THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2018-000741

Lamont Jeremiah McCauley,...Appellant,

v.

Paul Wickensimer, Greenville Family Court Clerk's Office,...
Respondents.

RECEIVED
JAN 02 2019
SC Court of Appeals

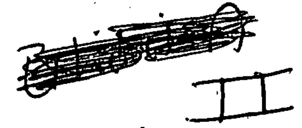
Record on Appeal

Lamont Jeremiah McCauley
504 Bethel Drive
Mauldin, S.C. 29662
(404)862-0179
Authorize Rep/Appellant

Russell Harter Jr.,
14 Lavinia Ave
Greenville S.C. 29601
(864)244-4500
Attorney/Respondent

Index

II. Notice of filing of Foreign Support Order.....
III. Rebuttal and Request for Hearing on Establishment of Foreign Support Order....
IV. Income Withholding Order......
V. Certified Letter to Court Clerk.......
VI. Final Pay Stub w Income Withholding......
VII. Dismissal of Registration of Foreign Support Order.....
VIII. Notice of Hearing for Chang of Venue Motion.........
IX. Proof of Service from Greenville County Sheriff........
X. Motion 12(b)6 dated January 31, 2018......
XI. Order of Dismissal from Tribunal.......
XII. U.S. District Court Certified Trinsey V. Pagliaro......
XIII. S.C. Appeals Court Brown v Leverette., 291 S.C.......
XIV. Higgins v MUSC., 326 S.C........
XV. Woodard v Westvaco Corp,. 315 S.C. ......



FILED CLERK OF COURT
GREENVILLE, S.C.
2017 MAY -5 PM 2:24
FAMILY COURT

STATE OF SOUTH CAROLINA)
) IN THE FAMILY COURT
COUNTY OF GREENVILLE)
) NOTICE OF FILING AND REGISTRATION
) OF FOREIGN SUPPORT ORDER

STATE OF SOUTH CAROLINA OBO)
DESIREE M. LEE AND)
STATE OF GEORGIA,)

PLAINTIFF,)

-vs-) Docket No. 2017-DR-23-2020

LAMONT J. MCCAULEY,)
504 Bethel Dr)
Mauldin, SC 296621841)

DEFENDANT.)

TO THE DEFENDANT NAMED ABOVE AND THE COURT:

The above-captioned support Order has been filed and registered in the Registry of Foreign Support Orders of Greenville County under S.C. Code Ann., Section 63-17-2900 et seq. (1976). The Order is enforceable as of the date of registration. Except as provided in Sections 63-17-3610 through 63-17-4040 (1976), the Family Court shall recognize and enforce and may not modify this registered Order.

The obligor has twenty (20) days after the mailing of the Notice of Registration to file a motion in the Family Court of Greenville County to contest the validity or enforcement of the registered Order and to serve the attorney for Plaintiff, to the attention of A. Devorea Spriggs, Child Support Services Division, 714 N. Pleasantburg Drive, Post Office Box 17799, Greenville, SC, 29607. If the obligor does not file a motion with the Court, the support Order is confirmed by operation of law and the Order and arrears will be enforced and the obligor will be precluded from any further contest of the Order with respect to any matter that could have been asserted

II.

Pursuant to the terms of the above-captioned support Order, the obligor is in arrears $__________ as of __________.

The Child Support Services Division shall send by first class mail to the obligor at the address given above a Notice of Registration with a copy of the registered support Order.

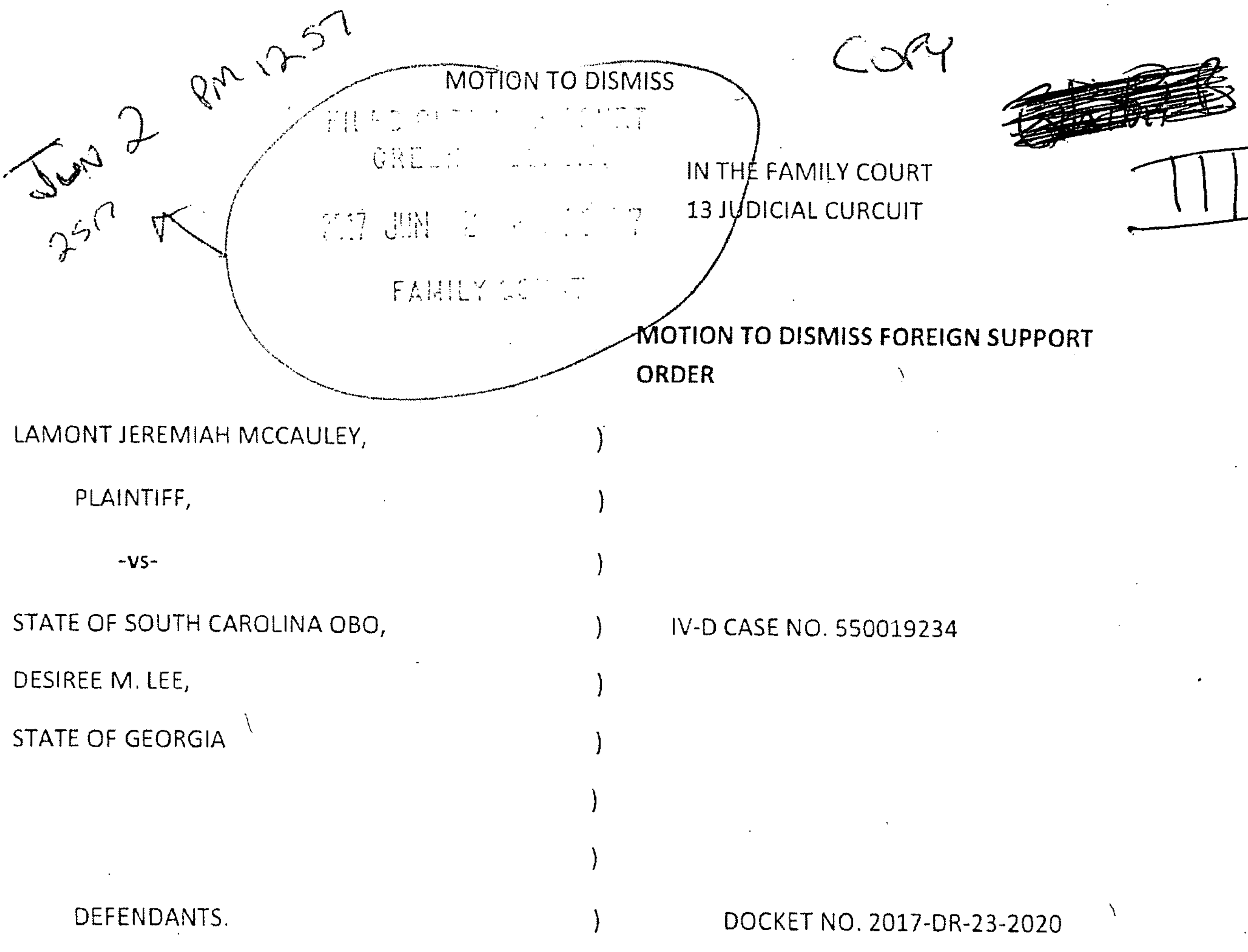
Payments may be mailed in the form of Postal Money Orders, Certified Checks, or Cashier's Checks, made payable to the Family Court of Greenville County and mailed to P. O. Box 757, Greenville, SC, 29602.

A. Devorea Spriggs
Attorney for Plaintiff

Greenville, S.C.

5-1, 20 12

as:0960190



MOTION TO DISMISS

IN THE FAMILY COURT
13 JUDICIAL CURCUIT

MOTION TO DISMISS FOREIGN SUPPORT ORDER

LAMONT JEREMIAH MCCAULEY,)

PLAINTIFF,)

-vs-)

STATE OF SOUTH CAROLINA OBO,) IV-D CASE NO. 550019234

DESIREE M. LEE,)

STATE OF GEORGIA)

)

)

DEFENDANTS.) DOCKET NO. 2017-DR-23-2020

SEE ATTACHED AFFIDAVIT

A man; LAMONT JEREMIAH MCCAULEY Pursuant to the STATE OF SOUTH CAROLINA and The UNITED STATES CONSTITUTION as well as 45 CFR § 303.101 (c)(4), 63-17-3630 (B)(C), 63-17-3730(2) requires an executive review of facts and demands dismissal and discharge of all Foreign Support Orders created in association with IV-D Case No 550019234. A motion has been filed with the Gwinnett County, Georgia Clerk of Court to dismiss without prejudice the Initial Tribunal's support order case against the Plaintiff. The Initial Tribunal is in violation of 45 CFR §303.101 (c)(4), due process and equal protections of the 14TH AMENDMENT of The United States' Constitution, The Omnibus Budget Reconciliation Act 1993, and The Fair Debt

IV

INCOME WITHHOLDING FOR SUPPORT

- [x] ORIGINAL INCOME WITHHOLDING ORDER/NOTICE FOR SUPPORT (IWO)
- [ ] AMENDED IWO
- [ ] ONE-TIME ORDER/NOTICE FOR LUMP SUM PAYMENT
- [ ] TERMINATION OF IWO

Date: 08/07/2017

☐ Child Support Enforcement (CSE) Agency ☒ Court ☐ Attorney ☐ Private Individual/Entity (Check One)

NOTE: This IWO must be regular on its face. Under certain circumstances you must reject this IWO and return it to the sender (see IWO instructions **www.acf.hhs.gov/programs/css/resource/income-withholding-for-support-instructions**). If you receive this document from someone other than a state or tribal CSE agency or a court, a copy of the underlying order must be attached.

State/Tribe/Territory: SOUTH CAROLINA
City/County/Dist./Tribe: GREENVILLE
Private Individual/Entity:
Remittance Identifier (include w/payment): 201702020
Order ID: 201702020
CSE Agency Case ID:

INDUSTRIAL STAFFING SERVICES
Employer/Income Withholder's Name
PO BOX 177
Employer/Income Withholder's Address
E BRUNSWICK NJ 08816

ATTN: GARNISHMENTS

RE: LAMONT J. MCCAULEY
Employee/Obligor's Name (Last, First, Middle)
237-49-5039
Employee/Obligor's Social Security Number
GA FSR - 550019234
Custodial Party/Obligee's Name (Last, First, Middle)

Employer/Income Withholder's FEIN

Child(ren)'s Name(s) (Last, First, Middle)	Child(ren)'s Birth Date(s)
MCCAULEY, NEVAEH S	08/23/2006

ATTENTION
REMIT ALL PAYMENTS TO
GREENVILLE COUNTY FAMILY COURT
P.O. BOX 757
GREENVILLE, SC 29602

ORDER INFORMATION: This document is based on the support or withholding order from (State/Tribe).
You are required by law to deduct these amounts from the employee/obligor's income until further notice.

$ 388.40 Per MONTH current child support
$ 77.70 Per MONTH past-due child support - **Arrears greater than 12 weeks?** ☐ Yes ☐ No
$ ______ Per ______ current cash medical support
$ ______ Per ______ past-due cash medical support
$ 0.00 Per ______ current spousal support
$ 0.00 Per ______ past-due spousal support
$ ______ Per ______ other (must specify) ______

for a **Total Amount to Withhold of $** 466.10 per MONTH.

AMOUNTS TO WITHHOLD: You do not have to vary your pay cycle to be in compliance with the *Order Information*. If your pay cycle does not match the ordered payment cycle, withhold one of the following amounts:

$ 107.56 per weekly pay period
$ 233.05 per semimonthly pay period (twice a month)
$ 215.12 per biweekly pay period (every two weeks)
$ 466.10 per monthly pay period
$ ______ **Lump Sum Payment:** Do not stop any existing IWO unless you receive a termination order.

SR
8/10/17

Document Tracking Identifier 201702020

OMB 0970-0154

Employer's Name: INDUSTRIAL STAFFING SERVICES Employer FEIN: ______

Employee/Obligor's Name: LAMONT J. MCCAULEY SSN: 237-49-5039

CSE Agency Case Identifier: ______ Order Identifier: 201702020

NOTIFICATION OF EMPLOYMENT TERMINATION OR INCOME STATUS: If this employee/obligor never worked for you or you are no longer withholding income for this employee/obligor, an employer must promptly notify the CSE agency and/or the sender by returning this form to the address listed in the Contact Information below:

☐ This person has never worked for this employer nor received periodic income.

☐ This person no longer works for this employer nor receives periodic income.

Please provide the following information for the employee/obligor:

Termination date: ______ Last known phone number: ______

Last known address: ______

______

Final payment date to SDU/tribal payee: ______ Final payment amount: ______

New employer's name: ______

New employer's address: ______

______

CONTACT INFORMATION:

To Employer/Income Withholder: If you have any questions, contact GREENVILLE COUNTY FAMILY COURT (Issuer name) by phone: (864) 467-5800, by fax at (864) 467-5971, by email or website at: WAGEWITHHOLD@GREENVILLECOUNTY.ORG

Send termination/income status notice and other correspondence to:

Fax, Email, or Mail: P.O. Box 757, Greenville, SC 29602 (Issuer address)

To Employee/Obligor: If the employee/obligor has questions, contact GREENVILLE COUNTY FAMILY COURT (Issuer name) by phone: (864) 467-5800, by fax at (864) 467-5971, by email or website at: WAGEWITHHOLD@GREENVILLECOUNTY.ORG

The Paperwork Reduction Act of 1995

This information collection and associated responses are conducted in accordance with 45 CFR 303. 100 of the Child Support Enforcement Program. This form is designed to provide uniformity and standardization. Public reporting burden for this collection of information is estimated to average 5 minutes per response for Non-IV-D CPs; 2 minutes per response for employers; 3 seconds for e-IWO employers, including the time for reviewing instructions, gathering and maintaining the data needed, and reviewing the collection of information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

KLN

IV.

Employer's Name: INDUSTRIAL STAFFING SERVICES Employer FEIN: ______

Employee/Obligor's Name: LAMONT J. MCCAULEY SSN: 237-49-5039

CSE Agency Case Identifier: ______ Order Identifier: 201702020

Lump Sum Payments: You may be required to notify a state or tribal CSE agency of upcoming lump sum payments to this employee/obligor such as bonuses, commissions, or severance pay. Contact the sender to determine if you are required to report and/or withhold lump sum payments.

Liability: If you have any doubts about the validity of this IWO, contact the sender. If you fail to withhold income from the employee/obligor's income as the IWO directs, you are liable for both the accumulated amount you should have withheld and any penalties set by state or tribal law/procedure.

Anti-discrimination: You are subject to a fine determined under state or tribal law for discharging an employee/obligor from employment, refusing to employ, or taking disciplinary action against an employee/obligor because of this IWO.

Withholding Limits: You may not withhold more than the lesser of: 1) the amounts allowed by the Federal Consumer Credit Protection Act (CCPA) (15 U.S.C. 1673(b)); or 2) the amounts allowed by the state of the employee/obligor's principal place of employment or tribal law if a tribal order (see *Remittance Information).* Disposable Income is the net income after mandatory deductions such as: state, federal, local taxes; Social Security taxes; statutory pension contributions; and Medicare taxes. The federal limit is 50% of the disposable income if the obligor is supporting another family and 60% of the disposable income if the obligor is not supporting another family. However, those limits increase 5% - to 55% and 65% - if the arrears are greater than 12 weeks. If permitted by the state or tribe, you may deduct a fee for administrative costs. The combined support amount and fee may not exceed the limit indicated in this section.

For tribal orders, you may not withhold more than the amounts allowed under the law of the issuing tribe. For tribal employers/income withholders who receive a state IWO, you may not withhold more than the limit set by tribal law.

Depending upon applicable state or tribal law, you may need to consider amounts paid for health care premiums in determining diposable income and applying appropriate withholding limits.

Arrears greater than 12 weeks? If the *Order Information* does not indicate that the arrears are greater than 12 weeks, then the employer should calculate the CCPA limit using the lower percentage.

Supplemental Information:

Employers may withhold a fee up to $3.00 per pay period (not to exceed $12.00/month) for company processing costs.

IMPORTANT: The person completing this form is advised that the information may be shared with the employee/obligor.

1Y.

Employer's Name: INDUSTRIAL STAFFING SERVICES Employer FEIN: ______

Employee/Obligor's Name: LAMONT J. MCCAULEY

CSE Agency Case Identifier: ______ Order Identifier: 201702020

REMITTANCE INFORMATION: If the employee/obligor's principal place of employment is South Carolina (State/Tribe), you must begin withholding no later than the first pay period that occurs 5 days after the date of August 07, 2017. Send payment within 10 working days of the pay date. If you cannot withhold the full amount of support for any or all orders for this employee/obligor, withhold up to 50% of disposable income. If the obligor is a non-employee, obtain withholding limits from Supplemental Information on page 3. If the employee/obligor's principal place of employment is not South Carolina (State/Tribe), obtain withholding limitations, time requirements, and any allowable employer fees at www.acf.hhs.gov/programs/css/resource/state-income-withholding-contacts-and-program-information for the employee/obligor's principal place of employment.

For electronic payment requirements and centralized payment collection and disbursement facility information (State Disbursement Unit [SDU]), see www.acf.hhs.gov/programs/css/employers/electronic-payments.

Include the ***Remittance Id* with the payment** and if necessary this FIPS code: 45045

Remit payment to GREENVILLE COUNTY FAMILY COURT (SDU/Tribal Order Payee)

at P. O. BOX 757, GREENVILLE, SC 29602 (SDU/Tribal Payee Address)

☐ **Return to Sender [Completed by Employer/Income Withholder].** Payment must be directed to an SDU in accordance with 42 USC §666(b)(5) and (b)(6) or Tribal Payee (see Payments to SDU below). If payment is not directed to an SDU/Tribal Payee or this IWO is not regular on its face, you *must* check this box and return the IWO to the sender.

Signature of Judge/Issuing Official (if requied by State or Tribal law): Paul B. Wickensimer

Print Name of Judge/Issuing Official: PAUL B. WICKENSIMER

Title of Judge/Issuing Official: Clerk of Court

Date of Signature: August 07, 2017

If the employee/obligor works in a State or for a Tribe that is different from the State or Tribe that issued this order, a copy of this IWO must be provided to the employee/obligor.

☐ If checked, the employer/income withholder must provide a copy of this form to the employee/obligor.

ADDITIONAL INFORMATION FOR EMPLOYERS/INCOME WITHHOLDERS

State-specific contact and withholding information can be found on the Federal Employer Services website located at: www.acf.hhs.gov/programs/css/resource/state-income-withholding-contacts-and-program-information.

Priority: Withholding for support has priority over any other legal process under State law against the same income (42 USC §666(b)(7)). If a federal tax levy is in effect, please notify the sender.

Combining Payments: When remitting payments to an SDU or tribal CSE agency, you may combine withheld amounts from more than one employee/obligor's income in a single payment. You must, however, separately identify each employee/obligor's portion of the payment.

Payments To SDU: You must send child support payments payable by income withholding to the appropriate SDU or to a tribal CSE agency. If this IWO instructs you to send a payment to an entity other than an SDU (e.g., payable to the custodial party, court, or attorney), you must check the box above and return this notice to the sender. Exception: If this IWO was sent by a court, attorney, or private individual/entity and the initial order was entered before January 1, 1994 or the order was issued by a tribal CSE agency, you must follow the "Remit payment to" instructions on this form.

Reporting the Pay Date: You must report the pay date when sending the payment. The pay date is the date on which the amount was withheld from the employee/obligor's wages. You must comply with the law of the state (or tribal law if applicable) of the employee/obligor's principal place of employment regarding time periods within which you must implement the withholding and forward the support payments.

Multiple IWOs: If there is more than one IWO against this employee/obligor and you are unable to fully honor all IWOs due to Federal, state, or tribal withholding limits, you must honor all IWOs to the greatest extent possible, giving priority to current support before payment of any past-due support. Follow the state or tribal law/procedure of the employee/obligor's principal place of employment to determine the appropriate allocation method.

OMB Expiration Date -7/31/2017. The OMB Expiration Date has no bearing on the termination date of the IWO; it identifies the version of the form currently in use.

LAMONT JEREMIAH MCCAULEY

LAMONT JEREMIAH MCCAULEY
Mauldin SC 29662

Paul B. Wickensimer, CLERK
GREENVILLE FAMILY COURT
P.O. Box 757
Greenville, SC 29602

IN REGARDS TO CASE NUMBER: GA FSR-550019234/201702020

LAMONT JEREMIAH MCCAULEY non-adverse, non-belligerent, non-combative party, secure creditor with power of attorney general on behalf of LAMONT JEREMIAH MCCAULEY is in the possession of your recent Income Withholding Order sent to Industrial Staffing Services for wage withholding for a debt to Greenville County Family Court.

Paul B. Wickensimer, GREENVILLE COUNTY FAMILY COURT CLERK, must herein provide a true and certified copy of the complete audit trail of said account. In order for the debt to be validated, please provide verification through GREENVILLE COUNTY FAMILY COURT's audit certifications of debt entry in accordance with g.a.a.p.. i.f.r.s., in accordance with Basel 3 accord and u.n.c.i.t.r.a.l. conventions. I would also need a copy if your organization's Tax Registration certificate. An account summary from a tribunal entity other than GREENVILLE COUNTY FAMILY COURT does not sufficiently provide proof to the Secured Creditor that a debt is owed to this organization.

Failure to substantiate the claim through the aforementioned auditing forms, please settle the account within the seven days of receipt of this document and reimburse Industrial Staffing Services in the amount of 645.36usd on behalf of Secured Creditor.

Sincerely,

LAMONT JEREMIAH MCCAULEY

UCC FINANCING STATEMENT

FOLLOW INSTRUCTIONS

A. NAME & PHONE OF CONTACT AT FILER (optional)
LAMONT JEREMIAH MCCAULEY

B. E-MAIL CONTACT AT FILER (optional)
Refinedbyfire08@gmail.com

C. SEND ACKNOWLEDGMENT TO: (Name and Address)

LAMONT JEREMIAH MCCAULEY
504 BETHEL DRIVE
MAULDIN, SC 29662

THE ABOVE SPACE IS FOR FILING OFFICE USE ONLY

1. DEBTOR'S NAME: Provide only one Debtor name (1a or 1b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 1b, leave all of item 1 blank, check here ☐ and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

1a. ORGANIZATION'S NAME
DSS SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES/CHILD SUPPORT SERVICES DIVISION

OR

1b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX

1c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY
P.O.BOX 1469	Columbia	SC	29202	USA

2. DEBTOR'S NAME: Provide only one Debtor name (2a or 2b) (use exact, full name; do not omit, modify, or abbreviate any part of the Debtor's name); if any part of the Individual Debtor's name will not fit in line 2b, leave all of item 2 blank, check here ☐ and provide the Individual Debtor information in item 10 of the Financing Statement Addendum (Form UCC1Ad)

2a. ORGANIZATION'S NAME
GREENVILLE COUNTY FAMILY COURT

OR

2b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX

2c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY
P.O.BOX 757	Greenville	SC	26049	USA

3. SECURED PARTY'S NAME (or NAME of ASSIGNEE of ASSIGNOR SECURED PARTY): Provide only one Secured Party name (3a or 3b)

3a. ORGANIZATION'S NAME
LAMONT JEREMIAH MCCAULEY

OR

3b. INDIVIDUAL'S SURNAME	FIRST PERSONAL NAME	ADDITIONAL NAME(S)/INITIAL(S)	SUFFIX

3c. MAILING ADDRESS	CITY	STATE	POSTAL CODE	COUNTRY
504 BETHEL DRIVE	MAULDIN	SC	29662	USA

4. COLLATERAL: This financing statement covers the following collateral:

DSS SOUTH CAROLINA DEPARTMENT OF SOCIAL SERVICES/CHILD SUPPORT SERVICES DIVISION, GREENVILLE COUNTY FAMILY COURT

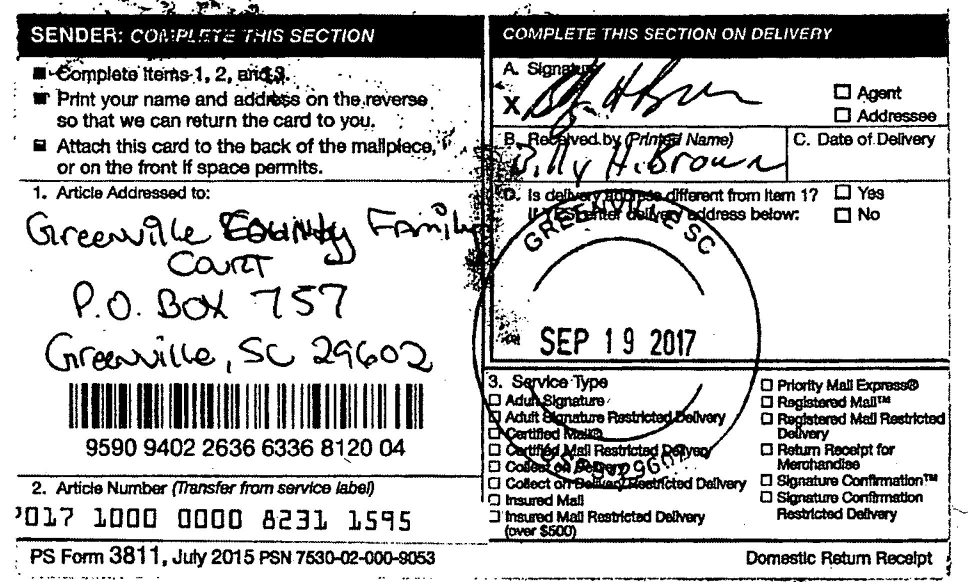
5. Check only if applicable and check only one box: Collateral is ☐ held in a Trust (see UCC1Ad, item 17 and Instructions) ☐ being administered by a Decedent's Personal Representative

6a. Check only if applicable and check only one box:
☐ Public-Finance Transaction ☐ Manufactured-Home Transaction ☐ A Debtor is a Transmitting Utility

6b. Check only if applicable and check only one box:
☐ Agricultural Lien ☐ Non-UCC Filing

7. ALTERNATIVE DESIGNATION (if applicable): ☐ Lessee/Lessor ☐ Consignee/Consignor ☐ Seller/Buyer ☐ Bailee/Bailor ☐ Licensee/Licensor

8. OPTIONAL FILER REFERENCE DATA:



SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Greenville County Family Court
P.O. Box 757
Greenville, SC 29602

9590 9402 2636 6336 8120 04

2. Article Number (Transfer from service label)

7017 1000 0000 8231 1595

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) Billy H. Brown

C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

GREENVILLE SC
SEP 19 2017

3. Service Type
- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☐ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery (over $500)
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☐ Return Receipt for Merchandise
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

PS Form 3811, July 2015 PSN 7530-02-000-9053 Domestic Return Receipt

U.S. Postal Service™
CERTIFIED MAIL® RECEIPT
Domestic Mail Only

For delivery information, visit our website at www.usps.com®.

OFFICIAL USE

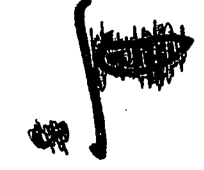
7017 1000 0000 8231 1595

Certified Mail Fee	$3.35
$	$2.75
Extra Services & Fees (check box, add fee as appropriate)	
☐ Return Receipt (hardcopy)	$0.00
☐ Return Receipt (electronic)	$0.00
☐ Certified Mail Restricted Delivery	$0.00
☐ Adult Signature Required	$0.00
☐ Adult Signature Restricted Delivery	$
Postage	$0.49
Total Postage and Fees	$6.59

Postmark Here
SEP 16 2017
USPS - 29602
09/16/2017

Sent To: Greenville County Family Court
Street and Apt. No., or PO Box No.: P.O. Box 757
City, State, ZIP+4®: Greenville, SC 29602

PS Form 3800, April 2015 PSN 7530-02-000-9047 See Reverse for Instructions



Industrial Staffing Services, Inc.
25 Kennedy Blvd, Suite 200
East Brunswick, NJ 08816

Direct Deposit Earnings Statement

Pay Period: 10/2/2017 to 10/8/2017

Pay Date	Check Number
10/11/2017	DD000000000000182324

Earnings

Code	Rate	Hours	Amount
OT	$27.00	7.24	$195.48
ST	$18.00	40.00	$720.00
Total		47.24	$915.48

Taxes

Code	Amount	Year To Date
FICA Med	$13.27	$148.45
SS	$56.76	$634.76
Federal	$20.39	$124.71
State SC	$31.60	$295.41
Local		
Total	$122.02	$1,203.33

Payroll Deductions

Code	Check Amount	Year To Date
CHILD1	$107.56	$968.04
Total	$107.56	$968.04

Wage Amounts

Gross Wages Per Period	$915.48
Net Wages Per Period	$685.90
Gross Wages YTD	$10,238.13
Net Wages YTD	$8,066.76

Direct Deposit Information

Bank	Account	Amount
XXXX 4483	XXXXXX 9561	$685.90

Miscellaneous

Employee ID	MCCA5039
Employee SSN	XXX-XX -5039
Vacation Available	0.00
Sick Time Available	0.00

LAMONT MCCAULEY
504 Bethel Drive
Mauldin SC 29662

FILED CLERK OF COURT
GREENVILLE, S.C.
2017 OCT 24 P 2:50
FAMILY COURT

STATE OF SOUTH CAROLINA	)	IN THE FAMILY COURT
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
		CASE NO.: 2017-DR-23-2020
South Carolina Department of Social Services, Plaintiff,	)	CSSD: 0960190
vs.	)	ORDER
Lamont J. McCauley, Defendants.	)	

PRESIDING JUDGE:	**ROCHELLE CONITS**
DATE OF HEARING:	**OCTOBER 23, 2017**
PLAINTIFF' S ATTORNEY for SCDSS:	**A. DEVOREA' SPRIGGS**
DEFENDANT PRO SE:	**LAMONT J. McCAULEY**
COURT REPORTER:	**DEBRINA JONES**

This matter was scheduled before the court for a Judicial Process hearing to address the Defendant's objection to the registration of the Georgia child support order.

Appearances were as listed above. The custodial parent is located in Georgia and was not present.

After hearing from counsel and after careful review of the evidence presented and other matters of record, I make the following findings of fact:

1. I find that this court will not enforce the Georgia Registration at this time.
2. I find that this court is suspending enforcement of the Georgia child support order by the Greenville County Clerk of Court pending the outcome from the Defendant's Motion to Dismiss which has been filed in Gwinnett County Court.
3. I find that the any funds which have been collected by the Greenville County Clerk of Court and disbursed to the State of Georgia shall be challenged by the Defendant in his court action with the State of Georgia.

THEREFORE, IT IS SO ORDERED.

1. This court will not enforce the Georgia Registration at this time.
2. This court is suspending enforcement of the Georgia child support order by the Greenville County Clerk of Court pending the outcome from the Defendant's Motion to

Dismiss which has been filed in Gwinnett County Court.

3. Any funds which have been collected by the Greenville County Clerk of Court and disbursed to the State of Georgia shall be challenged by the Defendant in his court action with the State of Georgia.

AND IT IS SO ORDERED.

JUDGE, ROCHELLE CONITS

Greenville, South Carolina
October 24, 2017

A Certified Copy
Clerk of Court C.P. & G.S. & Family Court
Greenville County, SC
Dated 10/24/17

VIII.

2017-CP-23-08068
CIVIL CASE NUMBER

STATE OF SOUTH CAROLINA)
) IN THE MAGISTRATE'S COURT
COUNTY OF GREENVILLE)
)
LAMONT JEREMIAH MCCAULEY)
PLAINTIFF(S))
) AFFIDAVIT FOR
VS.) CHANGE OF VENUE
) Motion
PAUL WICKENSIMER/)
GREENVILLE COUNTY FAMILY COURT
CLERK OFFICE
DEFENDANT(S).)

2018 JAN 16 PM 4:09
FILED-CLERK OF COURT
PAUL B. WICKENSIMER
GREENVILLE CO SC

LAMONT JEREMIAH MCCAULEY, plaintiff, personally appearing before me, states that he believes that he is unable to have a fair trial before a judge or jury for the following reasons:

The Defendant is an official in GREENVILLE COUNTY and as such has great influence over pertaint filings, county personal, and process' vital to the plaintiff receiving a fair and impartial ruling in this case;

and, therefore, requests that a change of venue be granted.

Sworn to and Subscribed before me)
this 5th day of JAN , 2017)

Magistrate or Notary Public for South Carolina) PLAINTIFF (or his attorney)

My Commission expires March 30, 2021)

SCCA/714 (Amended 05/2008)

Service of Process by:
159786-0001

Court Date:

IX.

Greenville County Sheriff's Office

Civil Division

601 E. McBee Ave., Suite 101
Greenville, South Carolina 29601
Phone (864) 282-0008 Fax (864) 235-9171

Party Requesting Service:

LAMONT JEREMIAH MCCAULEY
Attn: Lamont Jeremiah McCauley
504 Bethel Dr.
Mauldin, SC 29662

AFFIDAVIT OF SERVICE

Paul Wickensimer, Clerk Greenville County Family Court

Lamont Jeremiah McCauley, et. al., Plaintiff(s)
vs.
Paul Wickensimer, Clerk Greenville County Family Court, et. al., Defendant(s)

Case No: 2017CP2308068

Name of Deputy: Kathryn L. Monahan, undersigned, being duly sworn, deposes and says that at time of service, s/he was over the age of twenty-one, was not a party to this action;

Date/Time of Service that on 06-Feb-2018 02:00 pm

Place of Service: at 305 E North St., City of Greenville, State of SC

Documents Served: the undersigned served the documents described as:
Summons and Complaint
Proof of ADR or Exemption
Exhibit A-G

Service of Process on, Person Served, and Method of Service: A true and correct copy of the aforesaid document(s) was served on:
Paul Wickensimer, Clerk Greenville County Family Court
By delivering them into the hands of
Sandra Mansel — Administrative Coordinator

Signature of Deputy: Subscribed and sworn to before me this ______ day of **February, 2018.**

Notary Public for South Carolina
My Commission Expires:

Undersigned declares under penalty of perjury that the foregoing is true and correct.

Kathryn L. Monahan

ELECTRONICALLY FILED - 2018 Jan 31 11:42 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2308068

X.

STATE OF SOUTH CAROLINA) COURT OF COMMON PLEAS
)
COUNTY OF GREENVILLE) C.A. NO.: 2017-CP-23-08068

Lamont Jeremiah McCauley,)
)
Plaintiff,)
)
vs.)
)
Paul Wickensimer,)
Greenville County Family)
Court Clerk's Office,)
)
Defendants.)

MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

YOU WILL PLEASE TAKE NOTICE that the defendant(s), by and through his/their undersigned attorney(s), will move before the presiding judge within ten days after service hereof, or as soon thereafter as counsel may be heard, , pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, for an order of court dismissing the within action on the grounds that plaintiff's Complaint fails to state facts sufficient to constitute a cause of action.

Respectfully submitted,

CHAPMAN, HARTER & CHAPMAN, PA

s/Russell W. Harter, Jr.
Russell W. Harter, Jr., #2778
Carly H. Davis 100112
1012 E. Washington Street

Post Office Box 10224, F.S.
Greenville, SC 29603
864/233-4500
864/232-1710 (fax)
E-mail: rwhjr@chhlaw.net

January 31, 2018

Greenville, South Carolina

ELECTRONICALLY FILED - 2018 Jan 31 11:42 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2308068

CHAPMAN, HARTER & HARTER, P.A.
PO BOX 10224
GREENVILLE, SC 29603

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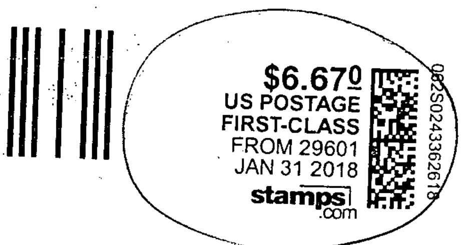


Lamont J. McCauley
504 Bethel Drive
Mauldin SC 29662-1841

XI.

ELECTRONICALLY FILED - 2018 Mar 26 11:35 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2308068

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE	IN THE COURT OF COMMON PLEAS
Lamont Jeremiah McCauley, **Plaintiff,** -vs- **Paul Wickensimer,** **Greenville County Family Court Clerk's Office** **Defendants.**	**ORDER OF DISMISSAL** C.A. NO.: 2017-CP-23-08068

This matter came before me for hearing on March 12, 2018. The Plaintiff appeared *pro se*. The Defendant was represented by Russell W. Harter, Jr. This matter is before me on the Defendants' Motion to Dismiss pursuant to SCRCP Rule 12(b)(6), and the Plaintiff's Motion for Change of Venue.

This action was filed on December 28, 2017. The Plaintiff alleges that he was a party to a family court proceeding which resulted in the Greenville County Family Court directing the Plaintiff's employer to withhold wages for payment under a foreign support order from the State of Georgia. The Plaintiff's Complaint has a number of attachments which include a notice filed with the Greenville County Family Court on May 5, 2017 requesting enforcement of the support order from the State of Georgia. The Plaintiff contends that the Defendant Clerk of the Greenville County Family Court prematurely issued a directive resulting in the Plaintiff's wages being withheld for a period of time in the total amount of $1,150.00.

It appears further that the Greenville County Family Court issued an order dated October 24, 2017 which dismissed the family court action in Greenville County and suspended

XI.

ELECTRONICALLY FILED - 2018 Mar 26 11:35 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2308068

enforcement of the Georgia child support order. The family court order of October 24, 2017 also provided that any funds which had been collected by the Greenville County Clerk of Court and disbursed to the State of Georgia would be subject to challenge in an action in the State of Georgia. The Plaintiff's Complaint alleges that the wage garnishment was not in keeping with proper procedure and the Plaintiff alleges entitlement to monetary damages from the Clerk of Court.

The Defendant in response to the allegations of the Plaintiff's Complaint filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, and I find that it is appropriate to address this motion before addressing the Plaintiff's Motion for Change of Venue.

The Defendant asserts that, pursuant to the South Carolina Tort Claims Act, the Clerk of Court is immune from liability for the claim which is alleged in the Complaint. The Defendant makes reference to the provisions of S.C. Code Ann. §15-78-60 and numerous exceptions from liability as are set out in that statute. Specifically, subsections (1)(2)(3)(4)(5) and (23) would appear to have overlapping applications to this claim. I specifically find that the issues raised by the Plaintiff appear to be judicial and quasi-judicial actions and/or administrative actions of a judicial or quasi-judicial nature. Clearly, the claim is also one that relates to the institution or prosecution of a judicial and/or an administrative proceeding.

Further, it is clear that the actions of the Clerk of Court as are alleged in the Complaint are all actions within the scope and course of the Clerk's official duties and, accordingly, I find that for these various reasons, the South Carolina Tort Claims Act is a bar to the claim which is outlined in the Plaintiff's Complaint.

The Defendant further argues that this Court lacks jurisdiction of the subject matter of this claim relying upon the Greenville County Family Court Order dated October 24, 2017 and provisions of S.C. Code Ann. §63-3-530 which relate to the Family Court's exclusive jurisdiction in domestic matters. Those provisions include and provide the Family Court has jurisdiction to hear and determine matters that come within the provisions of the Uniform Interstate Family Support Act, and proceedings within the County to compel the support of a child.

Based on the record before me, I find that the claims alleged in the Plaintiff's Complaint are barred by the South Carolina Tort Claims Act, and that this Court lacks jurisdiction of the subject matter therefore, the Defendants' Motion to Dismiss is granted. Further, I find that the Plaintiff's Motion for Change of Venue is moot.

It is THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant's Motion to Dismiss pursuant to SCRCP Rule 12(b)(6) is granted and the Plaintiff's Complaint is dismissed.

It is FURTHER ORDERED, ADJUDGED AND DECREE that the Plaintiff's Motion for Change of Venue is moot and therefore dismissed.

____
Perry H. Gravely, Judge
Thirteenth Judicial Circuit

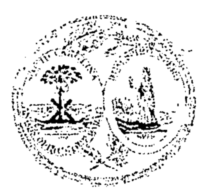
Greenville, South Carolina
Dated:________________

ELECTRONICALLY FILED - 2018 Mar 26 11:35 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2308068

XI

XI.

ELECTRONICALLY FILED - 2018 Mar 26 11:35 AM - GREENVILLE - COMMON PLEAS - CASE#2017CP2308068



Greenville Common Pleas

Case Caption: Lamont Jeremiah Mccauley vs. Family Court Clerk Greenville County

Case Number: 2017CP2308068

Type: Order/Dismissal

So Ordered

s/ Honorable Perry H. Gravely, #2755

229 F.Supp. 647 (1964)

John S. TRINSEY, Jr.,

v.

Frank J. PAGLIARO and Albert Foreman, Esq.

Civ. A. No. 34873.

United States District Court E. D. Pennsylvania.

May 28, 1964.

648 *648 Cohen, Shapiro, Berger & Cohen, by David Berger, and Herbert B. Newberg, Philadelphia, Pa., for plaintiff.

Silver & Barsky, by Jay D. Barsky, Philadelphia, Pa., for defendants.

WOOD, District Judge.

This case arises out of a dispute over the extent of the plaintiff's ownership interest in a tract of land of approximately 47.6 acres located in Gulph Mills, Pennsylvania, known as "Rebel Hill." By an agreement, dated April 29, 1960, title to the land was taken by the plaintiff and the defendant Pagliaro. On May 9, 1960, pursuant to a second agreement between the parties title was transferred to a trustee-straw party, Howard Richard, Esq., for the benefit of Trinsey and Pagliaro.

Thereafter, on May 13, 1960, Pagliaro and his attorney, Albert Foreman, Esq., procured a blank deed from the straw party and his wife. It is this blank deed that the plaintiff by his civil action filed with this Court seeks to have nullified.

Following the delivery of the blank deed, the straw party, Richard, executed a deed on November 29, 1962, conveying "Rebel Hill" to Trinsey and Pagliaro as tenants in common. This deed was recorded in the Office of the Recorder of Deeds for Montgomery County.

A civil action was commenced by Pagliaro in Montgomery County in December 1962 against Trinsey and Richard as defendants in the Court of Common Pleas on the ground that Richard at the instance of Trinsey violated his duties as Trustee when Richard executed the November 29, 1962 deed in favor of Trinsey and Pagliaro. This action resulted in a mistrial and Trinsey filed a petition to have the case referred to arbitration before the American Arbitration Association.[1] The Montgomery County Court granted this petition and Pagliaro appealed the order to the Pennsylvania Supreme Court which is awaiting decision at this time. The arbitration has not reached the hearing stage.

The defendants Pagliaro and Foreman have filed a motion to dismiss the action in this Court because of the possibility of further action in the Montgomery County Court and the arbitration appeal before the Supreme Court. Also, the defendants contend in their motion that this action is moot because the deed is in the control of the Montgomery County Court, having been offered in evidence in the original action, and not in the possession of Pagliaro. Finally, the defendants argue that if the State Supreme Court sustains the order for arbitration, this Court will lack jurisdiction to decide the matter.

This Court has jurisdiction because of diversity and the amount involved. The Montgomery County in personam action attacking the acts of the Trustee and which resulted in a mistrial, as aforesaid, does not preclude this Court from taking jurisdiction of this in rem action. This Court, if the facts warrant such a determination, could nullify the blank deed of May 13, 1960, as prayed for, and declare the recorded deed creating ownership as tenants in common between the parties valid or render such other relief as might be proper insofar as the land itself is concerned.

On the record before us the arbitration proceedings on appeal concern plaintiff Trustee's claims for back pay and collateral 649 *649 matters under an agreement between the parties. There is nothing before us which would warrant a determination that the arbitration proceedings will in any way determine title to the land involved, notwithstanding the statement at argument that a counterclaim had been filed in the arbitration proceedings by defendant which raised the questions previously before the Montgomery County Court, and furthermore, no mention was made of the May 13, 1960 blank deed in this counterclaim insofar as we are able to determine from the oral argument or the record.

The action before this Court being partly in rem because it seeks to nullify an outstanding deed and remove a cloud on the title of the premises is not in conflict with the in personam action before the State Court or the Arbitration Board.[2] Insofar as this action is in personam in that it seeks to restrain the defendants from executing the blank deed in favor of anyone other than the plaintiff, the Federal Court may proceed with the litigation because there is no bar to parallel Federal and State actions where each Court has jurisdiction over the persons. Penn General Casualty Co. v. Pennsylvania, 294 U.S. 189, 195, 55 S.Ct. 386, 79 L.Ed. 850 (1935).

The defendants' motion to dismiss for failure to state a claim unsupported by affidavits or depositions is incomplete because it requests this Court to consider facts outside the record which have not been presented in the form required by Rules 12(b) (6) and 56(c). Statements of counsel in their briefs or argument while enlightening to the Court are not sufficient for purposes of granting a motion to dismiss or summary judgment.

ORDER

And now, this 28th day of May, 1964, the defendants' motion to dismiss is denied without prejudice.

[1] Paragraph 17 of the April 29, 1960 agreement between Trinsey and Pagliaro provides for the settlement of any disputes by arbitration.

[2] Mach-Tronics, Inc. v. Zirpoli, 316 F.2d 820 (9 Cir. 1963).

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291 S.C. 364 (1987)
353 S.E.2d 697

Beverly BROWN and Thomas Brown, Appellants
v.
Dennis LEVERETTE, Floyd Hodge and John Doe, "whose true name is unknown," Respondents.

22679

Supreme Court of South Carolina.

February 23, 1987.

365 *365 *Donald E. Rothwell* and *Danny R. Collins*, both of *Law Offices of Donald E. Rothwell*, Columbia, *for appellants.*

Susan P. McWilliams, of *Nexsen, Pruet, Jacobs & Pollard*, Columbia, *for respondents Dennis Leverette* and *Floyd Hodge*.

Feb. 23, 1987.

FINNEY, Justice:

Appellants Brown brought this action against the individual respondents for personal injury and loss of consortium as a result of an automobile accident allegedly caused by the respondents' negligent maintenance of an unpaved road in Lexington County. Respondents moved to dismiss the action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. The trial court granted the motion. We reverse.

The appellants initially brought an action on June 24, 1981, against the County of Lexington based upon the same facts as set out below, naming only the County as a party defendant. The County demurred to the complaint. The trial court ruled the action could only be brought against the County pursuant to S.C. Code Ann. § 57-17-810 thru -860 (1976), and the complaint revealed on its face the one year statute of limitation provided in § 57-17-830 had run. Therefore, the action against the County of Lexington was barred. On appeal, the South Carolina Court of Appeals affirmed the trial court, Brown v. Lexington County, 283 S.C. 27, 320 S.E. (2d) 498 (S.C. App. 1984).

Appellants commenced the instant suit against the respondents in their individual capacity by filing a Summons and Complaint on June 28, 1985. The complaint alleges that on July 7, 1979, the appellant Beverly Brown was injured when the car in which she was a passenger struck a pothole(s) on an unpaved highway in Lexington County. The appellants assert
366 that the respondents owed a duty to properly maintain the roads and that their negligent performance *366 of their responsibilities caused the accident and resulting injuries.

Respondents moved to dismiss the complaint pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure on the grounds that: 1) the respondents were not charged with the duty of maintaining the county highways at the time of the accident; 2) the suit is barred by the one year statute of limitation provided in § 57-17-830, *supra;* and 3) the action is barred by *res judicata* and collateral estoppel. The respondents submitted affidavits in support of the motion. The trial court ruled in the affirmative on each ground of the respondents' motion and dismissed the complaint. Appellant contends the trial court erred in dismissing the action.

Rule 12(b)(6) of the South Carolina Rules replaces and performs the same function as the old statutory pleading rules regarding demurrers. *New Hanover County Department of Social Services, ex rel. Gore v. Graham*, 288 S.C. 138, 341 S.E. (2d) 631 (1986). South Carolina Rule 12(b)(6) essentially tracks Rule 12(b)(6) of the Federal Rules of Civil Procedure. The trial court must dispose of a motion for failure to state a cause of action based solely upon the allegations set forth on the face of the complaint. *Tele-Communications of Key West v. United States*, 757 F. (2d) 1330 (D.C. Cir.1985); *Hill v. Watford*, 276 S.C. 344, 278 S.E. (2d) 347 (1981). The motion cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case. *Milburn v. United States*, 734 F. (2d) 762 (11th Cir.1984); *Blandon v. Coleman*, 285 S.C. 472, 330 S.E. (2d) 298 (1985); and *Glass v. Glass*, 276 S.C. 625, 281 S.E. (2d) 221 (1981).

Rule 12(b)(6) of the South Carolina Rules of Civil Procedure provides in pertinent part that:

XIII.

"[I]f on a motion asserting the defense numbered (6) to dismiss for failure to state facts sufficient to constitute a cause of action, *matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material*

367 *367 *made pertinent to such a motion by Rule 56."* [Emphasis added.]

This Court has not previously had an opportunity to interpret this provision. It is our view the language of the Rule is clear, and it states plainly that the trial court may treat a 12(b)(6) motion as a motion for summary judgment and consider matters presented outside of the pleadings *if* the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure. The notice provisions in Rule 56 are incorporated into Rule 12(b)(6). Our interpretation of Rule 12(b)(6) is supported by numerous federal authorities. See *In re Bristol Industries Corporation*, 690 F. (2d) 26 (2nd Cir.1982); *Prospero Associates v. Burroughs Corporation*, 714 F. (2d) 1022 (10th Cir.1983); *Milburn, supra; Garaux v. Pulley*, 739 F. (2d) 437 (9th Cir.1984).

The order of the trial court does not specifically indicate the court considered the respondents' supporting affidavits in ruling on the 12(b)(6) motion and heard the motion as a motion for summary judgment. However, it is apparent the trial court necessarily looked beyond the complaint and considered the respondents' affidavits in ruling on the motion in order for the court to conclude in its order that "at the time of the matters alleged in the Complaint, [respondents] were not charged with the duty of maintaining the county highways and traffic control devices on the county highways of Lexington County." This conclusion is not ascertainable from the face of the complaint and could only have been discerned from the affidavits. The trial court gave no notice to the parties that it was going to consider the affidavits and hear the 12(b)(6) motion as a motion for summary judgment. The first indication that the respondents' affidavits would be used to support the 12(b)(6) motion was the trial court's order of dismissal.

We conclude the trial court erred in considering the respondents' supporting affidavits in ruling on the 12(b)(6) motion. It is also our opinion that the trial court's ruling on the statute of limitations, *res judicata* and collateral estoppel was error because these defenses were not apparent from the face of the complaint.

368 *368 Reversed.

NESS, C.J., and GREGORY and CHANDLER, JJ., concur.

HARWELL, J., not participating.

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326 S.C. 592 (1997)
486 S.E.2d 269

Kathryn K. HIGGINS and Douglas M. Higgins, Appellants,
v.
MEDICAL UNIVERSITY OF SOUTH CAROLINA, Fred A. Crawford, Jr., M.D., Bruce W. Usher, M.D., Daniel Alfono, M.D., Brian M. Gordon, M.D., and Peter Rosenthal, M.D., Respondents.

No. 2662.

Court of Appeals of South Carolina.

Submitted April 8, 1997.
Decided May 12, 1997.

594 *594 Teresa Zachry Hill, Charleston, for appellants.

Barbara Showers, Charleston, for respondents.

CURETON, Judge:

The Higginses filed this action for medical malpractice. They appeal the trial court's grant of summary judgment to all of the defendant doctors. We affirm as modified.[1]

I. FACTS

On May 26, 1994, Mrs. Higgins filed a medical malpractice action against the Medical University of South Carolina ("MUSC"), and Drs. Crawford, Usher, Alfono, Gordon, and Rosenthal (the "doctors"). Mr. Higgins pled a loss of consortium cause of action in the same complaint. On June 24, 1994, the defendants answered, generally denying the allegations and raising a number of affirmative defenses. The doctors filed with their answer a motion to dismiss and a motion to *595 strike the plea for punitive damages. On June 26, 1995, the doctors served the Higginses' attorney with affidavits from Drs. Gordon and Alfono, who asserted their sole source of compensation was from MUSC.

On September 14, 1995, the trial court heard the motions. At the hearing, the doctors argued that their motions to dismiss should be converted into motions for summary judgment. The doctors contended that physicians in the employment of state government were immune from suit under the South Carolina Tort Claims Act. They further argued that even though they provided services to Mrs. Higgins through a corporate entity known as University Medical Services ("UMA"), during their tenure with MUSC they were required to be members of a Clinical Practice Plan. The Clinical Practice Plan is the system by which faculty members provide patient care to the community while simultaneously providing clinical instruction to medical students and residents. UMA is an operation of MUSC's Clinical Practice Plan. The doctors also noted that their only source of compensation was MUSC. In support of these arguments, the doctors furnished the trial judge with copies of three circuit court orders which had ruled on similar motions.

The Higginses, on the other hand, argued strenuously against conversion of the motions to motions for summary judgment. They further argued that their allegations were sufficient to withstand a motion to dismiss, and contended further discovery was necessary to fully develop the factual issues.

After the trial judge heard the parties' arguments, he recessed for twenty-five minutes. When the judge returned to the bench, he informed the parties that he was converting the motions, and granted summary judgment to the doctors, leaving MUSC as the only defendant. The Higginses appeal, asserting (1) the trial judge should not have converted the motions, (2) the trial judge improperly relied on facts and legal conclusions in the unpublished circuit court orders, and (3) in any event, the trial judge erred in granting summary judgment.

596 *596 **II. CONVERSION OF THE RULE 12(b)(6) MOTION TO A RULE 56 MOTION**

XIV.

The Higginses first contend the trial court erred in converting the doctors' motion from a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, to a motion for summary judgment pursuant to Rule 56, SCRCP. The Higginses argue that they had not expected the trial judge to consider materials outside the complaint when deciding the motion. Consequently, the Higginses claim they were surprised and not afforded a reasonable opportunity to present pertinent materials. We agree that notice was insufficient for conversion.

The issue here involves satisfaction of Rule 56's notice provision when a 12(b)(6) motion is converted into a motion for summary judgment. South Carolina appellate courts have addressed conversion on a few occasions. In Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987), the Supreme Court reversed a trial court's grant of a 12(b)(6) motion because the trial court considered supporting affidavits and ruled on "defenses... not apparent from the face of the complaint." The first indication the non-movants had that the trial court was going to consider the submitted affidavits was the order of dismissal. *Id.* The *Leverette* court stated that "the notice provisions in Rule 56 are incorporated into Rule 12(b)(6)." *Id.* at 367, 353 S.E.2d at 699. *Leverette* does not expressly state whether the non-movant had copies of the supporting affidavits at least 10 days before the hearing as required by Rule 56.

However, in Bowen & Smoot v. Plumlee, 301 S.C. 262, 391 S.E.2d 558 (1990), our Supreme Court implied that less than express notice of the court's intent to convert would be sufficient. The *Plumlee* court held that the trial judge properly denied conversion of a 12(b)(6) motion to a Rule 56 motion because the supporting "affidavit was never sent to the [non-movants] nor were they advised of the [movant's] request for summary judgment." *Id.* at 266, 391 S.E.2d at 560.

In Crosswell Enters. v. Arnold, 309 S.C. 276, 422 S.E.2d 157 (Ct.App.1992), the court sanctioned conversion "because the motion was supported by matters outside the pleadings." The court noted that "the parties were afforded a reasonable opportunity to introduce evidentiary matters in accordance with Rule 56(c) and (e)." *Id.* at 279, 422 S.E.2d at 159.

597 *597 Next, in McDonnell v. Consolidated Sch. Dist., 315 S.C. 487, 445 S.E.2d 638 (1994), the court held that a party could use a summary judgment motion to raise a statute of limitations defense. In a footnote, the *McDonnell* court stated that "if on a motion under 12(b)(6) matters outside the pleadings are presented and not excluded, the motion shall be treated as one for summary judgment." *Id.* at 489 n. 2, 445 S.E.2d at 639 n. 2. The court then stated it was treating the motion as one for summary judgment because the trial judge considered matters outside the pleadings, but the *McDonnell* court did not expressly address whether proper notice had been given. *Id.*

Finally, in Johnson v. Dailey, 318 S.C. 318, 457 S.E.2d 613 (1995), the court explicitly sanctioned conversion even though the non-movant did not get express notice. In *Johnson,* the defendants attached outside materials to their 12(b)(6) motion. The trial court treated the 12(b)(6) motion as one for summary judgment, and our Supreme Court affirmed. *Id.* The *Dailey* court stated: "Here, unlike in Bowen & Smoot v. Plumlee, the outside materials, including Superintendent's letter attached to the 12(b)(6) motion, gave notice to Johnson more than thirty days prior to the hearing. Indeed, the outside materials were specifically referred to by [the movants], both in the motion and at the hearing." *Id.* at 321, 457 S.E.2d at 615.

In the present case, we believe that the trial judge improperly converted the doctors' motions. First, however, we must distinguish between Drs. Gordon and Alfono, who submitted affidavits, and the remaining doctors, who did not submit affidavits. The affidavits of Drs. Gordon and Alfono cannot be read as providing facts relevant to the other doctors. The submitted affidavits only aver that the two doctors were a resident and a fellow respectively, and that they received no money and provided no medical services outside of their employment with MUSC. At the hearing, even the doctors' attorney distinguished between the affiant doctors and the other doctors, by arguing that the affidavits showed the affiant doctors were students "for all intense and purposes [sic]." As to the other doctors, the attorney stated that there were "no allegations in the [Higginses'] Complaint that [the other doctors] receive income from any other source." Thus, as to the doctors who did
598 not submit affidavits or other outside materials, *598 the motion should have been heard pursuant to Rule 12(b)(6), SCRCP.

Even though Drs. Gordon and Alfono submitted affidavits, the trial court erred by converting their motions. Unlike *Dailey,* the record reflects (1) the affidavits were not attached to the motion, but were served about a year later, and (2) the doctors' motion and memorandum in support of the motion did not refer expressly to the outside materials. Further, unlike Prospero Assocs. v. Burroughs Corp., 714 F.2d 1022 (10th Cir.1983), which was cited to support the holding in *Leverette,* the Higginses did not expressly refer to or discuss the affidavits in their memorandum, which would have waived their objection to lack of notice. In fact, the Higginses' attorney argued strenuously that she had only been noticed with a motion to dismiss and motion to strike, and she responded at the hearing accordingly. The trial judge did not tell the parties he was converting the motion until he gave his oral decision after the court had recessed following argument. Under these facts and

XIV.

circumstances, we do not believe that the Higginses were "fairly apprised that the court would look beyond the pleadings." Garaux v. Pulley, 739 F.2d 437, 439 (9th Cir.1984). Thus, the trial court erred by granting summary judgment.

We briefly note that the practical effect of the *Dailey* conversion rule is to require non-movants to be vigilant and adequately prepare whenever a movant submits a 12(b)(6) motion coupled with affidavits. We hope that movants will not, as a strategic device, submit 12(b)(6) motions with affidavits, anticipating that the non-movant will appear at the hearing without having served supporting affidavits. *Cf.* *In re Bristol Indus. Corp.,* 690 F.2d 26 (2d Cir.1982) (expressing the concern that the potential for conversion might put an undue burden on those moving for a preliminary injunction). It is a fundamental rule that "if the plaintiff relies solely upon the pleadings, files no counter-affidavits, and makes no factual showing in opposition to a motion for summary judgment, the [trial] court is required under Rule 56, to grant summary judgment, if, under the facts presented by the defendant, he was entitled to judgment as a matter of law." *Humana Hospital-Bayside v. Lightle,* 305 S.C. 214, 216, 407 S.E.2d 637, *599 638 (1991). We cannot hold in good conscience that the Higginses were adequately noticed, and then proceed to apply the foregoing rule against them.

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III. RELIANCE ON CIRCUIT COURT ORDERS

The Higginses next contend that the judge improperly relied on three circuit court orders which either dismissed or granted summary judgment to MUSC doctors in actions similar to this one. They argue that since the trial judge included within the appealed order facts and evidence from these orders, the trial judge improperly considered evidence not in the record when he granted summary judgment to the doctors. Although we have held it error to convert the motions in this case, we nevertheless take the opportunity to address this issue. We agree, regardless of how the motions are characterized, that the trial judge's reliance on facts and legal conclusions within the orders was improper, but we hold the issue was not preserved for appeal.

When ruling on a motion for summary judgment, the trial judge must consider *all* of the documents and evidence *within the record,* including the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits. *Anthony v. Padmar, Inc.,* 307 S.C. 503, 415 S.E.2d 828 (Ct.App.1992); *Gilmore v. Ivey,* 290 S.C. 53, 348 S.E.2d 180 (Ct.App.1986). However, factual statements of the attorneys, whether made during argument or in written briefs or memoranda, ordinarily may not be considered by the court in determining whether a genuine issue of material fact exists. *Gilmore,* 290 S.C. 53, 348 S.E.2d 180. Moreover, reliance on an unpublished order is improper. *Plante v. State,* 315 S.C. 562, 446 S.E.2d 437 (1994) (partly discounting a litigant's argument by citing Rule 239(d)(2), SCACR, and holding that the party on appeal could not rely on an unpublished order).

In the present case, the defense sent one of the circuit court orders to the judge before the hearing. At the hearing, the doctors handed the judge another copy of that order as well as the orders of two other circuit judges. Two of the circuit judges granted summary judgment to MUSC doctors in similar actions, and one of the judges granted a 12(b)(2) motion to substitute MUSC as the proper defendant instead of *600 the doctors. Based on these orders, the doctors argued at the hearing that they did not receive money from any sources other than MUSC, that any money received by UMA "goes back to" MUSC, and that the "whole point [of the UMA] is to get competent physicians, and be able to compensate them well, and provide that cost effective liability insurance in this community for those physicians [sic]." In the order at issue in this case, the trial judge made a number of findings which were consistent with the doctors' arguments. Further, the present order cited one of the other orders as authority for a proposition of law. Except for factual findings relevant to the two affiant doctors' attestation that they only performed duties for and received compensation from MUSC, the rest of the trial court's factual findings only could have been based on the circuit court orders and the statements of defense counsel at the hearing.

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We hold that neither the doctors nor the trial court could rely on facts and legal conclusions within the circuit court orders.[2] Thus, the doctors' assertions at the hearing, which were based on facts within the orders, constituted factual statements of counsel. Moreover, the orders were, in effect, memoranda submitted by counsel. In any event, the trial court could not properly consider factual statements from either when deciding the motions, however they are characterized. *Cf.* *Stiles v. Onorato,* 318 S.C. 297, 457 S.E.2d 601 (1995) (noting that the ruling on a 12(b)(6) motion to dismiss must be based solely upon the allegations set forth on the face of the complaint); *Gilmore,* 290 S.C. 53, 348 S.E.2d 180 (holding that the judge cannot consider factual statements of counsel in a motion for summary judgment). This is not to say that circuit court orders cannot be submitted to a trial judge as one would submit a memorandum of law on a particular issue, but judges may not

accept the facts found therein as proof for summary judgment, nor may they expressly rely on the order as authority for any proposition.

601 *601 Nevertheless, the Higginses failed to preserve the issue for appeal. At the hearing, the Higginses' counsel did not object to defense counsel's submission of the subject orders to the trial judge. Nor did the Higginses' counsel object to the trial judge's consideration of the orders, even though defense counsel argued at the hearing:

> Judge, what we have tried to give you is what the three other judges have ruled on the exact same issue. You have their Orders and you and your law clerk can see where this issue has been raised where some very competent, very good plaintiffs attorneys have tried to do exactly what [the Higginses' counsel] is trying to do [sic]....

On appeal, the Higginses argue they preserved the error when their counsel stated:

> I would distinguish those cases from this one in that the motions before I believe Judge Howard and Judge Rawl, and I think it was Judge Connor, I believe were motions for summary judgment. Those judges had much more information before them from the depositions, I am sure affidavits from the President of the Medical University, affidavits from UMA, we don't have that before us today, and that would distinguish this situation from the orders they presented. We think this is an appropriate decision to be made in the future, after discovery has been completed.

In fact, this statement from the Higginses' counsel is an argument against summary judgment and conversion of the motions, and it cannot fairly be construed as either an objection to submission of the orders to the judge or an objection to consideration of facts and legal conclusions within the orders. Since the Higginses did not object, the issue is not preserved. *Cf.* *Beaufort Cty. v. Butler,* 316 S.C. 465, 451 S.E.2d 386 (1994) (issues not raised at merits hearing are not preserved for appellate review); *Millan v. Southern Ry. Co.,* 54 S.C. 485, 32 S.E. 539 (1899) (party cannot complain for the first time on appeal that the trial court relied on the verbal statement of facts by counsel in support of a motion to amend); *Smith v. Strickland,* 314 S.C. 192, 442 S.E.2d 207 (Ct.App.1994) (defendants could not complain on appeal where they failed to present to the trial judge the issue that he should not have given judgment to the plaintiffs before he considered all of the
602 plaintiffs' evidence). Moreover, the record does not reflect *602 that the Higginses filed a motion pursuant to Rule 59(e), SCRCP, which would have given the circuit judge a chance to clarify whether his decision would have been the same without his reliance on and citation of the circuit court orders.

IV. SUBSTANTIVE DISPOSITION OF THE RULE 12(b)(6) MOTIONS

Since we hold that the conversion of the motions was improper but that the Higginses failed to preserve the issue of whether the trial court improperly relied on facts and legal conclusions in other orders, we still address the substantive disposition of the motions. An error in conversion is harmless "if the dismissal can be justified under Rule 12(b)(6) without reference to matters outside of the plaintiff's complaint." *Brown v. Zavaras,* 63 F.3d 967, 970 (10th Cir.1995). *See also* *Travel All Over the World, Inc. v. Saudi Arabia,* 73 F.3d 1423, 1430 (7th Cir.1996). We hold that dismissal of the doctors was justified under 12(b)(6).

The Higginses sued the doctors alleging negligence in the performance of medical services while the doctors were in the employ of MUSC. Pursuant to S.C.Code Ann. § 15-78-70 (Supp.1996), an employee of a governmental entity is not liable for a tort as long as the tort was committed within the scope of official duty or was not committed "with actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." The definition of "governmental entity" includes the state and its political subdivisions, and the definition of "political subdivision" includes a "governmental health care facility." S.C.Code Ann. § 15-78-30(d), (h) (Supp.1996). A plaintiff who brings an action pursuant to these provisions "shall name as a party defendant only the agency or political subdivision for which the employee was acting," and, "[i]n the event that the employee is individually named, the agency or political subdivision... must be substituted as the party defendant." S.C.Code Ann. § 15-78-70(c) (Supp.1996).

However, the immunity of governmental physicians is limited. Section 15-78-70(c) provides:

> The provisions of this section in no way shall limit or modify the liability of a licensed physician ..., acting within the scope of his profession, with respect to any action or claim brought hereunder which involved

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> services for which the *603 physician ... was paid, should have been paid, or expected to be paid at the time of the rendering of the services from any source other than the salary appropriated by the governmental entity *or fees received from any practice plan authorized by the employer whether or not the practice plan is incorporated and registered with the Secretary of State.* (Emphasis added).

The emphasized portion of the above quote is an amendment which became effective on May 10, 1994, but it clearly mandates that immunity will continue for a doctor who performs medical services for the Clinical Practice Plan and UMA. Moreover, the South Carolina Supreme Court recently held that a MUSC doctor who performed services through UMA qualified for the immunity in § 15-78-70(c) even pursuant to the statutory language prior to the 1994 amendment. *Proveaux v. Medical Univ. of South Carolina,* 326 S.C. 28, 482 S.E.2d 774 (1997).

In deciding a motion to dismiss pursuant to 12(b)(6), the trial court should only consider the allegations set forth on the face of the plaintiff's complaint, and 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." *Stiles v. Onorato,* 318 S.C. 297, 300, 457 S.E.2d 601, 602-03 (1995). The Higginses note, in briefs filed before issuance of *Proveaux,* that their action accrued in January and February of 1992, and they contend that they allege a cognizable cause of action because the immunity is questionable for a doctor who performed services for UMA prior to the effective date of the amendment. Obviously, *Proveaux* disposes of this contention.

However, dismissal was appropriate even without reference to *Proveaux.* The Higginses alleged in their complaint that (1) the doctors were acting within the scope of their employment at the time of the alleged negligent acts, (2) MUSC and Dr. Crawford agreed to render medical care for valuable consideration, and (3) MUSC and the doctors "professed to be capable of furnishing the necessary care ... in accordance with the standards then prevailing in the community and *to make the usual and customary charges for the care, services and treatments rendered.*" (Emphasis added). In *604 their answer, the doctors admitted they were acting within the scope of their employment with MUSC, and that Mrs. Higgins had been admitted to MUSC under the care of Dr. Crawford. The Higginses argue that a reasonable inference from the emphasized allegation above is that the doctors were to be paid by a source other than MUSC. We disagree. While the allegation does state that the doctors and MUSC were going to charge for their services, this allegation in no way addresses the source from which the doctors ultimately were to be compensated. Moreover, the Higginses alleged that the doctors were at all times acting within their scope of employment with MUSC. Thus, the Higginses' complaint cannot be construed as asserting the doctors were acting outside of the immunity provisions by being paid from a nongovernmental source. The doctors were properly dismissed. Of course, the doctors ultimately would still escape the action pursuant to the ruling in *Proveaux.*

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In many instances, plaintiffs dismissed pursuant to 12(b)(6) are granted leave to amend. *See* Foman v. Davis, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *Dockside Ass'n v. Detyens, Simmons & Carlisle,* 297 S.C. 91, 374 S.E.2d 907 (Ct.App.1988) (citing *Foman* and stating that where a complaint is dismissed under 12(b)(6), plaintiff should be granted leave to file an amended complaint). In *Foman,* the United States Supreme Court stated:

> In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the [trial court], but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the [rules].

Here, however, any amendment of the Higginses' complaint which alleges the doctors were paid by UMA ultimately would be futile, in view of *Proveaux. See also* Abell v. Bell, 229 S.C. 1, 91 S.E.2d 548 (1956) (noting that "subsequent legislation *605 may be of service as indicating the construction given to the former by the legislature itself"). Thus, the dismissal of the doctors is final.

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V. CONCLUSION

We hold that the trial court erred by converting the doctors' 12(b)(6) motion into a motion for summary judgment. We further hold that the Higginses failed to preserve for appeal the issue of the trial court's consideration of facts not within the record

and reliance on circuit court orders. Finally, we hold that the conversion error was harmless inasmuch as dismissal was justified pursuant to Rule 12(b)(6), SCRCP, without reference to matters extrinsic to the pleadings.

Accordingly, the order of the trial court is

AFFIRMED AS MODIFIED.

HEARN and ANDERSON, JJ., concur.

[1] Because oral argument would not aid the court in resolving the issues on appeal, we decide this case without oral argument pursuant to Rules 215 and 220(b)(2), SCACR.

[2] Of course, orders from the trial level may be submitted as evidence in appropriate cases, such as for establishing offensive collateral estoppel. *Cf.* *Middleborough Horiz. Property Regime Council of Co-Owners v. Montedison S.p.A.,* 320 S.C. 470, 465 S.E.2d 765 (Ct.App.1995).

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460 S.E.2d 392 (1995)

Glenn WOODARD, Petitioner,

v.

WESTVACO CORPORATION, Respondent.

No. 24290.

Supreme Court of South Carolina.

Heard October 19, 1994.
Decided July 24, 1995.
Rehearing Denied August 28, 1995.

393 *393 Kerry W. Koon and O. Grady Query, Charleston, for petitioner.

G. Dana Sinkler and Elizabeth T. Thomas both of Warren & Sinkler, Charleston, for respondent.

PER CURIAM:

We granted certiorari to review the Court of Appeals' opinion in *Woodard v. Westvaco,* ___ S.C. ___, 433 S.E.2d 890 (Ct.App.1993). Because we hold that the order on appeal is not immediately appealable, we dismiss the appeal and vacate the Court of Appeals' opinion.

FACTS

Petitioner brought this negligence action against respondent seeking damages for personal injuries. Petitioner's complaint alleged that while he was employed by Southern Bulk Haulers, a trucking firm, he was injured when a hose at respondent's plant disengaged and sprayed him with a chemical known as "black liquor."

Respondent moved for summary judgment arguing the circuit court did not have subject matter jurisdiction over petitioner's action. Specifically, respondent alleged petitioner was a statutory employee of respondent and, therefore, his remedy was limited to bringing an action under the Workers' Compensation Act.[1]

After hearing arguments, the circuit court denied respondent's motion. On appeal, the Court of Appeals reversed, holding that petitioner was a statutory employee whose exclusive remedy was to bring an action under the Workers' Compensation Act.

DISCUSSION

The Court of Appeals correctly held that the proper procedure for raising lack of subject matter jurisdiction prior to trial is to file a motion to dismiss pursuant to Rule 12(b)(1), SCRCP, rather than a motion for summary judgment pursuant to Rule 56, SCRCP. *See* Ballenger v. Bowen, ___ S.C. ___, 443 S.E.2d 379 (1994). Further, the Court of Appeals appropriately noted that if a party files a Rule 56 motion for summary judgment on the ground of lack of subject matter jurisdiction, the trial court should treat the motion as if it were a Rule 12(b)(1) motion to dismiss. Nevertheless, the Court of Appeals incorrectly concluded that an order denying a Rule 12(b)(1) motion to dismiss was immediately appealable.

In its opinion, the Court of Appeals relied on *Timms v. Greene,* 310 S.C. 469, 427 S.E.2d 642 (1993) and *Duncan v. Provident Mut. Life Ins. Co.,* 310 S.C. 465, 427 S.E.2d 657 (1993) in concluding that an order denying a Rule 12(b)(1) motion to dismiss was immediately appealable. However, the appealability of such orders was not an issue raised in those cases. Consequently, *Timms* and *Duncan* are not controlling on the question whether the denial of a motion to dismiss for lack of subject matter jurisdiction is immediately appealable. *See* *Wallace v. Interamerican Trust Co.,* 246 S.C. 563, 144 S.E.2d 813 (1965) (the fact that an appellate court may have decided an appeal of a particular type of order on the merits is not dispositive of whether the order is appealable when the issue of appealability was not raised); *see also* *State v. Lockhart,* 275 S.C. 160, 267 S.E.2d 720 (1980).

Absent some specialized statute, determining if an interlocutory order is immediately appealable depends on whether the order falls within one of the several categories of appealable judgments, decrees, or orders listed in S.C.Code Ann. § 14-3-330 (1976 & Supp.1994). Because an order denying *394 a Rule 12(b)(1) motion to dismiss does not fall into any of these categories, we hold that such orders are not immediately appealable.[2] To the extent Carter v. Florentine Corp., 310 S.C. 228, 423 S.E.2d 112 (1992), Botany Bay Marina, Inc. v. Townsend, 296 S.C. 330, 372 S.E.2d 584 (1988), and Simms v. Phillips, 46 S.C. 149, 24 S.E. 97 (1896) hold otherwise, they are overruled. Accordingly, this appeal is dismissed, and the opinion of the Court of Appeals is vacated.[3]

[1] S.C.Code Ann. §§ 42-1-10 to 42-19-50 (1985 & Supp.1994).

[2] An order *denying* a motion to dismiss for lack of subject matter jurisdiction does not *finally* determine anything. *See* McLendon v. South Carolina Dep't of Highways and Pub. Transp., ___ S.C. ___, 443 S.E.2d 539 (1994) (like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage in the proceedings). Consequently, while such orders may involve a substantial right, they do not fall under § 14-3-330(2)(a) because they do not in effect determine the action and prevent a judgment from which an appeal might be taken or discontinue the action. For the same reason, such orders do not "involve the merits" under § 14-3-330(1). *See* Mid-State Distributors v. Century Importers, 310 S.C. 330, 426 S.E.2d 777 (1993) (for an order to "involve the merits" as that term is used in § 14-3-330, it must *finally determine* some substantial matter forming the whole or a part of some cause of action or defense).

[3] We do not decide whether this appeal actually involved a question of subject matter jurisdiction. *Compare* Googe v. Speaks, 194 S.C. 206, 9 S.E.2d 439 (1940) (the exclusivity of the Workers' Compensation Act is a "procedural" question rather than a "jurisdictional" question) *with* McSwain v. Shei, 304 S.C. 25, 402 S.E.2d 890 (1991) (exclusive "jurisdiction" over disputes between employees and employers for injuries occurring during and in the course of employment lies within the Workers' Compensation Commission).

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CERTIFICATION

I ______________________ certify that this Record on Appeal contains no materials that are not relevant to this Court of Appeal proceeding.

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