

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
KING GRANT-DAVIS, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
JASON MIKELL, ESQUIRE, STEPHEN )  
HARRIS, ESQUIRE, AND CITY OF )  
CHARLESTON, )  
 )  
Defendants. )  
 )

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**SC Court of Appeals**

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
CASE NO. 2019-CP-10-1388

**ORDER GRANTING  
DEFENDANT JASON MIKELL,  
ESQUIRE'S  
MOTION TO DISMISS  
PLAINTIFF'S AMENDED COMPLAINT**

This matter came before the Court on Defendant Jason Mikell, Esquire's ("Attorney Mikell") Motion to Dismiss Plaintiff's Amended Complaint (the "Complaint") pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, filed May 6, 2019. A hearing was held on October 31, 2019. Present were Plaintiff King Grant-Davis, proceeding *pro se*, and counsel for the Defendants. After careful consideration of the filings, oral arguments, and review of the record, the Court finds that Plaintiff's Amended Complaint fails to state a claim for which relief can be granted against Attorney Mikell. Accordingly, for the reasons set forth herein, Attorney Mikell's motion is GRANTED.

**BACKGROUND**

Following a disturbance with neighbors on February 17, 2016, Plaintiff was charged with making verbal threats in violation of the Charleston Municipal Code. (Compl., ¶¶ 1-7). During the pendency of his criminal case in the City of Charleston Municipal Court, Plaintiff took steps to represent himself, including filing three *pro se* motions to dismiss. (Compl., ¶¶ 8-11). Plaintiff's criminal proceedings were continued three times, and at each continuance, Plaintiff received notice from the Charleston Municipal Court clerk of his next scheduled court date. (Plaintiff's Complaint

Exhibits 4A-C). These notices clearly stated: “This is the only notice you will receive. If you fail to appear, you may be tried in your absence.” (*Id.*).

The record reflects that on June 14, 2016, Plaintiff’s case was called again, but Plaintiff was not present. (Plaintiff’s Complaint Exhibit 3). Attorney Mikell, who had taken over as the City of Charleston Public Defender since Plaintiff’s last court appearance, was present, as was the City Prosecutor, the victim, and another witness. (*Id.*). A discussion ensued about how to proceed, with the City Prosecutor informing the trial judge he wished to proceed because the victim, who had been present at all three prior court proceedings, was present again and Plaintiff had received proper notice. (*Id.*). The trial judge decided the matter would proceed, relieved Attorney Mikell as counsel, and a bench trial went forward with Plaintiff proceeding *pro se.* (*Id.*). Plaintiff was found guilty of simple assault. (*Id.*).

Following multiple post-conviction relief (“PCR”) applications, on June 28, 2016, the trial judge ordered Plaintiff released from jail but ultimately denied the PCR applications. (Compl., ¶¶ 14-16). Plaintiff appealed to the Circuit Court, and in an Order filed January 11, 2017, Judge Harrington reversed Plaintiff’s conviction and remanded the case for a new trial. (Plaintiff’s Complaint Exhibit 1, the “Order”). City of Charleston Municipal Court records reflect that the criminal case against Plaintiff was ultimately resolved when he was adjudicated guilty of disorderly conduct on June 18, 2017.<sup>1</sup>

#### **LEGAL STANDARD**

“In deciding a motion to dismiss pursuant to 12(b)(6), SCRCPP, the trial court should consider only the allegations set forth on the face of the plaintiff’s complaint.” *Plyler v. Burns*, 373 S.C. 637, 645, 647 S.E.2d 188, 192 (2007). “The question is whether, in the light most

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<sup>1</sup> Case no. 58338GX, <https://www.charleston-sc.gov/DocumentCenter/View/3612/Online-Court-Records?bidId=> (last visited November 11, 2019).

favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief.” *Id.* A Court “may properly take judicial notice of matters of public record” in reviewing a Rule 12(b)(6) motion. *Philips v. Pitt Co. Memorial Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009); *see Doe v. Bishop of Charleston*, 407 S.C. 128, 134, n.2, 754 S.E.2d 494, 498, n.2 (2014) (following federal standard holding that a trial court’s reliance on transcripts and court orders in an underlying action does not convert a motion to dismiss into summary judgment).

### **FINDINGS AND CONCLUSIONS**

Construed liberally, Plaintiff’s Amended Complaint asserts four claims against Attorney Mikell for (1) legal malpractice, (2) breach of contract, (3) fraud, and (4) a violation of 42 U.S.C. § 1983. All of Plaintiff’s claims fail as a matter of law because Plaintiff fails to state facts sufficient to constitute all four causes of action.

#### **A. Plaintiff fails to state a legal malpractice claim.**

To prevail in a legal malpractice claim, the plaintiff must satisfy the following four elements: 1) the existence of an attorney-client relationship; 2) breach of a duty by the attorney; 3) damage to the client; and 4) proximate causation of the client’s damages by the breach. *See Smith v. Haynsworth, Marion, McKay & Geurard*, 322 S.C. 433, 435, 472 S.E.2d 612, 613 (1996). Plaintiff fails to state a legal malpractice claim for three reasons: (1) an attorney-client relationship did not exist between Plaintiff and Attorney Mikell; (2) Plaintiff failed to comply with the statutory requirements to pursue a professional malpractice claim; and (3) Plaintiff’s subsequent guilty adjudication demonstrates he was not innocent of the actions underlying the charge at issue.

#### **1. No attorney-client relationship existed between Plaintiff and Attorney Mikell.**

Plaintiff cannot satisfy the first element for a legal malpractice claim against Attorney Mikell. The record reflects that the trial judge relieved Attorney Mikell when Plaintiff failed to

appear for his scheduled trial. Once Attorney Mikell was relieved, the case went forward with Plaintiff as a *pro se* party. The lack of an attorney-client relationship is fatal to Plaintiff's claim.

**2. Plaintiff failed to file the supporting affidavit required by S.C. Code Ann. § 15-36-100.**

It is undisputed that Plaintiff did not, and has not, filed the expert affidavit required for a professional malpractice action under S.C. Code Ann. § 15-36-100(B). If the affidavit is not timely filed, "the complaint is subject to dismissal for failure to state a claim." S.C. Code Ann. § 15-36-100(C)(1). Plaintiff argues two reasons why the bright-line rule in § 15-36-100(C)(1) should not apply to him, but these arguments are unavailing.

First, Plaintiff claims that his suit falls into the "common knowledge" exception to the professional malpractice expert affidavit requirement set forth in S.C. Code Ann. § 15-36-100(C)(2). Plaintiff generally alleges Attorney Mikell committed malpractice when he "verbally acquiesced" to the prosecutor and trial judge proceeding without Plaintiff. The record reflects the presiding judge raised the issue of Attorney Mikell being relieved *sua sponte*. (Plaintiff's Complaint Exhibit 3). This Court concludes that in such a situation, expert testimony is required to opine whether Attorney Mikell deviated from the standard of care. *See Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 282, 701 S.E.2d 742, 745 (2010) (holding that plaintiff in a legal malpractice action must establish the standard of care by expert testimony). Accordingly, the "common knowledge" exception is inapplicable.

Second, Plaintiff argues that the January 11, 2017, circuit court order (the "Order") satisfies the expert affidavit requirement. This argument fails for multiple reasons. As an initial matter, a judicial order is not the same as a sworn affidavit. Clearly, a circuit court judge would not intend for an order in a criminal matter to be used as an expert affidavit for a professional malpractice claim against a public defender. Further, even if liberally construed to be an affidavit, the Order

does meet the specific requirements set forth in S.C. Code Ann. § 15-36-100(B) for the contents of a professional malpractice expert affidavit because it does not state Attorney Mikell committed a negligent act or omission. (Plaintiff's Complaint Exhibit 1). Plaintiff's failure to file the required expert affidavit requires the dismissal of his Amended Complaint. *See H & H of Johnston, LLC v. Old Republic Nat. Title Ins. Co.*, 405 S.C. 469, 474, 748 S.E.2d 72, 74 (Ct. App. 2013) (dismissing claims against attorney pursuant to § 15-36-100 because plaintiff failed to file expert affidavit).

**3. Plaintiff was not innocent of the actions which led to the underlying criminal charge.**

Plaintiff failed to plead his innocence of the behavior underlying his criminal charge. Regardless, the public record reflects that the criminal charge against Plaintiff was ultimately resolved through a guilty adjudication for disorderly conduct on June 18, 2017. (*See n.1, above*). Plaintiff's inability to demonstrate his innocence of the actions underlying his criminal charge bars his legal malpractice claim as a matter of law. *See Brown v. Theos*, 345 S.C. 626, 630, 550 S.E.2d 304, 306 (2001) (holding that claimant's no contest plea to charges arising from same conduct as original charges barred a legal malpractice action against the attorney represented the claimant).

**B. Plaintiff fails to state a breach of contract claim because no contract existed between Plaintiff and Attorney Mikell.**

Plaintiff asserted a breach of contract claim based upon the contract between Attorney Mikell and the City. (Compl., ¶¶ 26-27; Plaintiff's Complaint Exhibit 2). "[T]o recover for breach of contract, a plaintiff must allege and prove (1) the existence of a contract, (2) breach of the contract, and (3) damages caused by the breach." *Consignment Sales, LLC v. Tucker Oil Co.*, 391 S.C. 266, 271, 705 S.E.2d 73, 76 (Ct. App. 2010). The "contract" upon which Plaintiff relies expressly states it is between Attorney Mikell and the City and Plaintiff is not a party to the contract. Because Plaintiff is not a party to the contract, Plaintiff fails to state a breach of contract

claim. *Tidewater Supply Co. v. Indus. Elec. Co.*, 253 S.C. 483, 486, 171 S.E.2d 607, 608 (1969) (finding complaint that does not allege a contract between the plaintiff and defendant fails to state a claim).

**C. Plaintiff fails to state a fraud claim because the allegations do not satisfy all of the required elements.**

Construing Plaintiff's Amended Complaint liberally, Plaintiff alleges Attorney Mikell committed fraud against the City by "breaching the contract." (Compl., ¶ 28). "In order to recover in an action for fraud and deceit, based upon misrepresentation, the following elements must be shown by clear, cogent and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) either knowledge of its falsity or a reckless disregard of its truth or falsity; (5) intent that the representation be acted upon; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on its truth; (8) the hearer's right to rely thereon; (9) the hearer's consequent and proximate injury. Failure to prove any one of the foregoing elements is fatal to recovery." *M. B. Kahn Const. Co. v. S.C. Nat. Bank of Charleston*, 275 S.C. 381, 384, 271 S.E.2d 414, 415 (1980). Plaintiff fails to satisfy elements 6, 7, 8, and 9 because there are no allegations that Attorney Mikell ever made any representation to him. Accordingly, Plaintiff has failed to state a claim for fraud, and any such claim should be dismissed.

**D. Plaintiff's 42 U.S.C. § 1983 claim fails as a matter of law because Attorney Mikell was not acting "under color" of state law.**

Plaintiff asserts a claim against Attorney Mikell for a violation of his civil rights under 42 U.S.C. § 1983. (Compl., ¶ 37). "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v. Atkins*, 487 U.S. 42, 48 (1988). Plaintiff's 42 U.S.C § 1983 claim fails as a matter of law because he cannot establish the "under color of state law" element. The Supreme Court has held that public defenders are

necessarily independent from the government and cannot, as a matter of law, be a state actor for purposes of § 1983. *See Polk Cty. v. Dodson*, 454 U.S. 312, 325 (1981) (holding that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding).

For all of the foregoing reasons, Defendant Jason Mikell, Esquire's Motion to Dismiss Plaintiff's Amended Complaint is GRANTED.

AND IT IS SO ORDERED!

[JUDICIAL E-SIGNATURE PAGE FOLLOWS]

**JULIE J. ARMSTRONG**

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**NOTICE OF ENTRY OF JUDGMENT/ORDER PURSUANT TO RULE 77 SCRPC**

**Order Granting Jason Mikells Motion to Dismiss**

**CASE NO: 2019CP1001388**

**King Grant Davis VS Jason Mikell Esq , defendant, et al**

This judgment was entered on the 13th day of November, 2019, and notice mailed first class on Wednesday, November 13, 2019, to all counsel of record and/or all parties entitled to receive notice.

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