The State of South Carolina
In the Court of Appeals

Appeal from Beaufort County
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case Number: 2017-002013

Tonja McAllister,

Appellant,

v.

Susan Cato and CAPA of Beaufort,

Respondents.

Final Brief of Appellant

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Statement of Issues on Appeal

The trial court's errors raise three issues on appeal:

1. **Proper Pleading.** The trial court granted Cato and CAPA of Beaufort's motion to dismiss, concluding that McAllister's Complaint failed to allege facts to satisfy the two necessary elements of an abuse of process tort, but throughout its reasoning, the trial court made no reference to the Complaint itself. Did the court err in not reviewing the allegations of the Complaint?

2. **Initiation of the Process.** The trial court also concluded that McAllister could not maintain this suit because neither Cato nor CAPA of Beaufort initiated the legal process that McAllister claimed they abused. But no South Carolina case, or any case for that matter, adds this requirement. The cause of action only requires two elements: "the ulterior purposes" and "willful act." Did the court err in adding a third element to the cause of action?

3. **Greater Recovery.** CAPA of Beaufort had already been made whole by McAllister and its insurance policy, but it sought more money at McAllister's probation hearing. Was it error for the trial court to conclude that CAPA of Beaufort's actions was a legitimate use of the legal system?

Statement of the Case

On October 24, 2016, Tonja McAllister initiated this litigation against Susan Cato and CAPA of Beaufort. The lawsuit asserted a single cause of action: abuse of process.

On March 3, 2017, Susan Cato and CAPA of Beaufort filed a motion to dismiss. McAllister filed her Memorandum in Opposition on June 20, 2017, and the hearing was ultimately held on June 22, 2017.

On July 3, 2017, the trial court granted Cato and CAPA of Beaufort's Motion to Dismiss, and on July 13, 2017, McAllister filed her Motion to Alter or Amend the Court's Judgment.

On August 22, 2017, the trial court denied McAllister's Motion to Alter or Amend by a Form 4 Order, and on September 29, 2017, McAllister served the Notice of Appeal.

Brief Statement of Facts

This case arose during McAllister's probation following her arrest, prosecution, and punishment for the theft of $66,610.58 from CAPA of Beaufort.

On October 27, 2008, McAllister was sentenced, following her guilty plea, to five years' probation and ordered to pay restitution. (R. p. 14 ¶ 7.) And, over the next five years, McAllister paid approximately $25,000.00 in restitution to CAPA of Beaufort. (R. p. 15 ¶ 21.)

McAllister's probation was set to end on October 27, 2013 (R. p. 14 ¶ 8), but on October 24, 2013, McAllister appeared for a hearing regarding the potential revocation of her probation. (R. p. 14 ¶ 9.) The only issue before the court was the remaining monetary obligation. (R. p. 14 ¶ 10.)

During the revocation hearing, the court requested CAPA of Beaufort's position regarding restitution. (R. p. 14 ¶ 11.) Cato, the Director of CAPA of Beaufort at the time, stated the following, "Well, I'm disappointed that probation can't be extended, because she does owe that money. . . . So, you know, she does owe the money. She stole the money. So, it's just misfortunate that she hasn't been able to pay it. But, that doesn't diminish the fact that she still owes the money." (R. p. 14 ¶ 12.) However, unknown to McAllister at the time, CAPA of

Beaufort had in fact been made whole and received approximately $10,000.00 in excess of the $66,610.58 original balance. (R. p. 15 ¶ 20-21.)

Following a break, the court returned and found that McAllister had violated her parole and sentenced her to two years in prison. (R. p. 14 ¶ 13.) In response to the court's ruling, Cato asked the court, "Can you explain to me what just happened?" (R. p. 15 ¶ 14.) "I just put her in prison for two years," the court responded. (R. p. 15 ¶ 15.) And, Cato stated, "Thank you." (R. p. 15 ¶ 16.)

The court further stated, "There's nothing else I can do. Again, I can't get money out of her. I don't have the power to extend it. If I could, I would. I wish I could put her on probation for the next 20 years, because I would love to get you paid back, but unfortunately, my hands are tied." (R. p. 15 ¶ 17.)

The Court of Appeals ultimately reversed and remanded McAllister's revocation, but because of Cato's statements, McAllister was incarcerated for 31 days, lost her job, and continues to suffer from depression and anxiety. (R. p. 15 ¶¶ 19, 27)

Standard of Review on Appeal

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

Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.* Moreover, a judgement on the pleadings is considered to be a drastic procedure by our courts, and pleadings in a case should be construed liberally so that substantial justice is done between the parties. *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991).

Argument

McAllister sued Cato and CAPA of Beaufort asserting that they abused their status as a victim to procure additional money from the restitution process than what it was owed. In essence, Cato and CAPA of Beaufort saw an opportunity for their cup to "runneth over," and their actions resulted in the revocation of McAllister's probation and a 31-day incarceration.

"The abuse of process tort provides a remedy for one damaged by another's perversion of a legal procedure for a purpose not intended by the procedure." *Food Lion v. United Food & Commercial Workers Int'l Union*, 351 S.C. 65, 69, 567 S.E.2d 251 (Ct. App. 2002) "Process" as used in this context, has been interpreted broadly to include the entire range of procedures incident to the litigation process. *Pallares v. Seinar*, 407 S.C. 359, 756 S.E.2d 128, 133 (2014).

The elements for a cause of action for abuse of process are (1) an "ulterior purpose" and (2) a "willful act in the use of the process not proper in the conduct of the proceeding." *Food Lion*, 351 S.C. at 71, 567 S.E.2d 251.

The first element, or an improper or ulterior purpose, exists if the process is used to gain an objective not legitimate in the use of the process. *Id.*; *see also Hainer v. Am. Med. Int'l, Inc.*, 492 S.E.2d 103, 108, 328 S.C. 128, 136 (1997) ("The improper purpose usually takes the form of coercion to obtain a collateral

advantage, not properly involved in the proceeding itself.") The second element, or willful act, requires some definite act not authorized by the process or aimed at an objective not legitimate in the use of the process. *Hainer*, 328 S.C. at 136, 492 S.E.2d at 107.

The trial court should be hesitant to dismiss a complaint because of the low standards for pleading a cause of action. The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in the plaintiff's behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987). Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Id.*

1. McAllister properly pled facts sufficient to satisfy the two necessary elements of the abuse of process cause of action.

At this early stage of the process, the only information upon which the court could base its decision on was that found in the Complaint, and McAllister properly alleged the "ulterior purpose" and "willful act" elements.

McAllister unambiguously alleged the first element of the tort by stating in her Complaint that Cato, as director of CAPA of Beaufort, "acted with an ulterior purpose, one not legitimate in the use of the process, when [Cato] used [McAllister's] probation to extract money in excess of the amount that was lost by [Cato]." (R. p. 16 ¶ 24.) *See Hainer*, 328 S.C. at 136, 492 S.E.2d at 107 (noting

that the improper purpose usually is to obtain a collateral advantage not properly involved in the proceeding itself.)

As to the "willful act" element, McAllister properly alleged it by stating that Cato "acted willfully at the revocation hearing when the court asked for her position on the restitution, and she stated that the balance was still outstanding. This act was aimed at the illegitimate collateral objective of extracting more money from [McAllister]." (R. p. 16 ¶ 25-26.) *See Food Lion*, 351 S.C. 65, 76, 567 S.E.2d 251 (S.C. App. 2002) ("It therefore follows that when a claim for abuse of process is predicated on an alleged act 'aimed at an object not legitimate in the use of the process,' the ulterior purpose allegation must be accompanied by an allegation that the process was misused by the undertaking of the alleged act, not for the purpose for which it was intended but for the primary purpose of achieving a collateral aim.")

The leading case on abuse of process in South Carolina is *Huggins v. Winn-Dixie Greenville, Inc.*, 153 S.E.2d 693, 249 S.C. 206 (1967), and some of the issues that faced the *Huggins* Court rear their head in McAllister's case, namely a defendant seeking to obtain more money than the items were worth.

The *Huggins* Court carefully applied the abuse of process framework to the following facts:

- The plaintiff entered the defendant's store.

- While shopping for various items, the plaintiff placed into his coat pocket two small packages (about four inches square) of boiled ham, suitable for sandwiches, and costing fifty-nine cents each.
- He proceeded to the checkout and paid for a bottle of oil and a bag of potatoes.
- When he reached the doorway on his way out, the store manager stopped him and asked if he forgot to pay for the ham.
- The plaintiff stated that he had forgotten to pay for it, and he took out money and tried to pay for it.
- The manager refused and stated that he would have to pay ten dollars for the $1.18 of ham and merchandise the manager felt had previously been taken from the store.

Viewing the facts in the light most favorable to the plaintiff's case, and resolving all conflicts accordingly, the *Huggins* Court stated that there was evidence that "the criminal process of the court was used for the ulterior purpose of coercing the plaintiff into paying ten dollars for merchandise that the store manager felt he had previously taken, rather than for the sole purpose for which it could properly have been intended, viz., to punish the plaintiff for shoplifting two packages of ham." *Id.* at 696, 249 S.C. at 212.

The *Huggins* Court went further and provided, "The action for abuse of process is not founded on illegality of process; the arrest may be perfectly legal, and in the present case its legality was not in issue. Illegal arrest gives rise to a cause of action for false arrest or false imprisonment, but not one for abuse of process. The abuse, the perversion, of the process not its illegality, is the foundation of the cause of action with which we are concerned here."

Here, much like the defendant in *Huggins*, Cato and CAPA of Beaufort sought more money from McAllister than what it lost, and the trial court erred when it held otherwise. Especially at this motion to dismiss stage, there is an adequate basis for McAllister's suit to proceed.

2. The abuse of process cause of action does not require that a defendant initiate the process that a plaintiff claims is being abused.

It appears that the trial court confused the torts of abuse of process and malicious prosecution. According to Prosser, abuse of process is the perversion of a proper form of legal procedure to accomplish an ulterior purpose. "Abuse of process differs from [the tort of] malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." Prosser & Keeton on Torts 897 (5th ed.1984).

Contrary to its assertion, the initiation of the process by a defendant is not an essential element of an abuse of process claim, and any requirement that it is an error of law.

Although the two torts are often confused, their distinctions have been made clear in *Huggins v. Winn-Dixie Greenville, Inc.*, 153 S.E.2d 693, 249 S.C. 206 (1967). In that case, the court drew the following distinction:

> **To cause process to issue without justification is an essential element of malicious prosecution, but not of abuse of process.** In the latter, the issuance of the process may be justified in itself; it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process.... [T]he distinction between an action for malicious prosecution and one for abuse of process is that a malicious prosecution consists in maliciously causing process to be issued, whereas an abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect--the improper use of a regularly issued process.

153 S.E.2d 693, 695, 249 S.C. 206, 209-210 (1967) (emphasis added) (internal citations and quotations omitted). And, stated another way in *Johnson v. Painter*, "the tort of abuse of process, as distinguished from that of malicious prosecution, involves the malicious misuse or perversion of the process, after its issuance, for an end not lawfully warranted by it." 279 S.C. 390, 391, 307 S.E.2d 860, 860 (S.C. 1983).

Contrary to the trial court's ruling, the abuse of process cause of action only requires **two elements**, which were properly alleged in Appellant's Complaint: (1)

an "ulterior purpose" and (2) a "willful act in the use of the process not proper in the conduct of the proceeding," *Food Lion v. United Food & Commercial Workers Int'l Union*, 351 S.C. 65, 71, 567 S.E.2d 251 (S.C. App. 2002). The addition of a third essential element was an error of law, and the trial court erred in granting the motion to dismiss based on that error of law.

3. Attempting to recover more money that it lost is not a legitimate use of the legal system by a victim.

The trial court stated, "Cato's statement that [McAllister] still owed restitution, even if false, was still not aimed at an illegitimate objective. Accordingly, [McAllister's] Complaint fails to set forth facts that, if accepted as true, would support its sole abuse of process cause of action." (R. p. 7.) But, Cato and CAPA of Beaufort do not have an unabridged right to collect more restitution than they already collected from their insurance carrier. This analysis ignores the allegations of McAllister's Complaint, and the ruling is counterintuitive and effectively sanctioned a perverted use of the restitution and probation process.

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

> "Restitution" means payment for all injuries, specific losses, and expenses sustained by a crime victim resulting from an offender's criminal conduct. It includes, but is not limited to:
>
> (i) medical and psychological counseling expenses;

(ii) specific damages and economic losses;

(iii) funeral expenses and related costs;

(iv) vehicle impoundment fees;

(v) child care costs; and

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

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

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

The Code also provides the following language:

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

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

Although not explicit, the interplay between the two statutes is also present in the case relied on primarily by Cato and CAPA of Beaufort, *State v. Morgan*, 417 S.C. 338, 790 S.E.2d 27 (Ct. App. 2016). That case, much like § 16-3-1110(12) of the South Carolina Code of Laws, stands for the proposition that "civil

settlements and criminal restitution are distinct remedies with differing considerations." *Id.* at 343, 790 S.E.2d at 30. The facts of that case differ starkly from the facts of this case but lend an understanding of the court's analysis.

The question before the *Morgan* Court was whether a settlement and covenant not to execute between a victim and defendant prior to sentencing precluded restitution. *Id.* at 342, 790 S.E.2d at 29. In *Morgan*, the defendant caused an automobile collision where he caused sustained significant injuries, including a broken arm, a broken hip, and broken ribs. Because of the collision, the defendant was convicted of a felony DUI, which generated a civil claim for damages and a criminal prosecution. *Id.* at 339, 790 S.E.2d at 28.

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

The *Morgan* Court—relying on *Kirby v. State*, 863 So.2d 238, 240 (Fla. 2003) held "[b]ecause civil settlements and criminal restitution are distinct remedies with differing considerations, we hold that a settlement and release of liability on a civil claim for damages between private parties does not prohibit the trial court

from fulfilling its mandatory obligation to order restitution in the criminal case." *Morgan*, 417 S.C. at 343, 790 S.E.2d at 30.

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

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

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

CAPA of Beaufort received $50,000.00 from a private insurance policy and based on § 16-3-1190 of the South Carolina Code of Laws and *Morgan,* McAllister was entitled to a setoff or reduction of her restitution. Moreover, this setoff or

reduction comports with the notions of fairness and common sense.[1] But, at the probation revocation hearing, CAPA of Beaufort sought more than the $10,000.00 extra it had already received.

McAllister's Complaint alleges that Cato's testimony caused the trial judge to revoke McAllister's probation, and if Cato had explained the complete financial recovery to the court, McAllister's losses could have been avoided. But, Cato chose to seek a windfall, and these actions perverted and abused the restitution process. Courts cannot sanction this type of behavior, in so doing the trial courted erred in granting the motion to dismiss.

Conclusion

Viewing the allegations of the Complaint in the light most favorable to McAllister and the arguments contained in this brief, this Court should reverse the trial court and permit this case to proceed to the discovery phase.

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[1] The Attorney General of South Carolina reached an analogous result regarding the State Office of Victim Assistance's ability to recover money it provided to a victim when the victim later received money from a settlement. Op. S.C. Att. Gen. (September 24, 2013) (*citing* S.C. Code Ann. § 16-3-1190).

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Certificate of Counsel

I certify that Appellant's Final Brief complies with Rule 211(b) of the South Carolina Appellate Court Rules.

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Proof of Service

I certify that I have served the **Record on Appeal**, **Brief of Appellant**, and **Certificate of Counsel** on Respondents by sending a copy with sufficient postage to their attorney of record.

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