THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2018-001134

RECEIVED
JUL 29 2019
SC Court of Appeals

Glenda R. Couram .....Appellant

v.

Nationwide Mutual Insurance Company, Titan Indemnity Company, Eugene Matthews, in his individual capacity, Sherwood Plumbing SVC, LLC, dba and Beatrice T. Tidwell, Rick Skurko in his official and individual capacity and Tracey Peer, in her official and individual capacity, ...Respondents

---

FINAL BRIEF OF RESPONDENTS SHERWOOD TIDWELL, SHERWOOD PLUMBING LLC, AND BEATRICE TYREE TIDWELL

E. Dale Lang, Jr.
Bar No.: 16689
1612 Marion Street, Suite 200
Columbia, South Carolina 29201-2939
Phone: (800) 774-8242
Attorney for Respondent Sherwood Tidwell, Sherwood Plumbing LLC, and Beatrice Tyree Tidwell

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE 2

STANDARDS OF REVIEW AND ARGUMENTS

I. The Trial Court properly dismissed Appellant's claim of vicarious liability/respondeat superior as it was barred by the doctrine of res judicata.....4

II. The trial court properly dismissed Appellant's claims of intentional infliction of emotional distress, negligent infliction of emotional distress and civil conspiracy as Appellant's pleadings lacked sufficient facts to constitute these causes of action.....6

III. The Trial Court did not abuse its discretion in denying Appellant's request to amend her complaint as Appellant's motion to amend was futile.....9

CONCLUSION.....11

TABLE OF AUTHORITIES

CASES

Berry v. McLeod, 328 S.C. 435, 492 S.E.2d 794 (Ct. App. 1997).....9

First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co., 207 S.C. 15, 35 S.E.2d 47 (1945).....5

Foman v. Davis, 371 U.S. 178 (1962).....10

Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1987).....6,7

Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 369 S.E. 2d 156 (Ct. App. 1988).....10

Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 682 S.E.2d 871 (Ct. App. 2009).....8

Hainer v. American Med. Int'l, Inc., 320 S.C. 316, 465 S.E.2d 112 (Ct. App. 1995), aff'd as modified, 328 S.C. 128, 492 S.E.2d 103 (1997).....7

Hansson v. Sealise Builders of S.C., 374 S.C. 352, 650 S.E.2d 68 (2007).....6

Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 294 S.C. 9, 362 S.E.2d 176, (1987).....4,5

Jarrell v. Seaboard Sys. R.R., Inc., 294 S.C. 183, 363 S.E.2d 398 (Ct. App. 1987.....10

Johnson v. Greenwood Mills, Inc., 317 S.C. 248, 452 S.E.2d 832 (1994).....5

Judy v. Judy, 393 S.C. 160, 712 S.E.2d 408 (2011).....5

Lee v. Chesterfield General Hosp., Inc., 289 S.C. 6, 344 S.E.2d 379 (Ct.App.1986).....8

Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005)....9,10

Patton v. Miller, 420 S.C. 471 (2017).....9

Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999).....4

Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007).....4,7

Porter Bros., Inc. v. Specialty Welding Co., 286 S.C. 39, 331 S.E.2d 783 (Ct. App. 1985).....9

Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006).....8

Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188 (1992).....5

Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995).....4

Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001).....4

SOUTH CAROLINA RULES OF CIVIL PROCEDURE

Rule 12(b)(6), SCRCP.....4,8

Rule 15(a), SCRCP.....9,10

STATEMENT OF ISSUES ON APPEAL

I. Did the Trial Court err in dismissing Appellant's claim of vicarious liability/negligent supervision as it was barred by the doctrine of res judicata?

II. Did the Trial Court err in dismissing Appellant's claims of intentional infliction of emotional distress, negligent infliction of emotional distress and civil conspiracy as Appellant's pleadings lacked sufficient facts to constitute valid causes of action?

III. Did the Trial Court abuse its discretion in denying Appellant's request to amend her complaint as the Trial Court determined allowing the amended complaint would be futile?

STATEMENT OF THE CASE

Factual and Procedural History

This case arose from a personal injury action in which Appellant and Respondent Sherwood Tidwell (Respondent Tidwell) were involved in a motor vehicle accident on Interstate 20 in Richland County on September 18, 2015. Appellant, appearing pro se, filed a complaint on April 12, 2016, against Respondent Tidwell and "Titian [sic] Indemnity Company Subsidiary of Nationwide Insurance" in the Richland County Court of Common Pleas, alleging negligence on the part of Respondent Sherwood Tidwell. In that suit, Appellant sought damages for the September 18, 2015 automobile accident involving Respondent Tidwell. By Consent Order dated September 2, 2016, "Titan Indemnity Company, Subsidiary of Nationwide Mutual Insurance Company" was removed as a party to the action. On February 16, 2017, Respondent Tidwell filed an Offer of Judgment pursuant to Rule 68 of the South Carolina Rules of Civil Procedure in which he offered the sum of $20,000 to Appellant in full compromise and settlement of her claims. Appellant rejected Respondent Tidwell's offer. The case was heard by a jury and on June 16, 2017 a verdict was rendered in favor of Appellant in the amount of $1,000. Thereafter, Appellant filed a Rule 59(e) Motion requesting an additur or, in the alternative, a new trial on damages. By order filed October 9, 2017, the trial court denied Appellant's Rule 59(e) Motion. Appellant subsequently filed a notice of appeal which is also currently pending before this court.

On July 3, 2017, Appellant filed a second complaint before the suing Respondent Tidwell and Titan Indemnity Company, as well as Nationwide Mutual Insurance Company.[1] Appellant's second complaint arose out of the same September 18, 2015 automobile accident in the prior action. In the complaint, Appellant alleged the following causes of action against Respondents

[1] On July 19, 2017, Appellant filed an amended complaint adding Beatrice Tyree Tidwell as a defendant.

Matthews and Insurers: (1) intentional infliction of emotional distress and/or negligent infliction of emotional distress, and (2) civil conspiracy.[2] Appellant alleged the following causes of action against Respondent Tidwells: (1) Vicarious Liability/Respondeat Superior Negligent Entrustment and or (Common Law Negligence if applicable). On July 19, 2017, applicant filed an amended summons and amended complaint.

On August 7, 2017, Respondent Tidwell filed an answer to Appellant's complaint while also filing a motion to dismiss and motion for judgement on the pleadings. On December 6, 2017, Appellant filed a motion for leave to amend her complaint. On February 12, 2018, these matters were heard before the Honorable G. Thomas Cooper, Jr. Judge Cooper took the matters under advisement. In an order filed April 20, 2018, Judge Cooper granted Respondents' Motions to dismiss while also denying Appellant's motion for leave to amend her complaint. Appellant filed a motion to reconsider on May 10, 2018. In an order filed May 16, 2018, Judge Cooper denied Appellant's motion to reconsider. Appellant filed a notice of appeal on June 17, 2018 and filed her initial brief on October 10, 2018. This Brief of Respondent Tidwell follows.

[2] Appellant alleges a negligence cause of action as well but only against "Sherwood Plumbing Services, LLC dba Sherwood F. Tidwell, Owner Operator/Agent and Beatrice Tyree Tidwell."

STANDARD OF REVIEW

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the [circuit] court." Williams v. Condon, 347 S.C. 227, 232-33, 553 S.E.2d 496, 499 (Ct. App. 2001). "In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, 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). "'A 12(b)(6)[, SCRCP] 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.* (quoting Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Id.

ARGUMENT

I. The Trial Court properly dismissed Appellant's claim of vicarious liability/respondeat superior as it was barred by the doctrine of res judicata.

Appellant asserts the trial court erred in dismissing her claim of vicarious liability negligent supervision. This argument is without merit as the trial court properly dismissed this claim as it was barred by the doctrine of res judicata.

Appellant alleged in her complaint the claim of vicarious liability-respondeat superior against Respondents, Sherwood F. Tidwell, Sherwood Plumbing LLC, and Beatrice T. Tidwell. (R. pp. 29-31). As the trial court correctly noted in its order of dismissal, the matters were conclusively litigated in the prior action and were barred by res judicata. "Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." Plum Creek Dev. Co. v.

City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). "Under the doctrine of res judicata, '[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit.'" Id. (quoting Hilton Head Ctr. of S.C., Inc. v. Pub. Serv. Comm'n of S.C., 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987)). "[T]he fundamental purpose of res judicata . . . is to ensure that 'no one should be twice sued for the same cause of action.'" Judy v. Judy, 393 S.C. 160, 173, 712 S.E.2d 408, 414 (2011) (quoting First Nat'l Bank of Greenville v. U.S. Fid. & Guar. Co., 207 S.C. 15, 24, 35 S.E.2d 47, 56 (1945)). "Res judicata is shown if (1) the identities of the parties is the same as a prior litigation; (2) the subject matter is the same as in the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction." Johnson v. Greenwood Mills, Inc., 317 S.C. 248, 250-51, 452 S.E.2d 832, 833 (1994). "Our courts, however, have found that the doctrine of res judicata is not an 'ironclad bar' to a later lawsuit." Judy, 393 S.C. at 167, 712 S.E.2d at 412. Here, as the trial court correctly noted, Appellant was seeking to sue the same defendant, Respondent Tidwell related to the same accident which was litigated in the prior action. Additionally, in the previous lawsuit filed by Appellant she alleged negligence. During the previous action, Appellant could have also alleged vicarious liability respondeat superior but failed to do so. Because of that, the doctrine of res judicata barred her claim in the second action. Moreover, Appellant was also unable to litigate this claim against Sherwood Plumbing LLC and Beatrice T. Tidwell because they share privity with Sherwood Tidwell and as the trial court correctly noted in regards to res judicata, "under this doctrine, a final judgment on the merits in a prior action will conclude the parties and their privies in a second action based on the same claim as to the issues actually litigated and as to issues that might have been litigated in the first action." Sub-Zero Freezer Co. v. R.J. Clarkson Co., 308 S.C. 188 (1992). Because of this the trial court did not err and properly dismissed this cause of action as barred by the doctrine of re judicata.

II. The trial court properly dismissed Appellant's claims of intentional infliction of emotional distress, negligent infliction of emotional distress and civil conspiracy as Appellant's pleadings lacked sufficient facts to constitute these causes of action.

A. Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress

Appellant asserts the trial court erred in dismissing her claims of intentional infliction of emotional distress and or negligent infliction of emotional distress. Initially, Respondent Tidwell would note Appellant in her complaint filed on July 3, 2017 and amended complaint filed on July 19, 2017 did not allege intentional infliction of emotional distress or negligent infliction of emotional distress against Respondent Tidwell. Further, the trial court in its order of dismissal noted these causes of action were not alleged against Respondent Tidwell. Because of this, Respondent Tidwell would submit the trial court's dismissal of these causes of action would not be properly before this court with respect to Respondent Tidwell. Notwithstanding, Appellant's argument is without merit as the trial court properly dismissed these claims as Appellant's pleadings lacked sufficient facts to constitute these causes of action.

First, in Appellant complaint filed on July 3, 2017, she alleged as a second and third cause of action intentional infliction of emotional distress and or negligent infliction of emotion distress. As the trial court noted, to prove such a claim, a plaintiff must establish that: (1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct; (2) the conduct was so "extreme and outrageous" so as to exceed "all possible bounds of decency" and must be regarded as "atrocious, and utterly intolerable in a civilized community;" (3) the actions of the defendant caused plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was "severe" such that "no reasonable man could be expected to endure it." Hansson v. Sealise Builders of S.C., 374 S.C. 352, 356, 650 S.E.2d 68, 71 (2007) (quoting Ford v. Hutson, 276 S.C. 157, 276 S.E.2d 776 (1981).

As the Supreme Court has stressed, South Carolina requires the plaintiff to meet a heightened burden of proof with regards to the "extreme and outrageous" element of the claim and "extreme or severe distress" element of the claim. Ford, 276 S.C. at 166. "[W]here physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious." Id. "Initially, the trial court determines whether the defendant's conduct was extreme and outrageous enough to permit recovery." Hainer v. American Med. Int'l, Inc., 320 S.C. 316, 324, 465 S.E.2d 112, 117 (Ct. App. 1995), aff'd as modified, 328 S.C. 128, 492 S.E.2d 103 (1997). As referenced in the standard of review, "In deciding a motion to dismiss pursuant to 12(b)(6), SCRCP, the trial court should consider only the allegations set forth on the face of the plaintiff's complaint." Plyler, 373 S.C. at 645, 647 at 192 (2007). A review of Appellant's pleadings reveals she alleged the defendants acted outrageously, with intention to cause, or with reckless disregard of the probability of causing plaintiff additional severe emotional distress even with their advance knowledge of the plaintiff's fragile state. (R. pp. 48-49). Appellant further alleged in her amended complaint the manifestation of her emotional distress was a "fever blister that remained four days after the trial."(R. pp. 33). Here, and as the trial court correctly found, in the light most favorable to the plaintiff, and with every doubt resolved in her behalf, the complaint did not state sufficient facts to establish any valid claim for relief. Because of this, the trial court properly dismissed Appellant's claims of intentional infliction and negligent of emotion distress as Appellant's pleadings lacked sufficient facts to constitute a cause of action.

B. Civil Conspiracy

Appellant asserts the trial court erred in dismissing her claim of civil conspiracy. This argument is without merit as the trial court properly dismissed this claim as Appellant's pleadings lacked sufficient facts to constitute this cause of action.

As the trial court noted in its order of dismissal, the elements of a civil conspiracy claim are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. Pye v. Estate of Fox, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006). The trial court further noted a civil conspiracy cause of action requires the plaintiff to establish that the primary purpose or object of defendants was to injure the plaintiff. Id. (citing Lee v. Chesterfield General Hosp., Inc., 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct.App.1986)). (R. pp. 8-11). Moreover, the trial court noted "In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim." Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115-16, 682 S.E.2d 871, 875 (Ct. App. 2009). A review of Appellant's complaint reveals she alleged Respondents "jointly operated to perpetrate the wrongful acts complained of herein" and "agreed and conspired with each other to engage in the alleged wrongful conduct, including Respondents' interference with plaintiff employment relationships by coming to an agreement between them to do an unlawful act or to do a lawful act in an unlawful way..." (R. pp. 49-50). Furthermore, in Appellant's amended complaint filed on July 19, 2017, Appellant also failed to establish facts that would establish her claim of civil conspiracy. Again here, and as the trial court correctly found, Appellant failed to plead additional factual allegations in her complaint that would entitle her to proceed on this cause of action pursuant to the standard under Rule 12(b)(6), SCRCP. Because of this, the trial court properly dismissed Appellant claims of civil conspiracy as Appellant's pleadings lacked sufficient facts to constitute a cause of action.

STANDARD OF REVIEW

A motion to amend a pleading is normally addressed to the sound discretion of the trial court. Porter Bros., Inc. v. Specialty Welding Co., 286 S.C. 39, 41, 331 S.E.2d 783, 784 (Ct. App.

1985). The trial court's decision will not be overturned "without an abuse of discretion or unless manifest injustice has occurred." Berry v. McLeod, 328 S.C. 435, 450, 492 S.E.2d 794, 802 (Ct. App. 1997). The discretion afforded to the trial court in granting or denying an amendment "is so broad that it will rarely be disturbed on appeal." Porter Bros., 286 S.C. at 41, 331 S.E.2d at 784.

ARGUMENT

III. The Trial Court did not abuse its discretion in denying Appellant's request to amend her complaint as Appellant's motion to amend was futile.

Appellant asserts the trial court abused its discretion in denying her request to amend her complaint. This argument is without merit as the trial court did not abuse its discretion in denying Appellant request to amend her complaint as Appellant's motion to amend was futile.

Pursuant to Rule 15(a) of the South Carolina Rules of Civil Procedure, when more than thirty days have passed after service of a party's pleading, "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. In Patton v. Miller, 420 S.C. 471, the South Carolina Supreme Court held the following: Rule 15(a) provides that when a party asks to amend his pleading, "leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), SCRCP. "This rule strongly favors amendments and the court is encouraged to freely grant leave to amend." Parker v. Spartanburg Sanitary Sewer Dist., 362 S.C. 276, 286, 607 S.E.2d 711, 717 (Ct. App. 2005) (citing Jarrell v. Seaboard Sys. R.R., Inc., 294 S.C. 183, 186, 363 S.E.2d 398, 399 (Ct. App. 1987)). "Rule 15(a) is substantially the same as the Federal Rule." Rule 15(a), SCRCP notes, and the Supreme Court of the United States has referred to the Rule's "freely given" provision as a "mandate" that "is to be heeded." Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222, 226 (1962). The Foman Court continued:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be "freely given."

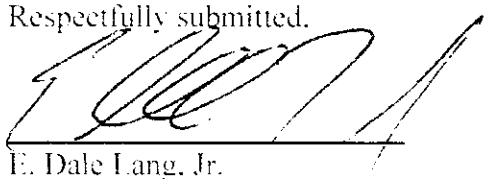
Id. (citing Fed. R. Civ. P. 15(a)); accord Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988).

Here, in its order denying plaintiff's motion to amend, the trial court found that Appellant's attempt to add additional defendants and causes of action was futile and Appellant was also collaterally estopped. The trial court noted that Appellant had previously litigated the issue of failing to settle her claim in her first suit. The court also noted taking the allegations in Appellant second complaint as true and viewing them and all reasonable inferences in a light most favorable to Appellant, the allegations did not support Appellant's claims against the proposed defendants for intentional infliction of emotional distress, civil conspiracy or intentional interference with contractual relations in her amended complaint. (R. pp. 12-20). A review of the record shows the trial court did not abuse its discretion as it in its order thoroughly analyzed the proposed amendments Appellant's wanted and articulated why those amendments were futile. Because of this, the trial court did not abuse its discretion in denying Appellant request to amend her complaint as Appellant's motion to amend was futile.

CONCLUSION

For the reasons stated, this Court should affirm the judgment of the lower court.

Respectfully submitted,



E. Dale Lang, Jr.
Bar No.: 16689
1612 Marion Street, Suite 200
Columbia, South Carolina 29201-2939
Phone: (800) 774-8242
Attorney for Respondent Sherwood Tidwell, Sherwood Plumbing LLC, and Beatrice Tyree Tidwell

July 26, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2018-001134

RECEIVED
JUL 29 2019
SC Court of Appeals

GLENDA R. COURAM ..... Appellant

v.

Nationwide Mutual Insurance Company, Titan Indemnity Company, Eugene Matthews, in his individual capacity, Sherwood Plumbing SVC, LLC, dba and Beatrice T. Tidwell, Rick Skurko in his official and individual capacity and Tracey Peer, in her official and individual capacity, ... Respondents

---

CERTIFICATE OF COUNSEL

The undersigned certifies this Final Brief of Respondents complies with Rule 211(b), SCAR.

July 26, 2019

E. Dale Lang
Bar No.: 16689
1612 Marion Street, Suite 200
Columbia, South Carolina 29201-2939
Phone:(800) 774-8242
Attorney for Respondents Sherwood Tidwell, Beatrice Tidwell, "Sherwood Plumbing Service LLC"