

20117

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable S. Jackson Kimball, Special Circuit Judge

Civil Action No. 2011-CP-46-4366

Cynthia Crowe, ... Respondent,

v.

Michael Earl Miller I and Michael Earl Miller II ... Defendants.
Of whom

Michael Earl Miller II Appellant.

RECORD ON APPEAL

Jonathan M. Milling
MILLING LAW FIRM, LLC
1614 Taylor Street, Suite C
Columbia, South Carolina 29201
(803) 451-7700
(803) 451-7701 facsimile

ATTORNEY FOR APPELLANT

RECEIVED

NOV 13 2012

SC Court of Appeals

Ashley W. Creech
Chad A. McGowan
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, SC 29732
Attorneys for Respondent

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable S. Jackson Kimball, Special Circuit Judge

Civil Action No. 2011-CP-46-4366

Cynthia Crowe, ... Respondent,

v.

Michael Earl Miller I and Michael Earl Miller II ... Defendants.
Of whom

Michael Earl Miller II Appellant.

RECORD ON APPEAL

Jonathan M. Milling
MILLING LAW FIRM, LLC
1614 Taylor Street, Suite C
Columbia, South Carolina 29201
(803) 451-7700
(803) 451-7701 facsimile

ATTORNEY FOR APPELLANT

INDEX

Plaintiff's Complaint for Damages	1
Answer of Michael Earl Miller, II	6
Plaintiff's Cynthia Crowe's Answer to Counterclaim of Defendant Michael Earl Miller, II's	9
Plaintiff's Motion for Judgment on the Pleadings on Defendant Michael Earl Miller, II ..	12
Response in Opposition for Judgment on the Pleadings on Defendant Michael Earl Miller, II's Counterclaims	16
Transcript of Proceedings, December 15, 2010	25
Transcript of Proceedings, April 19, 2012	41
Order for Judgment on the Pleadings as to Defendant Michael Earl Miller, II's Counterclaims	58

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Cynthia Crowe
Plaintiff,

v.

Michael Earl Miller, I, and Michael Earl
Miller, II
Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Civil Action No: 11-CP- 46-4366

COMPLAINT FOR DAMAGES
Jury Trial Demand

FILED-RECEIVED
2011 NOV 18 PM 3:35
DAVID HAMILTON
CLERK
S.C.C.P. & G.S.
YORK COUNTY S.C.

The Plaintiff Cynthia Crowe by and through her undersigned
Complaint against the Defendants and alleges:

PARTIES

Plaintiff

1. The Plaintiff Cynthia Crowe is a citizen and resident of York County, South Carolina.

Defendants

2. Defendant Michael Earl Miller, I is a South Carolina citizen who resides in York County, South Carolina.

3. Defendant Michael Earl Miller, II is a South Carolina citizen who resides in York County, South Carolina

4. To the extent permitted by applicable law, the named Defendants are jointly and severally liable as to all damages Plaintiff alleges because their negligent, grossly negligent, reckless, and wanton acts and omissions, singularly or in combination, were a direct and proximate cause of the Plaintiff's damages.

JURISDICTION AND VENUE

5. This Court has personal jurisdiction over Defendants pursuant to S.C. Code § 36-2-802, because Defendants reside in or have enduring relationships with the state of South Carolina.

6. Venue is appropriate pursuant to S.C. Code § 15-7-30 because most substantial part of the acts giving rise to these claims occurred in York County, South Carolina.

FACTUAL ALLEGATIONS

7. On April 23, 2010 Cynthia Crowe ("Crowe") was a passenger in a boat driven by Michael Earl Miller, II ("Miller"), owned by Michael Earl Miller, I.

8. Crowe and Miller had spent several hours traveling around Lake Wylie, and stopped at T-Bonz, a local restaurant on Lake Wylie, to eat and visit with friends.

9. While on the lake and at T-Bonz, Miller consumed alcoholic beverages. Because she was socializing with friends, Crowe did not observe how much, or the type of alcohol Miller consumed.

10. Miller never expressed to Crowe that he was intoxicated or that he could not safely operate his boat.

11. At approximately 8:30 p.m., Miller and Crowe left T-Bonz to head to Fort Mill.

12. At some point, Miller initiated a U-turn, where upon information and belief, the boat went underneath a pier and collided with large rocks.

13. During the crash, Crowe was ejected from the boat, suffering severe injuries to her hands, neck, and spine.

14. As a result of the accident, Miller was charged with boating under the influence, and upon information and belief, a drug test showed that his blood alcohol level was three times the legal limit.

15. Upon information and belief, Miller has received several previous citations for operating vehicles while intoxicated and also has undergone treatment for substance abuse issues on several occasions.

16. Upon information and belief, Miller's father, Michael Earl Miller, I, knew, or should have known, of his son's habitual alcohol abuse.

17. Upon information and belief, despite knowledge of his son's alcohol abuse, Michael Earl Miller, I entrusted a boat to his son to operate.

18. Defendants' negligence, carelessness, recklessness, willfulness, and wantonness, in failing to exercise the degree of reasonable care of persons or entities in similar circumstances caused Crowe's injuries and suffering. Specifically, Defendants failed to act as a reasonably prudent person in similar circumstances in one or more of the following particulars, as follows:

AS TO DEFENDANT Michael Earl Miller, II:

- a. In operating a boat while intoxicated.
- b. In failing to reasonably operate the subject boat in a safe manner.
- c. In failing to avoid the accident described above.
- d. In such other ways as may be shown at trial.

AS TO DEFENDANT Michael Earl Miller, I:

- a. In negligently entrusting a boat to his son despite knowledge that his son habitually abused alcohol and operated vehicles while abusing alcohol, thus making a wreck due to his alcohol consumption reasonably foreseeable to Michael Earl Miller, I.

- b. In failing to take any measures to control his son's habitual substance abuse so to avoid danger to other people.
- c. In such other ways as may be shown at trial.

FOR A FIRST CAUSE OF ACTION
(PERSONAL INJURY)

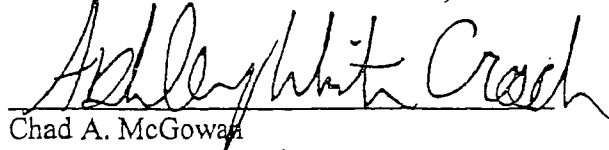
19. Plaintiff restates paragraphs 1-18 above as if set forth verbatim herein.

20. As a direct and proximate result of the Defendants' negligence, carelessness, gross negligence, recklessness and departure from the reasonable standard of care of persons in like or similar circumstances, Ms. Crowe suffered severe injuries, as a result of which Ms. Crowe is entitled to recover a sum to compensate her for her conscious pain and suffering, mental anguish, loss of earnings capacity, loss of enjoyment of life, and other damages. Plaintiff is also entitled to recover a sum of punitive damages to punish and deter these defendants and others like them from similar conduct in the future. All damages should be in an amount determined by a jury in this action.

WHEREFORE, Plaintiff respectfully prays for judgment against the Defendants for actual damages, special damages, consequential damages, and punitive damages in an amount to be determined by the jury at the trial of this action, for the costs and disbursements of this action and for such other and further relief as this court deems just and proper. Plaintiff specifically avers that the damages at issue in this case are more than \$100,000, such averment made to allow all manner of discovery under South Carolina Law.

Signature on Following Page

MCGOWAN HOOD & FELDER, LLC



Chad A. McGowan

Ashley White Creech

McGowan, Hood, & Felder, LLC

1539 Healthcare Drive

Rock Hill, South Carolina 29730

(803) 327-7800

(803) 328-5656 Facsimile

cmcgowan@mcgowanhood.com

Rock Hill, South Carolina

November 17, 2011

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK) SIXTEENTH JUDICIAL CIRCUIT

Cynthia Crow,)
Plaintiff,)
v.) ANSWER OF MICHAEL EARL
Michael Earl Miller I, and) MILLER, II
Michael Earl Miller II.) C.A. No.: 11-CP-46-4366
Defendants.)

The Defendant Michael Earl Miller, II, does hereby answer the Complaint of the Plaintiff as follows:

FOR A FIRST DEFENSE

1. All matters set forth in the Complaint which are not hereinafter specifically admitted are hereby specifically denied.
2. The allegations set forth in paragraphs 1, 2, 3, 5, 6, 7, 8 and 10 of the Complaint are hereby admitted.
3. The Defendant admits so much of paragraph 9 of the Complaint as alleges that "Miller (II) consumed alcoholic beverages while at T-Bones and on the lake." Defendant is without sufficient information to form a belief as to the remaining allegations of the paragraph and demands strict proof thereof.
4. The Defendant admits so much of paragraph 15 of the Complaint as alleges that he "has undergone treatment for substance abuse issues".

5. The Defendant (Miller II) admits so much of paragraph 14 of the Complaint as alleges that he was " charged with boating under the influence". Defendant is without sufficient information to form a belief as to the remaining allegations of the paragraph and demands strict proof thereof.

6. The Defendant is without sufficient information to form a belief as to the contents of paragraphs 11, 12, 13, 16 and 17 of the Complaint and therefore demands strict proof thereof.

7. The remaining allegations of the Complaint are specifically denied.

FOR A SECOND DEFENSE AND BY WAY OF COUNTERCLAIM

8. All matters admitted above by the Defendant (Miller II) are here reasserted as to the Plaintiff for purposes of this counter-claim.

9. The Plaintiff was operating the boat at the time of the collision with the dock.

10. The Plaintiff owed a duty to Defendant (Miller II) to operate the boat in a reasonable and safe manner in order to avoid injuring the Defendant (Miller II).

11. The Plaintiff's negligence, carelessness, recklessness, willfulness, and wantonness, in failing to exercise the degree of reasonable care of persons in similar circumstances caused damages to the person of the Defendant (Miller II). Plaintiff failed to act as a reasonably prudent person in one or more of the following particulars:

- (a) In operating the boat while intoxicated;
- (b) In failing to operate the boat in a safe manner;
- (c) In failing to keep a proper lookout;

(e) In failing to keep proper control of the boat.

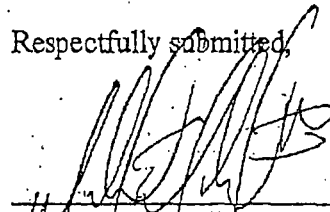
12. As a direct and proximate result of the acts alleged in paragraph 12 above, the Defendant (Miller II) suffered severe injuries causing him expensive medical bills, loss of work, temporary disability and permanent scarring, all to be shown at trial.

WHEREFORE, Defendant (Miller II) respectfully prays for:

(A) The action against Defendant (Miller II) by the Plaintiff to be dismissed against the Defendant (Miller II) and that Plaintiff be ordered to pay all costs and disbursements associated with the defense of the action, as well as such other relief the Court deems just and proper; and,

(B) Judgment be entered against the Plaintiff in an amount to be shown at trial, for all costs and disbursements of this action and for such other relief as the Court deems just and proper.

Respectfully submitted,



Michael/Earl Miller, Jr.
5074 McConnell's Highway
Rock Hill, South Carolina 29730
803.493.7446
Pro Se Defendant.

Rock Hill, South Carolina

December 28, 2011.

STATE OF SOUTH CAROLINA
COUNTY OF YORK

Cynthia Crowe

Plaintiff,

v.

Michael Earl Miller, I, and Michael Earl
Miller, II

Defendants.

IN THE COURT OF COMMON PLEAS
SIXTEENTH JUDICIAL CIRCUIT

Civil Action No: 11-CP-46-4366

PLAINTIFF'S CYNTHIA CROWE'S
ANSWER TO COUNTERCLAIM OF
DEFENDANT MICHAEL EARL
MILLER, II

Plaintiff Cynthia Crowe Answers the Counterclaim of Defendant Michael Earl Miller, II.

Any fact not specifically admitted is denied.

FOR A FIRST DEFENSE

1. Paragraphs 1-7 are not directed toward Plaintiff and as such do not require a response.

To the extent that Paragraphs 1-7 could be construed to contain allegations against Plaintiff, Plaintiff denies those allegations.

FOR A SECOND DEFENSE

2. Paragraphs 8 is not directed at Plaintiff and as such does not require a response. To the extent that Paragraphs 8 could be construed to contain allegations against Plaintiff, Plaintiff denies those allegations.
3. Plaintiff denies the allegations contained in Paragraph 9 of Defendant's Counterclaim.

4. Plaintiff denies the allegations contained in Paragraph 10 of Defendant's Counterclaim.
5. Plaintiff denies the allegations contained in Paragraph 11 of Defendant's Counterclaim.
6. Plaintiff denies the allegations contained in Paragraph 12 of Defendant's Counterclaim, including subparts.

FOR A THIRD DEFENSE

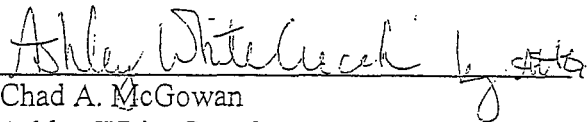
7. Michael Earl Miller, II's negligent, grossly negligent, or reckless conduct in operating the subject boat while intoxicated exceeds fifty percent (50%) of any alleged negligence of Cynthia Crowe, and as such Michael Earl Miller, II's claims are barred by the doctrines of comparative negligence and assumption of the risk.

FOR A FOURTH DEFENSE

8. The Complaint fails to state a cause of action upon which relief can be granted.

Plaintiff denies that Defendant is entitled to the relief requested in the paragraph titled

WHEREFORE.


Chad A. McGowan
Ashley White Creech
McGowan, Hood, & Felder, LLC
1539 Healthcare Drive
Rock Hill, South Carolina 29730
(803) 327-7800
(803) 328-5656 Facsimile
cmcgowan@mcgowanhood.com

Rock Hill, South Carolina

January 30th, 2012

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Cynthia Crowe

Plaintiff,

v.

Michael Earl Miller, I, and Michael Earl
Miller, II

Defendants.

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

Civil Action No: 11-CP-46-4366 .

PLAINTIFF'S MOTION FOR
JUDGMENT ON THE PLEADINGS ON
DEFENDANT MICHAEL EARL
MILLER, II's COUNTERCLAIMS

Plaintiff Cynthia Crowe respectfully moves the Court pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure to grant Judgment on the Pleadings in favor of Plaintiff as to Defendant's Counterclaims.

FACTUAL BACKGROUND

On November 18, 2011, Plaintiff Cynthia Crowe filed a Complaint (attached as Exhibit 1) against Defendants Michael Earl Miller, I (Miller) and his father Michael Earl Miller, II seeking to recover damages for injuries she sustained in a boating accident in which Miller was driving the boat. Plaintiff's sued Miller alleging causes of action for negligence as well as his father alleging causes of action for negligence and negligent entrustment.

Both Defendants served Answers to Plaintiff's Complaint (Defendant Michael Earl Miller, I Answer attached as Exhibit 2; Defendant Michael Earl Miller, II Answer Attached as Exhibit 3), asserting identical counterclaims alleging that Plaintiff was actually operating the boat and seeking monetary damages from Plaintiff for injuries sustained by Defendant Miller and property damage sustained by his father. (Plaintiff's Answers to Defendants' Counterclaims

attached as Exhibits 4 and 5). In December 2010, Defendant Miller pled no contest to Driving a Water Vehicle Under the Influence, causing severe bodily injury for the same events alleged in the Complaint (Indictment No. 2010 GS 4602926, Case No. J155361), and is estopped by South Carolina law from filing Counterclaims taking a contrary position. This Court should dismiss these counterclaims pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure and award Plaintiff the costs associated with making this motion.

STANDARD

Rule 12(c) of the South Carolina Rules of Civil Procedure allows parties to make a motion for judgment on the pleadings after the pleadings are closed but within such time so not to delay trial. A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle the claimant to judgment if resolved in his favor. *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). If matters outside of the pleadings are presented, the Court should treat the motion as one for summary judgment under Rule 56 of the South Carolina Rules of Civil Procedure.

ARGUMENT

In South Carolina, a Plaintiff cannot use a plea of *nolo contendere* (“No Contest”) against a Defendant at a Civil Trial. See *Generally Kibler v. State*, 267 S.C. 250, 254, 227 S.E.2d 199, 201 (S.C. 1976). However, the South Carolina Supreme Court has made clear that a party who has pled no contest to criminal charges may not use the benefits of the plea “offensively for his own benefit” in a subsequent civil proceeding. *Brown v. Theos*, 345 S.C. 626, 631, 550 S.E.2d 304, 307, n1 (2001). In *Brown*, a criminal defendant who pled no contest to criminal charges sued his attorneys for legal malpractice, alleging that his counsel’s negligent misrepresentation

caused him to be convicted pursuant to a no contest plea. *Id.* The South Carolina Supreme Court considered Rule 410 of the South Carolina Rules of Evidence, which states that a plea of no contest is typically not admissible against the defendant who made the plea, and found it applied only where “a party attempts to use a no contest plea in a criminal matter to prove a defendant liable in a civil proceeding,” not where a criminal defendant functions as the plaintiff and attempts to obtain monetary damages. *Id.* at 631, 550 S.E.2d at 307. The Court cited favorably *Walker v. Schaeffer*, which noted:

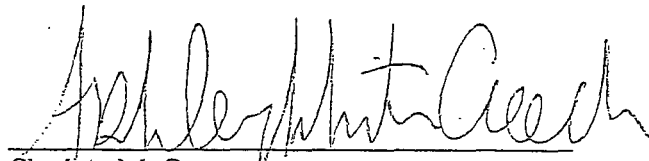
We find a material difference between using a *nolo contendere* plea to subject a former criminal defendant to subsequent civil or criminal liability and using the plea as a defense against those submitting a plea interpreted to be an admission which would preclude liability. Rule 410 was intended to protect a criminal defendant’s use of the *nolo contendere* plea to defend himself from future civil liability. We decline to interpret the rule so as to allow the former defendants to use the plea offensively, in order to obtain damages after having admitted facts which would indicate no civil liability on the part of the [defendant]. . .

Id. (citing 845 F.2d 138, 143 (6th Cir. 1998)). The Court further noted that in instances where a criminal defendant attempts to use the benefit of a no contest plea offensively, there is no difference between a no contest plea and a guilty plea. *Brown*, 345 S.C. at 632, 559 S.E.2d at 307.

In the present case, Miller has brought a counterclaim seeking damages based upon the same transactions and occurrences addressed by his no contest plea. For purposes of his counterclaim, he is functioning as the plaintiff, taking a position that directly contradicts the position he took in his plea. While Plaintiff Crowe is not seeking to use the no contest plea against him in her case in chief, Miller is prohibited by the Court’s ruling in *Brown* from invoking the benefit of the plea to seek monetary damages from Plaintiff. Miller’s no contest plea has the same effect as a guilty plea. *Brown*, 345 S.C. at 632, 559 S.E.2d at 307. The doctrine of collateral estoppel prevents Mr. Miller from taking the position that Plaintiff was operating the

subject boat when that issue has already been decided in General Sessions. *See, e.g., Zurcher v. Bilton*, 379 S.C. 132, 666 S.E.2d 224 (2008) (holding that an *Alford* plea prevented a party from taking contrary position in subsequent civil action).

For the reasons stated above, Plaintiff asks that the Court grant Plaintiff's Motion for Judgment on the Pleadings regarding Michael Earl Miller, II's counterclaim against Plaintiff and award Plaintiff the costs associated with bringing this motion.



Chad A. McGowan
Ashley White Creech
McGowan, Hood, & Felder, LLC
1539 Healthcare Drive
Rock Hill, South Carolina 29730
(803) 327-7800
(803) 328-5656 Facsimile
cmcgowan@mcgowanhood.com

Rock Hill, South Carolina

January____, 2012

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) SIXTEENTH JUDICIAL COURT
) Civil Action No. 2011-CP-46-4366

COUNTY OF YORK)

Cynthia Crowe)

v.)

Michael Earl Miller I, and
Michael Earl Miller II.)

Defendants)

RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR
JUDGMENT ON THE PLEADINGS ON
DEFENDANT MICHAEL EARL MILLER,
II'S COUNTERCLAIMS

DAVID HAMILTON
C.C. CP, 16th J.C.
YORK COUNTY, SC

FILED RECEIVED
2012 APR 19 PM 12:18

Comes now defendant Michael Earl Miller II ("Miller") by and through his undersigned counsel, and submits this Response in Opposition to Plaintiff's Motion for Judgment on the Pleadings on Defendant Michael Earl Miller, II's Counterclaims. For the reasons set forth herein, Plaintiff's motion should properly be denied.

BACKGROUND

On November 18, 2011, Plaintiff initiated the above-captioned action against Miller and his father, Michael Earl Miller, I, seeking to recover damages for injuries allegedly sustained in a boating accident on April 23, 2010 ("Action"). Specifically, Plaintiff alleges Miller's "negligence, carelessness, recklessness, willfulness, and wantonness" in the following regards:

- a) In operating a boat while intoxicated.
- b) In failing to reasonably operate the subject boat in a safe manner.
- c) In failing to avoid the accident described above.
- d) In such other ways as may be shown at trial.

See Action, ¶ 18.

Miller, at the time *pro se*, timely responded to the Action by way of Answer ("Answer"), generally denying the allegations made by Plaintiff, and further alleging that, in fact, she was

operating the boat at the time of the accident. *See* Answer, ¶ 9. Further, Miller included in the Answer a Counterclaim which alleged Plaintiff's own conduct caused Miller to sustain injuries. *See* Answer, ¶¶ 9-12. Specifically, Miller alleges Plaintiff's "negligence, carelessness, recklessness, willfulness, and wantonness" in the following regards:

- a) In operating the boat while intoxicated;
- b) In failing to operate the boat in a safe manner;
- c) In failing to keep a proper lookout;
- d) In failing to keep proper control of the boat.

See Answer, ¶ 11.

Plaintiff responded to the Counterclaim denying liability, and further averring that Miller's claims are barred by comparative negligence and assumption of the risk. *See* Reply. Plaintiff also moved the Court for Judgment on the Pleadings pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure ("Motion"). It is this motion to which Miller responds.

STANDARD

"Any party may move for a judgment on the pleadings under Rule 12(c), SCRPC." *Falk v. Sadler*, 533 S.E.2d 350, 353 (S.C.App 2000). "When considering such motion, the court must regard all properly pleaded factual allegations as admitted." *Id.* (quoting *Russell v. City of Columbia*, 406 S.E.2d 338 (S.C. 1991)). "On review of the motion, the court may not consider matters outside the pleadings." *Id.* (quoting *Firemen's Ins. Co. v. Cincinnati Ins. Co.*, 394 S.E.2d 855 (S.C. App.1990)).

A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment. *Brown v. United Insurance Company of America*, 233 S.E.2d 298 (S.C. 1977). A judgment on the pleadings is in the nature of a demurrer. *Brown, supra*. All properly

pleaded factual allegations are deemed admitted for purposes of the consideration of a demurrer. *Crowe v. Domestic Loans, Inc.*, 130 S.E.2d 845 (S.C. 1963). When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. *Crowe, supra*. Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever. *Baldwin v. Sanders*, 223 S.E.2d 602 (S.C. 1976). Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties. *Manning v. Dial*, 245 S.E.2d 120 (S.C. 1978). Further, a judgment on the pleadings is considered to be a drastic procedure by our courts. *U.S. Casualty Company v. Hiers*, 104 S.E.2d 561 (S.C. 1958).

Russell, 406 S.E.2d at 339.

ARGUMENT

Judgment on the Pleadings on Miller's Counterclaim is inappropriate. As noted in *Russell*, "[a]ll properly pleaded factual allegations are deemed admitted" and a "[claim] is sufficient if it states any cause of action or it appears that the [party] is entitled to any relief whatsoever." *See id.* Because Miller's *pro se* allegations contained within the Counterclaim do state a proper claim against the Plaintiff, Judgment on the Pleadings is not proper and Plaintiff's motion should be denied.

Miller's Counterclaim sounds in negligence. The elements of such are (1) duty of care; (2) breach of that duty; (3) legally protected injury; and (4) causal relationship between that injury and breach. *See e.g. Andrade v. Johnson*, 588 S.E.2d, 592 (S.C. 2003). Miller's pleading recites a legal duty owed by Plaintiff. *See Answer*, ¶ 10. A breach of that duty is also alleged. *See Answer*, ¶ 11. Finally, causation and damages are alleged. *See Answer*, ¶ 12. Thus, considering the allegations as true and admitted for purposes of the motion, Miller has pled a claim upon which he is entitled to relief. *See Russell*, 406 S.E.2d at 339. Plaintiff's motion should be denied.

COLLATERAL ESTOPPEL

Despite the foregoing, Plaintiff seeks to have this Court strike Miller's Counterclaim based upon the legal theory of "collateral estoppel." "Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. South Carolina Department of Transportation*, 684 S.E.2d 779, 782 (S.C. App. 2009)(citing *Judy v. Judy*, 677 S.E.2d 213, 217 (S.C. App. 2009)). "The party asserting collateral estoppels must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* (citing *Beall v. Doe*, 315 S.E.2d 186, 189-90, n.1 (S.C. App. 1984)). This doctrine should not be rigidly or mechanically applied, and even where all elements are met, courts may refuse to apply it where unfairness and injustice would result, or where public policy so requires. *See id.* (citations omitted).

BOATING UNDER THE INFLUENCE

In the instant matter, Plaintiff seeks to utilize a prior plea in a criminal matter to preclude the instant Counterclaim. Initially, Plaintiff would seek to utilize matters outside of the pleadings which is specifically prohibited in a Rule 12(c) motion. *See Falk*, 533 S.E.2d at 353. Beyond this, the prior criminal action lacks the requisite uniformity to the instant action for collateral estoppel to apply.

Miller was charged in the criminal matter with violating South Carolina Code Annotated Section 50-21-113, which prohibits the operating of a moving water device while under the influence of alcohol or drugs resulting in property damage, great bodily injury or death. This statute specifically provides that "[a] person who, while under the influence of alcohol, drugs, or the combination of alcohol and drugs operates a moving water device, or is in actual control of a

moving water device within this State and causes great bodily injury or death of a person other than himself, is guilty of a felony.” S.C. Code Ann. § 50-21-113 (A). “Operates” is defined as “to navigate, steer, drive, or be in control. It also includes the manipulation of moving water skis, a moving aquaplane, a moving surfboard, or similar moving device.” See S.C. Code Ann. § 50-21-10 (15). An “operator” is deemed “the person who operates or has charge or command of the navigation or use of a vessel or watercraft.” See S.C. Code Ann. § 50-21-10 (16). “Use,” as utilized in the statutes is intended to mean “operate, navigate, or employ.” See S.C. Code Ann. § 50-21-10 (24). “Navigate” is not defined in the Code, but its use in this context and in common nomenclature would demonstrate that “navigate” includes the aiding in the direction of the vessel, such as use of a map, compass, or other device to assist the “operator” in “operat[ing]” the boat. The statute, thus, can be violated in numerous ways. Ultimately, the question becomes whether the person charged (1) operated, navigated, steered, controlled, used or drove (2) a moving water device (a boat in this instance) (3) while under the influence of drugs, alcohol, or a combination of the two and (4) caused great bodily injury or death to someone other than himself.

Furthermore, the focus on the offense is whether the individual charged was under the influence of drugs, alcohol, or a combination of the two. The statute does not require negligence or recklessness, and in fact someone can violate the statute without committing negligent or reckless conduct. This fact is borne out by our Supreme Court’s decision in *State v. Cribb*, 426 S.E.2d 306 (S.C. 1992) which specifically holds that recklessness is not an element of felony driving under the influence, the companion statute for offenses occurring on the public highways as opposed to the public waters. See also *State v. Easler*, 471 S.E.2d 745, 758-59 (S.C. App. 1996). Additionally, the language of South Carolina Code Annotated Section 50-21-113(A) merely utilizes the causation phrasing “and causes” as opposed to the “proximately causes”

language of the analogous roadway statute of South Carolina Code Annotated Section 56-5-2945 (A). Thus, the boating under the influence permits conviction where the accused played *some* role in the injuries, but not necessarily the *proximate* or *sole* cause of those injuries. Clearly, then, Miller has not acknowledged facts or liability identical to the instant matter. Collateral estoppels should not bar the asserted Counterclaim.

NORTH CAROLINA v. ALFORD

Of note, Miller did not admit liability to Boating Under the Influence. Instead, he entered a plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). In *Alford*, the United States Supreme Court authorized a Court to accept a plea and impose a criminal sentence on a defendant who protests his or her innocence. See *State v. Paris*, 578 S.E.2d 751, 752 (S.C. App. 2003). Instead, the Supreme Court determined, “a guilty plea need only represent a voluntary and intelligent choice among alternative courses of action open to the defendant.” See *James v. State*, 659 S.E.2d 148, 150 (S.C. 2008). The Court must also conclude that the evidence strongly support the defendant’s guilt of the offense charged. See *Gaines v. State*, 517 S.E.2d 439, 440, n.1 (S.C. 1999). Under an *Alford* plea, a defendant voluntarily subjects himself to the jurisdiction of the Court for imposition of a sentence despite his protestation of innocence.

ZURCHER V. BILTON

Our Supreme Court has had occasion to review the application of an *Alford* plea in the context of collateral estoppels. In *Zurcher v. Bilton*, 666 S.E.2d 224 (S.C. 2008), the Supreme Court evaluated whether a criminal defendant who entered an *Alford* plea to simple assault and battery is collaterally estopped from bringing a civil assault action against the victim arising from the same incident which resulted in the criminal conviction.¹ The Supreme Court noted that “once a person has been criminally convicted, the person is bound by that adjudication in a

¹ Procedurally, the Defendant/Victim moved from Summary Judgment, as opposed to Judgment on the Pleadings.

subsequent civil proceeding based on the same facts underlying the criminal conviction.” *Zurcher*, 666 S.E.2d at 226 (quoting *Doe v. Doe*, 551 S.E.2d 257, 258 (S.C. 2001)). As such, “a defendant who enters a guilty plea *may* be collaterally estopped from litigating the same issue in a subsequent civil suit.” *Id.* at 226-27 (*emphasis added*). The elements of collateral estoppel must still be met, however.

Factually, in *Zurcher*, the criminal defendant and civil plaintiff was convicted of simple assault. While raising allegations in the criminal action regarding the criminal victim and civil defendant having been the primary aggressor, the criminal defendant ultimately entered the *Alford* plea, thereby waiving this defense. Thereafter, having already litigated (or had the opportunity to litigate) the issue of the primary aggressor in the assault, the criminal defendant was collaterally estopped from taking a different position in the civil action. The criminal and civil actions both arose on the issue of the assault, had the same elements, and the criminal determination necessarily decided the civil.

Similarly, in *Doe v. Doe*, 551 S.E.2d 257 (S.C. 2001), the criminal defendant was convicted of five counts of criminal sexual conduct with a minor and one count of lewd act upon a minor. Prior to said convictions, a South Carolina Family Court had terminated the defendant’s parental rights, as each of the aforementioned convictions was based upon conduct towards defendant’s children. Thereafter, a civil lawsuit was initiated by the victims against defendant. The victims moved for summary judgment on the issue of liability on assault and battery, claiming that the criminal and Family Court actions had already decided this issue. In affirming the Circuit Court’s grant of summary judgment, the Supreme Court noted that “[a]s a practical matter, to allow a party to offensively invoke the collateral estoppels doctrine in this situation, it must be shown the *identical issue* must have necessarily been decided in the prior criminal action and be decisive in the present civil action.” *Doe*, 551 S.E.2d at 259 (*emphasis*

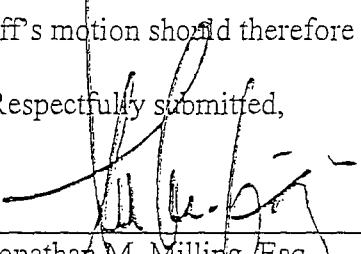
added). The Supreme Court concluded that the criminal conviction necessarily decided the civil issue as “[t]he criminal conviction of CSC necessarily found that appellant[defendant] had committed a battery on respondents[victims].” *Id.* at 259, n.5.

Both *Zurcher* and *Doe* involve assault situations where the elements in the underlying criminal action necessarily decided the civil assault allegations. As previously outlined, different issues and different elements are involved in the instant situation. The elements of Boating Under the Influence and the instant civil action are different. Thus, under the express terms of *Doe*, collateral estoppel is inapplicable. Furthermore, our legislature has recognized that operating motor vehicles is different from other situations which might hinge upon both criminal and civil liability. South Carolina Code Annotated Section 56-5-6160 specifically provides that criminal convictions under Chapter 5 of Title 56 are inadmissible in civil actions. Admittedly, there is no companion prohibition in Title 50. Considering the similar rationales behind the Highway and Waterway regulations, such a prohibition is illustrative. This is especially true considering the differing elements of the criminal and civil offenses. Because the underlying criminal action did not necessarily decide the civil action and because we do not have identical issues, collateral estoppel is inapplicable.

CONCLUSION

For the reasons set forth herein, Miller should not be collaterally estopped from maintaining the instant counterclaims. Plaintiff's motion should therefore be denied.

Respectfully submitted,



Jonathan M. Milling, Esq
MILLING LAW FIRM, LLC
1614 Taylor Street
Columbia, South Carolina 29201
(803) 451-7700

ATTORNEY FOR THE DEFENDANT

Columbia, South Carolina

April 18, 2012

State of South Carolina)
)
)
County of York)

In the General Sessions
Court of York

Case No.: 2010-GS-46-02926

State of South Carolina.,)
)
Plaintiff.,)
)
-vs-)
)
Michael Earl Miller.,)
)
Defendant.)

Transcript of Record

December 15, 2010
York, South Carolina

B E F O R E:

Honorable Edward Miller, Judge.

A P P E A R A N C E S:

MS. Jessica Holland
Assistant Solicitor
Sixteenth Judicial Circuit
Moss Justice Center
1675-1A York Hwy.
York, South Carolina 29745-7422
803-628-3020
For the Plaintiff

Mr. John Rhea
McKinney Givens Tucker & Rhea LLC
P.O. Box 11784
Rock Hill, South Carolina 29731-1784
803-328-1848
For the Defendant

Wanda Nelson
Circuit Court Reporter
Sixteenth Judicial Circuit

ORIGINAL

1 MS. LIPINSKI: Williamson, Nichols, Miller, Carter.

2 Stand back here, Ms. Inzerillo will be back here.

3 THE COURT: I know you did it twice, but I got

4 Williamson.

5 MADAME COURT REPORTER: I do too.

6 MS. LIPINSKI: Williamson, Nichols, Miller, Carter.

7 MADAME COURT REPORTER: That's the way I got it,

8 Judge.

9 THE COURT: Williamson, Nichols, Miller, Carter.

10 MADAME COURT REPORTER: Yes, sir.

11 MADAME CLERK: Will each of you raise your right hand.

12 (WHEREUPON: CHARLES

13 WILLIAMSON, BARBARA NICHOLS, MICHAEL MILLER AND ANNALISA

14 CARTER, BEING FIRST CALLED AND DULY SWORN, TESTIFIED AS

15 FOLLOWS:)

16 THE COURT: All right. How many jail days has

17 Williamson had?

18 MR. WILLIAMSON: It was only one.

19 THE COURT: Nichols?

20 MR. NICHOLS: One.

21 THE COURT: Miller?

22 MR. RHEA: None, Your Honor.

23 THE COURT: Carter?

24 MS. INZERILLO: Forty-five, Your Honor.

25 THE COURT: All right, in the last twenty-four hours

1 have you had any drugs, alcohol, medication, Mr.
2 Williamson?

3 MR. WILLIAMSON: No, sir, Your Honor.

4 THE COURT: Ms. Nichols?

5 MS. NICHOLS: No, sir, Your Honor.

6 THE COURT: Mr. Miller?

7 MR. MILLER: Yes, sir.

8 THE COURT: What?

9 MR. MILLER: Pain medicine. I had surgery.

10 THE COURT: All right. Prescribed to you?

11 MR. MILLER: Yes.

12 THE COURT: Over the last three days have you had the
13 prescribed dosage?

14 MR. MILLER: Whatever was recommended I take yes, sir.

15 THE COURT: All right. Does it limit your ability to
16 understand what you're doing?

17 MR. MILLER: No, sir.

18 THE COURT: How about you, Ms. Carter?

19 MS. CARTER: No, sir.

20 THE COURT: Have you ever been treated for the abuse
21 of alcohol, drugs, mental illness or emotional problems,
22 Mr. Williamson?

23 MR. WILLIAMSON: Yes, sir.

24 THE COURT; What?

25 MR. WILLIAMSON: Keystone. July 26, '06.

1 THE COURT: All right. Sober today?

2 MR. WILLIAMSON: Yes, sir.

3 THE COURT: How about you, Ms. Nichols?

4 MS. NICHOLS: Yes. I went to Monroe Alcohol Center.

5 THE COURT: How about you? Are you sober?

6 MS. CARTER: Am I sober? Yes.

7 THE COURT: Miller?

8 MR. MILLER: Yes, sir.

9 THE COURT: What?

10 MR. MILLER: Over Comers, I think it's Over Comer's
11 Rescue Mission in Greenville.

12 THE COURT: Okay. How about you, are you sober today?

13 MR. MILLER: Yes, sir.

14 THE COURT: Ms. Carter?

15 MS. CARTER: No, sir.

16 THE COURT: Okay. Let's see here. We had some -

17 All right, Mr. Williamson, you're up here on
18 Indictment 2010-3707 alleges you did in York County May 16,
19 2010 possess a quantity of cocaine with intent to
20 distribute; pleading to possession of cocaine, third
21 offense; carries up to ten years, twelve thousand five
22 hundred dollar fine. Do you understand that?

23 MR. WILLIAMSON: Yes, sir.

24 THE COURT: Ms. Nichols, you're up here on Indictment
25 2010-3352 alleges you did in York County June 26th 2010

1 drive a motor vehicle under the influence of alcohol, drugs
2 or any combination thereof, materially and appreciably
3 impaired your ability to drive and you had at least one
4 prior DUI in the last ten years. The BA was between .1 and
5 .6 and second offense, carries thirty days, mandatory
6 minimum of thirty days up to two years a fine of twenty-
7 five hundred up to fifty-five hundred, no suspension of the
8 fine less than eleven hundred dollars. Do you understand
9 that?

10 MS. NICHOLS: Yes, Your Honor.

11 THE COURT: Mr. Miller, you're up here on Indictment
12 2010-2926 alleges you did in York County on or about
13 November 26, '09 operated a moving water device under the
14 influence of alcohol, drugs or any combination thereof
15 which materially and appreciably impaired your ability to
16 operate the vehicle and while doing so you caused great
17 bodily injury to another. This carries a mandatory minimum
18 of thirty days up to fifteen years, a fine of five thousand
19 and ten thousand dollars. Do you understand that?

20 MR. MILLER: Yes, sir.

21 THE COURT: Ms. Carter, you're up here on 2010-2715
22 alleges you did in York County on or about May 17, 2010
23 being the parent or guardian of Ellie Lynn Turbeville, you
24 placed that child in unreasonable risk of harm. That
25 carries ten years. Do you understand that?

1 MS. CARTER: Yes, sir.

2 THE COURT: I'm sorry.

3 MS. CARTER: Yes, sir.

4 THE COURT: All right. You're also up here on 2010-
5 2716 alleges you did in York County May 17, 2010 being the
6 parent or guardian of Alexander Feemster age seven, place
7 that child in unreasonable risk of harm affecting their
8 health or safety and that is another ten years. Do you
9 understand that?

10 MS. CARTER: Yes, sir.

11 THE COURT: Do each of you understand the nature of
12 the charges against you and the maximum possible
13 punishment? How do you want to plead, Mr. Williamson?

14 MR. BROWN: Your Honor, there's one correction and I
15 saw this, it should be a second offense. I think the
16 Solicitor will concur?

17 MR. MAINES: That's correct, Your Honor, the CDR Code
18 for that is 3012 and you can just strike through the 3rd.

19 THE COURT: Here, I'll let you do it. I'm getting
20 hand cramps.

21 (SOLICITOR MAINES CORRECTED INDICTMENT.)

22 THE COURT: All right. That carries up to - what is
23 it?

24 MR. MAINES: Five years.

25 THE COURT: Five years, seventy-five hundred dollars.

1 Do you understand that?

2 MR. WILLIAMSON: Yes, sir, Your Honor.

3 THE COURT: All right. How do you want to plead?

4 MR. WILLIAMSON: Guilty, Your Honor.

5 THE COURT: All right, Ms. Nichols, how do you want to
6 plead to it?

7 MS. NICHOLS: Guilty.

8 THE COURT: All right. Mr. Miller?

9 MR. MILLER: No context, Your Honor.

10 MR. RHEA: Your Honor, I talked to Ms. Holland about
11 that. He has no memory of the incident.

12 THE COURT: Well, you and your lawyer, you understand
13 I don't take no context. We might do an Alford Plea,
14 North Carolina versus Alford. Do you know what that is?

15 MR. RHEA: If I can explain that to him?

16 THE COURT: Okay. But ether way it's a guilty plea.
17 Do you understand that?

18 MR. RHEA: He understands.

19 THE COURT: Well, I don't know.

20 Do you understand that?

21 MR. MILLER: Do I understand that a No Contest is a
22 guilty plea?

23 THE COURT: I'm not taking a No Context Plea. I'll
24 take it pursuant to North Carolina versus Alford. But that
25 has the same force and effect as a guilty plea. Its just a

1 question of what --

2 Talk to him about it?

3 MR. RHEA: Okay.

4 THE COURT: How about you, Ms. Morton?

5 MS. CARTER: It's Carter.

6 THE COURT: Huh?

7 MS. CARTER: Carter.

8 THE COURT: Oh, Carter. Yeah, sorry.

9 MS. CARTER: Guilty.

10 THE COURT: Okay. All right.

11 (PAUSE.)

12 THE COURT: How do you want to plead?

13 MR. MILLER: Guilty, Your Honor, under Alford.

14 THE COURT: All right. Anybody forced you in any way
15 or coerced you, threatened you, or promised you anything to
16 get you to do that, Mr. Williamson?

17 MR. WILLIAMSON: No, sir.

18 THE COURT: Ms. Nichols?

19 MS. NICHOLS: No, sir, Your Honor.

20 THE COURT: Mr. Miller?

21 MR. MILLER: No, sir.

22 THE COURT: Ms. Carter?

23 MS. CARTER: No, sir.

24 THE COURT: Do you each understand you have an
25 absolute right to a trial by a jury where you would be

1 presumed innocent unless and until the State could prove
2 you guilty beyond any reasonable doubt of each and every
3 element of the offense or offenses you are charged with?
4 You would have the right to confront and cross examine the
5 witnesses and the evidence put up against you by the State.
6 You would have the right to compel in court all relevant
7 and competent evidence in your own defense; or you could
8 remain silent your silence could not be held against you
9 and you could never be compelled to incriminate yourself.
10 Do you understand all those rights, Mr. Williamson?

11 MR. WILLIAMSON: Yes, sir, Your Honor.

12 THE COURT: Ms. Nichols?

13 MS. NICHOLS: Yes, sir.

14 THE COURT: Mr. Miller?

15 MR. MILLER: Yes, sir.

16 THE COURT: Ms. Carter?

17 MS. CARTER: Yes, sir.

18 THE COURT: Do you want to give all those rights up to
19 enter this plea, Mr. Williamson?

20 MR. WILLIAMSON: Yes, sir, Your Honor.

21 THE COURT: Ms. Nichols?

22 MS. NICHOLS: Yes, sir.

23 THE COURT: Mr. Miller?

24 MR. MILLER: Yes, Your Honor.

25 THE COURT: Ms. Carter?

1 MS. CARTER: Yes, sir.

2 THE COURT: Are you guilty, Mr. Williamson?

3 MR. WILLIAMSON: Yes, sir, Your Honor.

4 THE COURT: Ms. Nichols?

5 MS. NICHOLS: Yes, sir, Your Honor.

6 THE COURT; Ms. Carter?

7 MS. CARTER: Yes, sir.

8 THE COURT: And, Mr. Miller, do you think if your
9 attorney and the State put twelve people in the box over
10 there the State has enough evidence that there is a
11 substantial likelihood that you would be convicted?

12 MR. MILLER: Yes, sir, Your Honor.

13 THE COURT: And do you --

14 He's getting a recommendation out of this?

15 MR. RHEA: It's essentially a negotiated plea, Your
16 Honor.

17 THE COURT: Oh, negotiated. All right, so he's
18 getting a benefit. Okay. All right.

19 Are you totally and completely satisfied with your
20 lawyer, Mr. Williamson?

21 MR. WILLIAMSON: Yes, sir, Your Honor.

22 THE COURT: Ms. Nichols?

23 MS. NICHOLS: Yes, sir.

24 THE COURT: Mr. Miller?

25 MR. MILLER: Yes, sir.

1 THE COURT: Ms. Carter?

2 MS. CARTER: Yes, sir.

3 THE COURT: And have you had enough time to review the
4 evidence the State has against you, Mr. Williamson?

5 MR. WILLIAMSON: Yes, sir, Your Honor.

6 THE COURT: Ms. Nichols?

7 MS. NICHOLS: Yes, sir, Your Honor.

8 THE COURT: Mr. Miller?

9 MR. MILLER: Yes, sir.

10 THE COURT: Ms. Carter?

11 MS. CARTER: Yes, sir.

12 THE COURT: Tell us about it.

13 (COLLOQUY BETWEEN THE COURT AND SOLICITOR MAINES,
14 SOLICITOR SIKORA AND ATTORNEYS MICHAEL BROWN AND JOHN RHEA
15 IN REGARDS TO DEFENDANT'S WILLIAMSON AND NICHOLS.)

16 MS. HOLLAND: Ready for Mr. Miller, Your Honor?

17 THE COURT: Okay.

18 MS. HOLLAND: The night in question during the evening
19 hours after dark Mr. Miller operated a boat on Lake Wylie,
20 it's located in York County. At the time he was
21 intoxicated and impaired he struck a dock. And also a
22 passenger on that boat, the passenger Cynthia Crow was
23 injured, sustained injuries to her hands; she also had
24 broken bones in her finger. She's also severely affected
25 the use of her hands. An inventory was conducted of the

1 boat where numerous cans of beer and bottles of alcohol
2 were found in the boat. And also numerous witness's gave
3 statements that the defendant had been drinking that night.

4 THE COURT: Okay. This is negotiated?

5 MS. HOLLAND: This is negotiated and this is rather
6 lengthy as well. It's ten years suspended on five years
7 probation ---

8 THE COURT: Okay.

9 MS. HOLLAND: --- during which we want him to do in
10 patient treatment. We're not requiring that he enter the
11 jail and be allowed to remain in the community until a bed
12 is open.

13 THE COURT: That's it?

14 MS. HOLLAND: A few more. Substance abuse counseling.

15 THE COURT: That's what the inpatient treatment is?

16 MS. HOLLAND: Yeah. We'd just like something to kind
17 of make sure or at least drug and alcohol testing just to
18 make sure ---

19 THE COURT: Okay.

20 MS. HOLLAND: --- that he's abiding with his
21 treatment. And also there's restitution ---

22 THE COURT: Oh, yeah.

23 MS. HOLLAND: --- in the amount of fourteen thousand,
24 one hundred and eighty-three dollars and ninety cents,
25 (\$14,183.90). That's going to be payable to the State

1 Office of Victim Assistance. Also they're going to give
2 him the chance for early termination after two years if he
3 gets that money paid off. And this negotiation is at the
4 request of the victim. They have children together so she
5 did not want him to go to jail.

6 THE COURT: All right. Is all that true?

7 MR. MILLER: Yes, sir.

8 THE COURT: Is that where you got that scar?

9 MR. MILLER: Yes, sir.

10 THE COURT: All right. Mr. Rhea, anything you need to
11 tell me?

12 MR. RHEA: Just briefly, Your Honor. He's got some
13 lovely family members including his mom and I know his mom
14 and dad very well. He's twenty-eight years of age, this
15 has obviously been a difficult time for everybody. Cynthia
16 is the mother of his two children ages five and three.

17 THE COURT: Are they divorced?

18 MR. RHEA: They were never married. Never married.
19 Obviously everybody in the family, you know, is glad she's
20 getting better, that she has those injuries but you know
21 this could have been a lot worse than it was and I think
22 everybody's thankful for that. You know Mike was severely,
23 he had a major, major head injury which has effected his
24 memory. I mean I've known him a long time and I think it
25 has affected his memory a little bit. Damage to his mouth,

1 we're just fortunate that, you know, Cynthia's okay. Just
2 respectfully ask Your Honor to go along with the
3 negotiations in this matter. Mike works for his daddy and
4 has for the last - over ten years in his dad's successful
5 business.

6 Your Honor, just as we discussed earlier, yourself and
7 myself and Ms. Holland, with regard to the thirty day
8 mandatory minimum, I guess that is a mandatory minimum, so
9 just respectfully ask...

10 THE COURT: Okay. All right.

11 MS. HOLLAND: And, Your Honor, and I'm sorry to
12 interrupt, at some point I promised that they can all read
13 a letter. I will summarize.

14 THE COURT: Why don't you just hand it to me and I'll
15 read it.

16 MS. HOLLAND: Okay. It's rather lengthy, I can
17 summarize it.

18 (LETTER RECEIVED UP AND READ BY THE COURT.)

19 THE COURT: Okay. All right. Anything you want to
20 tell me?

21 MR. MILLER: Yes, sir, Your Honor. Honestly I'm just
22 grateful that this accident that happened wasn't as tragic
23 as it could have been. I'm thankful that the mother of my
24 children is okay and well and she's getting better.

25 THE COURT: All right. So what did you do to your

1 head?

2 MR. MILLER: You have to ask my neurosurgeon, Your
3 Honor. I don't know. Some long word.

4 THE COURT: Subdural hematoma. Did you have to have
5 surgery?

6 MR. MILLER: Cognitive memory --

7 THE COURT: Deficit?

8 MR. MILLER: I can't remember stuff sometimes.

9 THE COURT: Okay. Ten years suspended to five years
10 probation. Restitution pursuant to the order. Substance
11 abuse counseling, random drug and alcohol testing, in-
12 patient treatment, terminate after two years if in full
13 compliance and paid in full.

14 Does that comply with the negotiated?

15 MS. HOLLAND: It does, Your Honor.

16 MR. RHEA: It does, Your Honor. Thank you, Your
17 Honor.

18 THE COURT: All right. Good luck to you.

19 MR. MILLER: Yes, sir.

20 - END OF TRANSCRIPT OF HEARING -

21

22

23

24

25

CERTIFICATE OF REPORTER

State of South Carolina)
)
County of York)

I, Wanda Nelson, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of General Sessions for York County, South Carolina, on the 15th day of December 2010.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Wanda Nelson
Wanda Nelson, CVR-Master
Certified Verbatim Reporter,
Official Court Reporter,
Notary Public, in and for
The State of South Carolina.

My Commission Expires: 1/21/2021

DATE: 2-21 1 2012

STATE OF SOUTH CAROLINA

County of York

Cynthia Crowe,

Plaintiff,

vs.

Michael Earl Miller, I, and

Michael Earl Miller, II,

Defendants.

COURT OF COMMON PLEAS

Civil Action No.

2011-CP-46-4366

Appellate Case No.

2012-212029

TRANSCRIPT OF RECORD

April 19th, 2012
York, South Carolina

BEFORE:

THE HONORABLE S. JACKSON KIMBALL, JUDGE.

APPEARANCES:

ASHLEY WHITE CREECH, ESQ.
Attorney for the Plaintiff

JONATHAN M. MILLING, ESQ.
Attorney for the Defendants

AMINAH R. HARDY, RPR
Official Court Reporter

EXHIBITS

No.

Description

Page

(No exhibits marked.)

P R O C E E D I N G S

1
2 THE COURT: Ms. Creech, this is plaintiff's motion
3 for judgment upon the pleadings.

4 MS. CREECH: Yes, Your Honor. If it may please the
5 Court, my client, Cynthia Crowe, filed a complaint against
6 Michael Earl Miller, II -- I'm going to refer to him as
7 Mr. Miller. Just for the record, it's the II that I'm
8 referring to -- seeking damages for injuries she sustained
9 in a boating accident, basically alleging causes of action
10 for negligence because he was boating under the influence.

11 When I filed this motion, I looked up the recorded
12 record of the plea, and it was a no contest plea. Since
13 filing the motion, which is what I based our motion on,
14 actually spoke with the solicitor in the case, because the
15 Clerk of the Court indicated that a lot of times pleas are
16 entered incorrectly. So I got a transcript, and it was,
17 in fact, an Alford plea, a guilty plea under North
18 Carolina versus Alford. And I have a copy of that
19 transcript here, because the court was hearing
20 different -- because the court was hearing from different
21 defendants, I went on ahead and tabbed where Mr. Miller
22 pled guilty.

23 So for that reason in his answer, Mr. Miller asserted
24 a counterclaim alleging that my client was actually
25 operating the boat and seeking damages there from her, but

1 pleading guilty to boating under the influence and causing
2 severe bodily harm. He's estopped under the Zurcher case,
3 which I have a copy of as well, which basically says that
4 a plea under North Carolina versus Alford is fully
5 admissible as to the issue of liability. So we'd ask the
6 court to dismiss his counterclaim, since he's already pled
7 guilty.

8 THE COURT: Well, what you're saying is that the rule
9 that apparently applies to a no -- nolo contendere plea
10 being used offensively applies to an Alford plea?

11 MS. CREECH: Actually, I'm going to say -- go a step
12 ahead of that. In Zurcher v. Bilton, the court, the
13 Supreme Court actually held that North Carolina v. Alford
14 plea is admissible as to liability. So we've actually
15 filed now a motion for summary judgment as to liability on
16 our claims as well, which I'm sure you -- someone will be
17 hearing in the next few months. So it's a little bit of
18 an different analysis.

19 THE COURT: More binding, in other words.

20 MS. CREECH: Yes.

21 THE COURT: All right. Okay. Yes, sir.

22 MR. MILLING: Thank you, Your Honor. May it please
23 the court. As an initial matter, what brings us here
24 before the court is the plaintiff's motion for judgment on
25 the pleadings and Rule 12(c). If we look at Rule 12(c),

1 the Faulk case, the Russell versus City of Columbia case,
2 it's pretty clear a motion for judgment on the pleadings
3 is supposed to look at the pleadings, not matters outside
4 the pleadings in determining whether or not the party
5 against whom the motion has been brought has properly pled
6 the motion, or properly pled the claim for relief. And if
7 we look at the counterclaims which Mr. Miller filed pro
8 se, he did really a very good job in outlining the
9 elements of negligence, the duty, the breach, the
10 causation of the damages.

11 THE COURT: Well, let's -- let me stop you right
12 there.

13 MR. MILLING: Yes, sir.

14 THE COURT: We got two ways -- three ways we can go.
15 We can hear this motion as is.

16 MR. MILLING: Yes, sir.

17 THE COURT: We can continue it and have it come back
18 as a motion for summary judgment.

19 MR. MILLING: Yes, sir.

20 THE COURT: Or we can consider the -- what is
21 essentially only a legal argument that the counterclaim as
22 stated cannot be maintained.

23 MR. MILLING: Yes, sir.

24 THE COURT: I think in that -- which way do you want
25 it?

1 MR. MILLING: Judge, I'm fully prepared to go forward
2 however Your Honor sees fit.

3 THE COURT: Let's go forward.

4 MR. MILLING: Yes, sir. If we look at collateral
5 estoppel and how it has been applied in the criminal
6 versus the civil context -- and, Your Honor, I have been
7 able to prepare, finished it up yesterday, a memorandum
8 that would support our position. I have not had a chance
9 to file that yet just because I'm in Columbia. And I
10 understand me just now having provided to it you, I'm
11 going to walk you through what essentially we have
12 submitted in here. We'll file it with the clerk's office
13 as soon as we finish up with the hearing. But
14 essentially, Your Honor, if we look at collateral estoppel
15 or issue preclusion, the cases have essentially outlined
16 that one court -- the earlier court must have actually
17 litigated the prior action, must have directly determined
18 the prior action, and the fact upon which the moving party
19 wants to rely must have necessarily been relied upon in
20 support of the prior judgment.

21 I'm looking at the Carolina Renewal, Inc., versus
22 South Carolina Department of Transportation case. It's a
23 2009 South Carolina appellate court case. In a nutshell,
24 Your Honor, what we have to do is look at what somebody
25 litigated in the earlier action to determine whether or

1 not it is identical to that which has been litigated in
2 the instant action. If we look at what the count of
3 conviction was in this case, Mr. Miller entered an Alford
4 plea to boating under the influence involving great bodily
5 injury. Boating under the influence essentially says that
6 if someone operates a motor vehicle -- and I'm using that
7 term generically for purposes of our argument -- operates
8 a boat while under the influence of drugs of alcohol or
9 combination of the two and causes great bodily injury to
10 somebody other than himself, he's guilty of a felony.

11 THE COURT: A premise of the charge is that the
12 action of driving under the influence caused the bodily
13 injury, right?

14 MR. MILLING: That the operating as defined by the
15 statute and --

16 THE COURT: -- caused the bodily injury.

17 MR. MILLING: Yes, sir. And --

18 THE COURT: And that's an element?

19 MR. MILLING: Yes, sir. Played some role. It does
20 not say that it has to be the only cause or the proximate
21 cause, but rather some cause. And that is different from
22 felony DUI, which requires that it be a proximate cause of
23 the injuries. So we've got a broader term of liability,
24 if you will, for causation under the boating under the
25 influence statute versus the felony driving under the

1 influence statute. But if we look at the definitions
2 section -- and I've got this outlined in the memo -- if we
3 look at the definitions section, "operates" as defined by
4 South Carolina code annotated 50-21-10, subsection 15,
5 includes "to navigate, to steer, to drive, or to be in
6 control." And so the South Carolina legislature saw fit
7 to include navigation of the vessel as a grounds for
8 liability under this statute. "Navigation" is not or
9 "navigate" is not defined under the statute, so we have to
10 look at what the common meaning, common understanding of
11 what "navigate" might be in the boating context. Looking
12 at a map, determining where to turn, helping to go around
13 the buoys, so on and so forth. So an individual such as
14 Mr. Miller can enter a plea and be convicted of boating
15 under the influence without having necessarily --

16 THE COURT: This was boating under the influence
17 causing great bodily injury.

18 MR. MILLING: Yes, sir. And I'm looking at the
19 different elements because ultimately Mr. Miller could
20 have been convicted of providing instructions on where to
21 turn, how to turn, what to go around.

22 THE COURT: Well, he was convicted.

23 MR. MILLING: He was, yes, sir. But what I'm
24 suggesting is --

25 THE COURT: And the conviction was boating under the

1 influence causing great bodily injury.

2 MR. MILLING: Yes, sir.

3 THE COURT: Not a lesser-included offense.

4 MR. MILLING: Absolutely.

5 THE COURT: Go ahead.

6 MR. MILLING: But what we don't know is what the
7 premise of what he was doing to quote, operate the boat.

8 THE COURT: What difference does it make?

9 MR. MILLING: The difference it makes is because what
10 the plaintiff is attempting to do here is establish
11 definitively through this prior conviction that he was
12 driving. That's what -- and this was not necessarily
13 decided in the earlier action.

14 THE COURT: Go ahead.

15 MR. MILLING: If we look at the DUI statutes -- and
16 our courts have been clear that recklessness is not an
17 element of driving under the influence because many a
18 defense attorney has attempted to get a lesser-included
19 charge on that. I think State v. Cribb is one of the
20 cases where defense attorneys try to get a charge for
21 reckless driving in a DUI trial, and our Supreme Court has
22 been clear: Recklessness is not an element of driving
23 under the influence. That additionally is another
24 distinguishing characteristic between what we're looking
25 at in boating under the influence and the negligence

1 action that the plaintiff brought and the negligence
2 action which Mr. Miller brought against the plaintiff in
3 the counterclaim. The Zurcher case that Ms. Creech has
4 relied upon and passed up to the court is factually --

5 THE COURT: What does he claim -- in the context of
6 his guilty plea, what does he claim the plaintiff did for
7 which she is liable?

8 MR. MILLING: In the guilty plea or in the
9 counterclaim?

10 THE COURT: The context in which we're discussing
11 this is a guilty plea.

12 MR. MILLING: Yes, sir.

13 THE COURT: Or deemed to be a guilty plea.

14 MR. MILLING: Yes, sir, the Alford plea.

15 THE COURT: And his counterclaim claims the plaintiff
16 is liable.

17 MR. MILLING: Yes, sir, for his injuries. Yes, sir.

18 THE COURT: What acts of -- and I didn't read the
19 counterclaim. I'm sorry. What acts of hers does he say
20 proximately caused his injuries?

21 MR. MILLING: That she was the one who was driving
22 and he was the one navigating.

23 THE COURT: Let me draw your attention to the
24 discussion of the guilty plea.

25 MR. MILLING: Yes, sir.

1 THE COURT: The solicitor -- the solicitor says, "The
2 night in question during the evening hours after dark,
3 Mr. Miller operated a boat on Lake Wylie, located in York
4 County. At the time he was intoxicated and impaired, and
5 he struck a dock. And also a passenger on that boat, the
6 passenger, Cynthia Crowe, was injured," and goes on, the
7 solicitor goes on. Subsequently in the -- in the plea,
8 obviously --

9 MR. MILLING: Yes, sir.

10 THE COURT: -- the defendant has accepted that
11 recitation of the facts, and he is bound by them.

12 MR. MILLING: Your Honor, if we look -- and that was
13 something I paid great detail to. I think it was page 11
14 of the plea that the facts or recitation begins -- and
15 it's not until page 13 of the plea colloquy that Judge
16 Miller -- and there's no relationship between Judge Miller
17 from Greenwood and the defendant in the case.

18 THE COURT: I understand.

19 MR. MILLING: But two pages later after we have a
20 factual recitation and then we've got essentially a page
21 and a half recitation as to what the negotiations are in
22 the case. And so it was unclear whether or not the
23 question looking at the transcript whether the question
24 posed "is this correct" that -- to which Mr. Miller
25 responds, "Yes, it is," whether or not he is responding to

1 the negotiations or everything in its entirety.

2 Regardless, Your Honor, if we look at the elements of
3 collateral estoppel, we've got to determine whether or not
4 those issues were necessarily decided by the plea judge
5 and in the context of whether or not Ms. Crowe was a
6 passenger or the driver. That was not necessarily decided
7 by Judge Miller because he didn't have to decide. He
8 didn't have to decide. All he had to decide was whether
9 or not --

10 THE COURT: That's what was represented to the court
11 and he agreed to it.

12 MR. MILLING: That was represent to the court by the
13 Solicitor's Office. And, again, what Mr. Miller is
14 agreeing to is unclear from reading the record.

15 THE COURT: It's clear to me.

16 MR. MILLING: Well, in the context of several pages
17 later and we've got an intervening --

18 THE COURT: Let's go ahead with your legal argument.
19 I disagree with you.

20 MR. MILLING: Yes, sir. If we look at what was
21 necessarily decided by Judge Miller in determining whether
22 or not a sufficient factual basis existed to support the
23 plea, all he had to was decide whether or not Mr. Miller
24 operated the boat as defined by the statute, which
25 included navigated the boat. Whether or not he decided

1 that Mr. Miller was under the influence of drugs or
2 alcohol or a combination of the two, and whether or not
3 someone other than Mr. Miller received great bodily
4 injury. Did not have to decide whether or not there was
5 an intervening cause of the injury or if anyone else
6 played a role in the injury, whether or not Ms. Crowe
7 could have been the driver of the boat, and also had some
8 liability. The focus was on Mr. Miller and his conduct
9 and whether or not he violated the statute, which he found
10 that he did.

11 We look at the Zurcher case and another case, Doe
12 versus Doe, which deals with a similar set of
13 circumstances. Those cases both dealt with assault, and
14 in the Zurcher case factually we've got a situation where
15 -- it was essentially a fight. The -- I guess the
16 plaintiff in this case was charge with simple assault. He
17 ended up pleading guilty under Alford to simple assault.
18 He also filed a claim against the victims in a criminal
19 case for assault and battery. Because we've got identical
20 elements necessary to prove criminal assault and civil
21 assault, our state Supreme Court in the Zurcher case said,
22 Yes, we've got identical issues, and for purposes of a
23 situation like this, we're going to treat Alford versus
24 North Carolina and a standard guilty plea the same.

25 Doe versus Doe was another assault-type case where

1 the defendant in that case pled guilty to I believe five
2 different counts of criminal sexual conduct with a minor
3 and one count of lewd act with a minor, all with his own
4 biological children. Family court terminated parental
5 rights and then the children filed a civil lawsuit against
6 him for the damages caused by his assaults. Again, we've
7 got identical elements of proof because necessary to the
8 determination in the criminal context was that he
9 unlawfully touched those children. That's what they had
10 to prove for the assault and battery context in this case.
11 I think it's the Theos case which was cited in the
12 original motion I don't think has any application, and I
13 don't know Ms. Creech is arguing that because we're
14 dealing with the difference between a no contest plea
15 versus an Alford plea, but the Theos case was a situation
16 where the defendant takes his case to trial.

17 THE COURT: I read it.

18 MR. MILLING: Yes, sir. Factually, I don't think it
19 has any application to this situation we've got here. Our
20 argument essentially, Your Honor, is if you look at
21 collateral estoppel, it requires identical issues to be
22 necessarily decided by the criminal court. The Zurcher
23 case and the Doe case both had identical issue of assault
24 and battery, the unlawful touching of one by another.
25 They found that collateral estoppel applied to preclude

1 either the defense and found liability or preclude the
2 civil action of the Zurcher case.

3 Boating under the influence is a different animal.
4 There are no necessarily elements of negligence, no
5 necessarily elements of recklessness, no necessarily
6 elements that the operator -- which can be a number of
7 different things -- that the operator had been the only
8 cause of the injuries. So we've got a lot of different
9 aspects of this situation which distinguishes and
10 differentiates the criminal plea from the civil
11 counterclaim and the civil claim. So we would
12 respectfully submit that collateral estoppel does not
13 bar --

14 THE COURT: Is it your position that he could deny
15 liability as a -- in response to the claim?

16 MR. MILLING: Yes, sir, because, again, we've got a
17 situation where he did not admit to driving.

18 THE COURT: He admitted -- he acknowledged a set of
19 facts where he -- it was stated that he operated the boat,
20 that he ran into a dock and that she was a passenger.
21 That's what the transcript says.

22 MR. MILLING: That's what the transcript says, Your
23 Honor.

24 THE COURT: All right.

25 MR. MILLING: But again, "operation" is a term of art

1 as defined by the statute which includes conduct outside
2 of driving, and whether she was a passenger or the driver
3 was not necessarily decided by the trial judge, by Judge
4 Miller in the plea context.

5 THE COURT: Okay. Anything else?

6 MR. MILLING: No, Your Honor.

7 THE COURT: Motion granted. E-mail me an order. I
8 find that the clear testimony -- record, rather, of the
9 guilty plea indicates that the defendant Miller 2, I
10 think -- he's Miller 1 or Miller 2.

11 MR. MILLING: Miller 2, Your Honor.

12 THE COURT: Acknowledged and pled guilty based upon a
13 recitation of facts that included him being the operator
14 of the boat, a term I think is not hard to define; and
15 furthermore, that the plaintiff was a passenger, not an
16 operator of the boat. So I grant you summary judgment on
17 the counterclaims. You need to e-mail me an order in
18 either Word or Word Perfect format so I can edit it if I
19 feel I need to.

20 MS. CREECH: Thank you, Your Honor.

21 MR. MILLING: Thank you, Your Honor.

22 (Whereupon, the proceedings were concluded.)
23
24
25

CERTIFICATE OF REPORTER:

STATE OF SOUTH CAROLINA)
)
COUNTY OF YORK)

I, Aminah R. Hardy, RPR, Official Court Reporter
for the 16th Judicial Circuit of the State of South
Carolina, do hereby certify that the foregoing is a true,
accurate and complete Transcript of Record of the
proceedings had and evidence introduced in the hearing of
the captioned case, relative to appeal, in the Court of
Common Pleas for York County, South Carolina, on the 19th
day of April, 2012.

July 21st, 2012

Aminah R. Hardy

Aminah R. Hardy, RPR

STATE OF SOUTH CAROLINA

COUNTY OF YORK

Cynthia Crowe

Plaintiff,

v.

Michael Earl Miller, I, and Michael Earl
Miller, II

Defendants.

IN THE COURT OF COMMON PLEAS

SIXTEENTH JUDICIAL CIRCUIT

Case No: 2011-CP-46-4366

ORDER FOR JUDGMENT ON THE
PLEADINGS AS TO DEFENDANT
MICHAEL EARL MILLER, II's
COUNTERCLAIMS

This matter came before me on April 19, 2012, upon Plaintiff's Motion for Judgment on the Pleadings as to the counterclaim of Defendant Michael Earl Miller, II ("Miller"). Representing the parties were: Ashley Creech for Plaintiff; and, Jonathan Milling for Defendant. Based on the record presented, I make the following findings and conclusions.

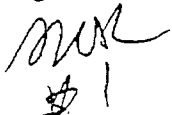
BACKGROUND

On November 18, 2011, Plaintiff filed a Complaint against Defendant Miller seeking to recover damages for injuries she sustained in a boating accident. She asserts that she was a passenger in a boat being driven by Miller, who was driving the boat while intoxicated by alcohol. Defendant served an Answer to Plaintiff's Complaint, asserting a counterclaim alleging that Plaintiff was actually "operating" the boat and seeking monetary damages from Plaintiff for injuries sustained by Miller.

In December, 2010, Miller entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to Driving a Water Vehicle Under the Influence and causing severe bodily injury. The plea was based on the same events alleged in the Complaint. The transcript of the plea shows that Miller agreed to a recitation of the facts, stating that he was driving a boat while under the influence of alcohol at the time of the occurrence, and that Plaintiff was a passenger.

STANDARD

Rule 12(c) of the South Carolina Rules of Civil Procedure allows parties to make a motion for judgment on the pleadings after the pleadings are closed, but within such time so not to delay trial. A judgment on the pleadings is proper where there is no issue of fact raised by the complaint that would entitle the claimant to judgment if resolved in his favor. *Russell v. City of*



Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). If matters outside of the pleadings are presented, the Court should treat the motion as one for summary judgment under Rule 56 of the South Carolina Rules of Civil Procedure. See Rule 12(c) S.C. R. Civ. P.

DISCUSSION

Miller pled guilty under *Alford* to operating a water vehicle while under the influence of alcohol and causing severe bodily injury. The plea addresses the same events as Miller's counterclaim. Where a party has pleaded guilty under *Alford* in a former criminal proceeding, that party is collaterally estopped from asserting a contrary position concerning the same factual issues in a subsequent civil action. *Zurcher v. Bilton*, 379 S.C. 132, 66 S.E.2d 224, 136 (2008); See *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Miller pled guilty to operating a boat while under the influence of alcohol, causing bodily injury to Plaintiff. In the plea proceeding, Miller effectively acknowledged that Plaintiff was a passenger, and that was the driver of the boat. Accordingly, Miller is collaterally estopped from asserting in his counterclaim that Plaintiff was driving the boat, and caused him injury.

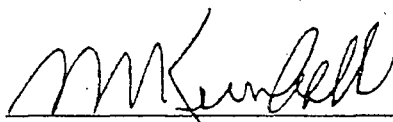
Based on the preceding discussion, I find and conclude that Miller's counterclaim should be dismissed as a matter of law.

ORDER

Therefore, it is ordered that Plaintiff's Motion for Judgment on the Pleadings be granted, and that Miller's counterclaim be dismissed with prejudice.

AND IT IS SO ORDERED.

May 1, 2012


S. Jackson Kimball
Special Circuit Court Judge
York County

42

**STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM YORK COUNTY
Court of Common Pleas**

The Honorable S. Jackson Kimball, Special Circuit Judge

Civil Action No. 2011-CP-46-4366

Cynthia Crowe, ... Respondent,

v.

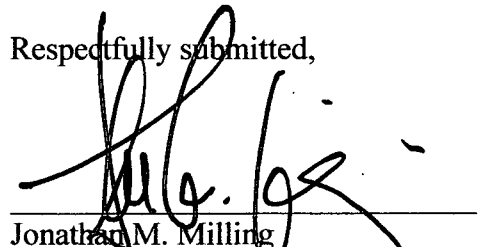
**Michael Earl Miller I and Michael Earl Miller II.... Defendants.
Of whom**

Michael Earl Miller II.....Appellant.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully submitted,



Jonathan M. Milling
MILLING LAW FIRM, LLC
1614 Taylor Street, Suite C
Columbia, South Carolina 29201
(803) 451-7700
(803) 451-7701 facsimile

ATTORNEY FOR APPELLANT

RECEIVED
NOV 13 2012
SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

The Honorable S. Jackson Kimball, Special Circuit Judge

Civil Action No. 2011-CP-46-4366

Cynthia Crowe, ...Respondent,

v.

Michael Earl Miller I and Michael Earl Miller, II Defendants.
Of whom

Michael Earl Miller, II Appellant.

PROOF OF SERVICE

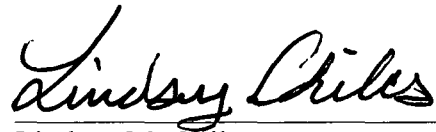
The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Record on Appeal* by mailing copies of the same via United States Mail with first class postage prepaid to the following addresses:

RECEIVED

OCT 23 2012

SC Court of Appeals

Ashley White Creech, Esquire
McGowan, Hood & Felder, LLC
1539 Health Care Drive
Rock Hill, South Carolina 29732
(803) 327-7900
(803) 328-5656 (facsimile)
rhood@mcgowanhood.com

A handwritten signature in black ink, reading "Lindsey Chiles". The signature is written in a cursive style with a horizontal line underneath.

Lindsey M. Chiles
Assistant to Jonathan M. Milling

October 22, 2012