISMISS REGARDLESS OF WHICH COMPLAINT WAS CONTROLLING.

While the Appellant's Amended Complaint attached to his Motion to Dismiss differs from the one he filed, the court correctly held neither stated a claim for the reasons set forth in the order of the court and argued by Respondent, supra.

VII. THE COURT APPLIED THE CORRECT STANDARD OF REVIEW.

Appellant argues that the court applied the standard of review for SCRCP 12(c) as opposed to SCRCP 12 (b) (6). The standards are the same. On appeal from the granting of a motion under Rule 12(b)(6) or Rule 12(c), the reviewing court may not

consider matters outside the pleadings. JM Mechanical Corp. v. United States, by United States Dept. of Housing and Urban Dev., 716 F.2d 190 (3d Cir. 1983) (Fed.R.Civ.P. 12(b)(6)); McDonnell v. Estelle, 666 F.2d 246 (5th Cir. 1982) (Fed.R.Civ.P. 12(c)); cf. Carrington v. City of Spartanburg, 283 S.C. 298, 322 S.E. (2d) 28 (Ct.App. 1984) (demurrer), overruled on other grounds, McCall v. Batson, 285 S.C. 243, 329 S.E. (2d) 741 (1985). A motion under Rule 12 (b)(6) or Rule 12(c) admits the well pleaded facts in the complaint, but it does not admit the inferences drawn by the plaintiff from such facts, nor does it admit conclusions of law. Bryan v. Stillwater Bd. of Realtors, 578 F.2d 1319 (10th Cir. 1977) (Fed.R.Civ.P.12(b)(6)); Hargis Canneries v. United States, 60 F.Supp. 729 (W.D. Ark. 1945) (Fed.R.Civ.P... 12(c)); cf.Carrington v. City of Spartanburg, supra. The court must take all well pleaded factual allegations in the complaint as true. Bryan v. Stillwater Bd. of Realtors, supra; Austad v. United States, 386 F.2d 147 (9th Cir. 1967) (Fed.R.Civ.P. 12(c)); cf. Cook v. Mack's Transfer & Storage, 291 S.C. 84, 352 S.E. (2d) 296 (Ct. App. 1986) (demurrer), cert. denied, 292 S.C. 230, 355 S.E. (2d) 861 (1987). Carolina Winds Owners' Ass'n v. Joe Harden Builder, Inc., 297 S.C. 74, 76, 374 S.E.2d 897, 899 (Ct. App. 1988).

CONCLUSION

Appellant's Amended Complaints fail to state claims for which relief can be granted. There has had been no publication of the defamation he describes and nothing but conclusory allegations beyond that. The lower court correctly dismissed the Amended Complaints.

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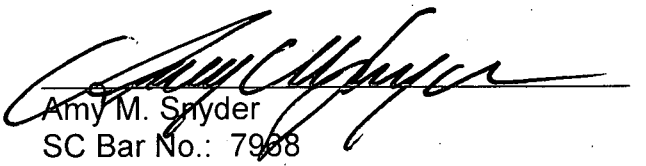
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief Complies with Rule 211(b), SCACR.

CLAWSON and STAUBES, LLC



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