THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Opinion No. 2019-UP-110 (S.C. Ct. App. filed March 20, 2019)
Appellate Case No. 2019-001070

Kenji Kilgore ..... Petitioner,

v.

Estate of Samuel Joe Dixon, Samuel E. Dixon, and Fredda L. Dixon ..... Respondents.

RETURN TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review the law that was correctly applied by the trial court when Petitioner did not preserve that issue for appeal and cannot show it would change the result of this case?

2. Why review the dismissal of Petitioner's Complaint against Samuel E. Dixon and Fredda Dixon pursuant to Rule 12(b)(6), SCRCP, when Petitioner failed to plead the required elements needed to establish a duty to warn based on existing and uncontradicted South Carolina law?

3. Does Petitioner have any basis to argue the need to pursue discovery on a Rule 12(b)(6), SCRCP, dismissal for failure to allege a legal duty when Petitioner failed to pursue any discovery for almost two years while the case was pending?

STATEMENT OF THE CASE

In a Complaint filed on July 1, 2015, Petitioner brought suit alleging Samuel Joe Dixon (hereinafter referred to as shooter) intentionally shot him. (Appendix. p. 5 para. 12 & p. 6 para. 21) In addition to naming shooter, Petitioner also named Respondents as defendants. Petitioner, however, did not allege in the Complaint that Respondents had any "special relationship" with anyone, Respondents had "the ability to monitor, supervise, and control" shooter, or Respondents were aware of a "specific threat or harm" that shooter directed at Plaintiff.

On January 24, 2017, the trial court dismissed the Complaint against Respondents pursuant to Rule 12(b)(6), SCRCP.[1] (Appendix pp. 33-39) The trial court found the Complaint failed to state a claim that Respondents owed a legal duty based on established and uncontested South Carolina law. (Appendix pp. 35-37) During the year and ten months this case was pending in the circuit court, Petitioner never served or participated in discovery. (Appendix pp. 48-49)

Petitioner filed a Motion to Reconsider the Order of Dismissal on very narrow grounds that did not really address the Rule 12(b)(6), SCRCP, dismissal. On May 8, 2017, the trial court denied Petitioner's Motion to Reconsider. (Appendix pp. 65-67)

Petitioner filed an appeal with the South Carolina Court of Appeals. Petitioner's final brief raised only two issues:

I. WHETHER THE APPELLANT SUFFICIENTLY ALLEGED THE ELEMENTS OF NEGLIGENCE IN HIS CAUSE OF ACTION?

II. WHETHER THE APPELLANT WAS DEPRIVED OF HIS RIGHT TO PURSUE DISCOVERY PROCEEDINGS?

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[1] The trial court also dismissed the Complaint against shooter because Petitioner never commenced an action within the statute of limitations. (Appendix. pp. 37-38) Petitioner did not challenge this ruling with the trial court or on appeal.

(Appendix p. 73) Respondent points out in the Final Brief that Petitioner "does not challenge any of the law applied by the trial court." (Appendix p. 94) The South Carolina Court of Appeals affirmed the trial in a Rule 220(b), SCACR, memorandum opinion. (Appendix p. 99-100) The South Carolina Court of Appeals denied Petitioner's Petition for Rehearing. (Appendix p. 132)

ARGUMENTS

I. THERE IS NO NEED TO REVIEW THE VALID AND WELL ESTABLISHED LAW APPLIED IN THIS CASE WHEN THAT WAS NOT PRESERVED FOR APPELLATE REVIEW AND WOULD NOT AFFECT THE DISMISSAL.

The courts below conducted a thorough and complete analysis of the law relating to a duty to warn. At no point, did Petitioner raise any issue to the trial court or court of appeals challenging the law applied in this case.[2] In fact, Petitioner's final brief to the South Carolina Court of Appeals raised only two issues presented on appeal and neither asked for review of the law applied by the trial court. (Appendix pp. 73 & 94) Accordingly, Petitioner's request for a legal review of the duty to warn is improper and not preserved for appellate review. Hubbard v. Rowe, 192 S.C. 12, 5 S.E.2d 187 (1939) (requiring question presented for appellate review to be first fairly and properly raised and ruled on by the lower court); State v. Austin, 306 S.C. 9, 17, 409 S.E.2d 811, 815 (Ct.App. 1991) ("An exception not argued in the brief is deemed abandoned on appeal."); Jean Hoefer Toal, Appellate Practice in South Carolina 185 (3d ed. 2016) ("The first step in preserving an issue for appellate review is to actually raise it to the lower court.").

Regardless of the preservation issue, the law applied in this case is sound and supported by ample legal authority. Petitioner does not and cannot point out a single flaw in the legal analysis conducted by the courts below. More importantly, Petitioner cannot show how a different legal analysis would change the dismissal based on what was actually pled in the Complaint.

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[2] Petitioner actually agrees with the trial court's legal analysis. In his Motion to Reconsider before the trial court, Petitioner acknowledges that for Respondents to have a duty to warn there must be a "special relationship" exception under Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 545 (2002), that would require "the ability to control [and] supervise." (Appendix p. 43)

II. PETITIONER'S COMPLAINT FAILED TO ALLEGE THE REQUIRED ELEMENTS TO ESTABLISH A LEGAL DUTY TO WARN AND DOES NOT REQUIRE FURTHER REVIEW.

There is no need for further review of this case because Petitioner simply failed to plead elements needed to establish that Respondents owed a duty to warn of the dangerous propensities of a third party. A "special relationship" must exist to invoke an exception to the general rule that there is no duty to warn of the danger of another person.[3] Rogers v. S.C. Dep't of Parole & Cmty. Corr., 320 S.C. 253, 255, 464 S.E.2d 330, 332 (1995). A "special relationship" requires allegations of (1) "the ability to monitor, supervise and control an individual's conduct" and (2) "the individual has made a specific threat of harm directed at a specific individual." Roe v. Bibby, 410 S.C. 287, 295-96, 763 S.E. 2d 645, 649-50 (Ct. App. 2014). Petitioner's Complaint simply does not contain any allegations that Respondents had any "special relationship" with anyone, Respondents had "the ability to monitor, supervise, and control" anyone, or Respondents were aware of a "specific threat of harm" directed at Petitioner. Accordingly, there is no basis for Petitioner's appeal, and Petitioner makes no specific argument to the contrary.

III. PETITIONER HAS NO RIGHT TO DISCOVERY ON A RULE 12(b)(6) MOTION ESPECIALLY WHERE PETITIONER FAILED TO PURSUE ANY DISCOVERY FOR THE TWENTY-TWO MONTHS THE CASE WAS PENDING.

Petitioner's request to conduct discovery on a Rule 12(b)(6), SCRCP, dismissal is totally without merit. Because a dismissal pursuant to Rule 12(b)(6), SCRCP, is based solely on the allegations within the four corners of the Complaint, discovery is not necessary. See Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

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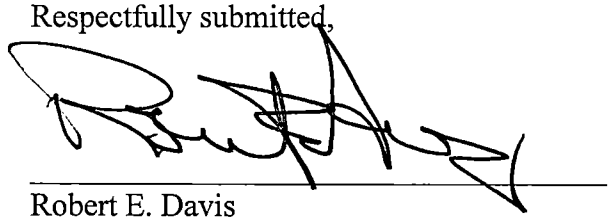
[3] Again, Plaintiff agreed with this legal analysis in his Motion to Reconsider in the trial court. (Appendix p. 43)

Furthermore, Petitioner's request for more time to conduct discovery tests the boundaries of good faith. In the almost two years this case was pending below, Petitioner failed to engage in discovery in any manner. Petitioner did not serve any written discovery, request depositions, or even respond to Defendant's written discovery that was served on February 27, 2016. While discovery is not even relevant on a Rule 12(b)(6) motion, Petitioner certainly is not entitled to relief for his own dilatory behavior. See Dawkins v. Fields, 354 S.C. 58, 71, 580 S.E.2d 433, 439–40 (2003).

CONCLUSION

No further review of this case is required or necessary under Rule 242(b), SCRCP. It is time for this case to finally end.

Respectfully submitted,



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PROOF OF SERVICE

I certify that I have served an original and six (6) copies of Respondents' Return to Petition for Certiorari upon The Honorable Daniel Shearouse, Clerk of Court, South Carolina Supreme Court, P. O. Box 11330, Columbia, South Carolina 29211, and a copy upon Petitioner's attorney of record, Donald L. Smith, 122 N. Main Street, Anderson, South Carolina 29621 by US Mail, on July 17, 2019.

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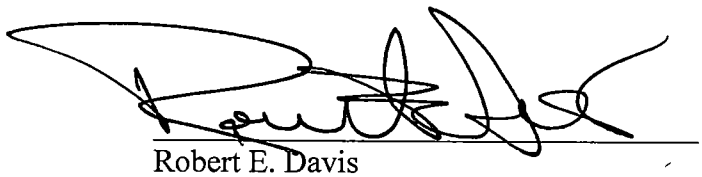

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