

**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 IIAppellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE FOR REVIEW

- I. Did the circuit court err in finding Michael Earl Miller II is collaterally estopped from asserting his counterclaim against Cynthia Crowe based on the Michael Earl Miller II's plea under North Carolina v. Alford, 400 U.S. 25 (1970)?

STATEMENT OF THE CASE

On November 18, 2011, Cynthia Crowe (“Crowe”) initiated an action against Michael Earl Miller II (“Miller”) and his father, Michael Earl Miller, I seeking to recover damages for injuries allegedly sustained in a boating accident on April 23, 2010. Specifically, Crowe 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.

(R. p. 3). Miller answered Crowe’s complaint and asserted a counterclaim against Crowe alleging that Crowe’s conduct caused Miller to sustain injuries. (R. p. 7). 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.

(R. p. 7-8).

Crowe answered Miller’s counterclaims denying liability and alleging that comparative negligence and assumption of the risk bar Miller’s claims. (R. p. 10). Crowe also filed a motion for judgment on the pleadings on Miller’s counterclaims arguing

that because Miller, pursuant to North Carolina v. Alford, 400 U.S. 25 (1970), entered a plea to driving a water vehicle under the influence in connection with the boating accident, he is collaterally estopped from taking the position that Crowe operated the boat involved in the accident as that issue was decided in during his plea. (R. p. 12-15). On May 1, 2012, the circuit court issued an order granting Crowe's motion and dismissing Miller's counterclaim. (R. p. 58). For the reasons set forth herein, the circuit court erred and Miller should be permitted to proceed with his counterclaim.

I. The circuit court erred in finding the Miller is collaterally estopped from asserting his counterclaim against the Crowe based on the Miller's plea under North Carolina v. Alford, 400 U.S. 25 (1970).

"Any party may move for a judgment on the pleadings under Rule 12(c), SCRPC." Falk v. Sadler, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000). "When considering such motion, the court must regard all properly pleaded factual allegations as admitted." Id. (quoting Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (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., 302 S.C. 234, 394 S.E.2d 855 (Ct.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, 268 S.C. 254, 233 S.E.2d 298 (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., 242 S.C.

310, 130 S.E.2d 845 (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, 266 S.C. 394, 223 S.E.2d 602 (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, 271 S.C. 79, 245 S.E.2d 120 (1978). Further, a judgment on the pleadings is considered to be a drastic procedure by our courts. U.S. Casualty Company v. Hiers, 233 S.C. 333, 104 S.E.2d 561 (1958).

Russell, 305 S.C. at 89, 406 S.E.2d at 339. Appellate courts apply the same standard as trial courts when reviewing an order granting judgment on the pleadings. See The Housing Authority of City of Columbia v. Cornerstone Housing, LLC, 356 S.C. 328, 334, 588 S.E.2d 617, 630 (Ct. App. 2003).

Miller's Counterclaim sounds in negligence. The elements of negligence 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, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (S.C. 2003). Miller's pleading recites a legal duty owed by Crowe, a breach of that duty, and causation and damages. (R. p. 7). Thus, considering the allegations as true and admitted for purposes of the motion, Miller pled a claim upon which he is entitled to relief. See Russell, 305 S.C. at 89, 406 S.E.2d at 339.

The circuit court did not take issue with Miller's allegations. Rather, the court

found Miller is collaterally estopped from asserting a counterclaim against Crowe due to the fact that he entered a plea under North Carolina v. Alford, 400 U.S. 25 (1970) to operating a water vehicle while under the influence of alcohol and causing severe bodily injury.

The circuit court relied upon Zurcher v. Bilton, 379 S.C. 132, 666 S.E.2d 224 (2008). In that case, the Supreme Court considered whether Zurcher was collaterally estopped from pursuing a civil assault action because he plead under North Carolina v. Alford to simple assault arising from the same incident. The Supreme Court explained:

Under the doctrine of collateral estoppel, also known as issue preclusion, when an issue has been actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action whether on the same or a different claim. S.C. Prop. and Cas. Ins. Guar. Assoc. v. Wal-Mart Stores, Inc., 304 S.C. 210, 213, 403 S.E.2d 625, 627 (1991). The doctrine may not be invoked unless the precluded party has had a full and fair opportunity to litigate the issue in the first action. See *id.* This Court recently extended the doctrine of collateral estoppel by adopting the rule that “once a person has been criminally convicted, the person is bound by that adjudication in a subsequent civil proceeding based on the same facts underlying the criminal conviction.” Doe v. Doe, 346 S.C. 145, 148, 551 S.E.2d 257, 258 (2001).

Id. at 135-36, 666 S.E.2d at 226. Accordingly, the Supreme Court held “a defendant who enters a guilty plea may be collaterally estopped from litigating the same issue in a subsequent civil suit.” Id. at 136, 666 S.E.2d at 226-27 (emphasis added). The Supreme Court, while extended the doctrine of collateral estoppel to criminal convictions, continues to require the precluded party have a “full and fair opportunity to litigate the issue in the first action” before a conviction becomes preclusive. Id. at 135, 666 S.E.2d at 226.

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 statute permits conviction when the accused played some role in the injuries, but not necessarily the proximate or sole cause of those injuries.

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, 354 S.C. 1, 3, 578 S.E.2d 751, 752 (Ct. App. 2003). 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, 377 S.C. 81, 84, 659 S.E.2d 148, 150 (2008). The court must also conclude that the evidence strongly support the defendant’s guilt of the offense charged. See Gaines v. State, 335 S.C. 376, 378, 517 S.E.2d 439, 440, n.1 (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.

Although Miller entered his plea to boating under the influence, he did not acknowledged facts or liability identical to the instant matter. The plea did not litigate the issue of Miller’s negligence or recklessness, nor did it address whether or not Miller’s actions were the proximate or sole cause of Crowe’s injuries. Therefore, the underlying criminal action did not necessarily decide the civil action because two essential elements of civil action were not addressed. Because Miller did not have a full and fair opportunity to litigate the issue of his negligence, the circuit court erred in applying collateral estoppel to his counterclaims.

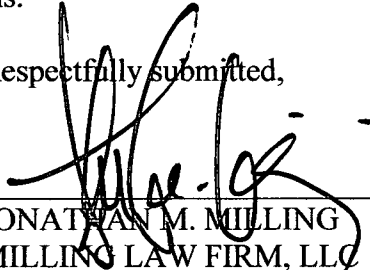
CONCLUSION

Although, the Supreme Court in Zurcher held that a criminal defendant who pled guilty under Alford can be collaterally estopped from litigating an issue in a subsequent civil action, collateral estoppel requires that the issue must have been actually litigated and determined in the prior action. The Supreme Court found Zurcher had such an opportunity to litigate the criminal assault and battery charge before the magistrates and the testimony of witnesses at his plea provide a sufficient factual basis for the plea.¹ Miller

1. Criminal and civil liability for assault and battery both require proof of the same elements - the unlawful touching of another. See eg. Mellen v. Lane, 377 S.C. 261, 276-77, 659 S.E.2d 236, 244-45 (Ct. App. 2008); State v. Mims, 286 S.C. 553, 554, 335 S.E.2d 237, 237-38 (1985). Thus Zurcher had the opportunity to litigate the exact issue in his criminal case as was present in the civil case.

did not have that opportunity. The underlying criminal action did not necessarily decide the civil action because the issues addressed in each are not identical. Thus, the circuit court erred in applying the doctrine of collateral estoppel to Miller's counterclaim. Thus, we ask this Court to reverse the circuit court's order granting Crowe's motion for judgment on the pleadings and dismissing Miller's counterclaims.

Respectfully submitted,



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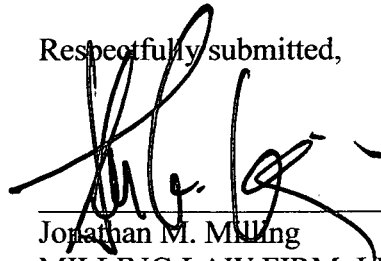
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that the *Brief of Appellant* and complies with the provisions of Rule 211(b), SCACR, and with the August 13, 2007, Supreme Court Order regarding personal data identifiers.

/Signature page attached

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Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Jonathan M. Milling', is written over a horizontal line.

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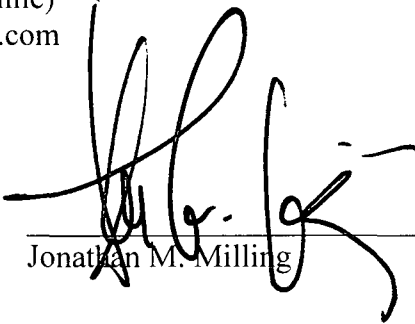
Michael Earl Miller, IIAppellant.

PROOF OF SERVICE

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

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