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STATE OF SOUTH CAROLINA  
COUNTY OF ANDERSON

2015 JUL 10 AM 9:47  
IN THE COURT OF COMMON PLEAS  
TENTH JUDICIAL CIRCUIT

Gregg Battersby,

COMMON PLEAS AND  
GENERAL SESSIONS

Plaintiff,

CIVIL ACTION NO.: 2015-CP-04-00667

v.

J. Kirkman Moorhead, Krause, Moorhead &  
Draisen, P.A., Allstate Insurance Company,  
and Allstate Northbrook Indemnity  
Company,

**ORDER GRANTING J. KIRKMAN  
MOORHEAD AND KRAUSE,  
MOORHEAD, & DRAISEN, P.A.'S  
MOTION FOR SUMMARY JUDGMENT  
AND MOTION TO DISMISS**

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Defendants.

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SC Court of Appeals

THIS MATTER comes before the Court on a Motion to Dismiss Plaintiff's Second Amended Complaint ("Complaint") against Defendants J. Kirkman Moorhead and Krause, Moorhead and Draisen, P.A., (hereinafter referred to collectively as "Attorneys"), pursuant to South Carolina Rule of Civil Procedure 12(b)(6). After due notice, a hearing was held in this matter on June 4, 2015. Plaintiff was represented by Donald L. Smith, Esq., and Attorneys were represented by Eric K. Englehardt, Esq., of Turner Padgett Graham and Laney, P.A. At the hearing the Motion was converted to a Motion for Summary Judgment at the request of Plaintiff and consent of Attorneys. (Hr'g. Tr. p. 3 ll. 17-23). Having carefully considered the allegations in the Plaintiff's Complaint and arguments and evidence submitted by counsel, the Court grants Attorneys' Motion for Summary Judgment and holds that Attorneys are not liable to Plaintiff under any of the causes of action brought in the Complaint.

**BACKGROUND AND FINDINGS OF FACT**

Plaintiff brings his Complaint alleging Attorneys are liable to Plaintiff for damages arising out Attorneys' performance of professional activities as attorneys for a client, namely Jan Morton (hereinafter referred to as "Client"). Plaintiff's Complaint also names Allstate Insurance

Company and Allstate Northbrook Insurance Company as Defendants based upon acts arising out of wholly separate transactions from those complained of against Attorneys.<sup>1</sup>

The Complaint alleges Attorneys have an attorney-client relationship with Client. (Complaint ¶ 11). In particular, Attorneys are providing legal representation to Client in a separate civil action brought by the Plaintiff against Client. (Ex. 3 to Plaintiff's Memorandum). The Complaint alleges Attorneys and Client conspired to concoct a story that Plaintiff indecently exposed himself to Client, and that Attorneys advised Client to report the incident to the Anderson County Sheriff's Office. (Complaint ¶¶ 12-13). Client did report the incident, and Plaintiff was arrested by the Sheriff on August 2, 2013 and subsequently charged by the Solicitor. (Complaint ¶¶ 14, 17, 27). The Complaint alleges Attorneys knew Client's statements were false, and that Attorneys conspired with Client to use the criminal charges to strengthen a civil case against Plaintiff. (Complaint ¶¶ 16, 28). Additionally, the Complaint alleges Attorneys assisted Client by filing an administrative complaint with South Carolina Department of Labor, Licensing and Regulation ("LLR") regarding the incident. (Complaint ¶ 25).

Plaintiff's Complaint asserts seven causes of action against Attorneys for acts arising out of Attorneys' representation of Client: (1) false imprisonment; (2) defamation; (3) intentional infliction of emotional distress ("IIED"); (4) malicious prosecution; (5) conspiracy; (6) fraud; and (7) abuse of process. At the hearing, Plaintiff stipulated Attorneys were entitled to summary judgment on all causes of action except civil conspiracy. (Hr'g. Tr. p. 16 ll. 9-19). Even if Plaintiff had not stipulated to summary judgment of the other six causes of action in Attorneys' favor, this Court finds that the grounds outlined below for granting summary judgment of the

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<sup>1</sup> The causes of action against Allstate and Northbrook were dismissed pursuant to a separate order of this Court under the same Civil Action Number.

conspiracy claim in Attorneys' favor, namely attorney immunity, also warrant summary judgment of those causes of action in Attorneys' favor.

### LEGAL STANDARD

At the hearing, Plaintiff submitted a portion of Morton's deposition transcript in support of his arguments, and presented arguments based upon the exhibits attached to his Memorandum in Opposition to Defendant's Motion to Dismiss. When a court is considering a motion to dismiss and matters outside the pleadings are presented to and not excluded by the court, "the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Rule 12(b), SCRCP; *Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 574, 593 S.E.2d 624, 627 (Ct. App. 2004).

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Knight v. Austin*, 396 S.C. 518, 521-22, 722 S.E.2d 802, 804 (2012); Rule 56(c), SCRCP. "The evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002) (internal citations omitted).

### DISCUSSION AND ORDER

Considering the facts in the light most favorable to Plaintiff, Attorneys were at all times acting within the within the scope of their representation of Client and owed no duty to the third-party, non-client Plaintiff. "Generally, an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509

(2006) (quoting *Gaar v. N. Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986)). Because an attorney normally conducts litigation solely in his professional capacity, the attorney “has no personal interest in the suit” and cannot be held liable to third-party non-clients “for injury allegedly arising out of the performance of his professional activities.” *Id.* at 529, 339 S.E.2d at 889. Further, an attorney owes no duty to a non-client unless he “breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client.” *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010). (quoting *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)).

Plaintiff failed to allege and the evidence does not show Attorneys ever stepped outside the scope of their representation of Client. Plaintiff argues Attorneys stepped outside of the scope of their representation of Client when they advised Client to report her allegations to the police and further advised Client to recommend to another alleged victim that she also report her own, similar encounters with the Plaintiff. In addition, Plaintiff argues Attorneys stepped outside their role as attorney when they assisted Client with an online complaint form filed with LLR because Client did not need an attorney to file an LLR complaint and nor were Attorneys representing Client when they completed the complaint form. (Hr’g. Tr. pp. 19-20, II. 10-2). This Court finds this argument unpersuasive. At all times alleged in the Complaint, Attorneys were acting on behalf of and as attorneys for the Client in all the acts complained of by Plaintiff. There is simply no cognizable basis in either law or fact to conclude these acts fall outside the scope of Attorneys’ representation of Client. See *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 23, 567 S.E.2d 881, 893 (Ct. App. 2002). (“The absolute privilege covers anything that may be

said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court.”).

Plaintiff also argues Attorneys acted outside of the scope of their representation and in their own personal interest when they allegedly created, embellished or made up better facts to strengthen Client’s claims. (Hr’g. Tr. pp. 21-24, ll. 15-2). Plaintiff argued at the hearing and in his memorandum that Attorneys conspired with Client because Attorneys would share in any judgment obtained as a result of the suit. (Hr’g. Tr. pp. 21-22, ll. 15-19). Despite Plaintiff’s claims, an attorney has an ethical obligation to zealously to pursue any lawful claim of his client and properly represent and support his client. *Gaar*, 287 S.C. at 529-30 (citing former Rule 32, Canon 7, Rules of Practice in the Supreme Court of South Carolina). And, no different than any other profession, an attorney obtains a fee as compensation for professional services rendered. The fee, which may be paid out of proceeds from a judgment, is directly tied to the representation of the client, and therefore falls squarely within the scope of representation. See *Gaar*, 287 S.C. at 529 (holding that an attorney normally conducts the litigation solely in his professional capacity and he has no personal interest in the suit). This Court finds there is no evidence Attorneys had any personal interest in their representation of Client.

Regarding Plaintiff’s allegations that Attorneys conspired with Client to make up or embellish certain facts to strengthen Client’s claims, Plaintiff points to Client’s deposition testimony that the number of times the LLR complaint states she visited the Plaintiff for treatment was wrong. (Hr’g. Tr. pp. 22-23, ll. 11-20). The relevant portion of Client’s Deposition, as cited at the hearing by Plaintiff, is as follows:

Q: “Dr. Battersby had been treating me for several issues once a week for 20 weeks.” Is that true?

A: "No. The 20 weeks is wrong."

Q: "And can you estimate -- I believe you said earlier that you thought you may have started with Dr. Battersby back in April."

A: "I thought I did, but I went back and looked. It was May 2nd":

Q: "What did you look at?"

A: "The cancelled check from my first visit."

(Dep. of Jan Morton, June 18, 2014, p. 76, ll. 6-17). Contrary to Plaintiff's assertions, this deposition testimony clearly shows Client was mistaken in her original estimation stated in the LLR complaint, and the number was not an embellishment or number otherwise made up by Attorneys. This Court therefore finds there is no evidence Attorneys conspired with Client to makeup or embellish facts to strengthen Client's case.

Turning to the other exception to the general rule of attorney immunity, Plaintiff's Complaint does not allege, and this Court finds that Attorneys owed no duty to the Plaintiff. The Plaintiff is not a client of Attorneys. At the hearing and in his memorandum, Plaintiff argues that Rule 3.3 Candor Toward the Tribunal of the South Carolina Rules of Professional Conduct imposes a duty on Attorneys to Plaintiff. In particular, Plaintiff argued that Attorneys owed Plaintiff a duty of advising their Client not to report her allegations to law enforcement. Rule 3.3 mandates that a lawyer not knowingly make false statements or present evidence the lawyer knows to be false to a tribunal, fail to correct the past representations later discovered to be false, or knowingly permit a client to engage in fraudulent conduct without taking remedial measures or disclosing to the tribunal. By its plain language, this Court finds that Rule 3.3 does not impose upon Attorneys a duty to Plaintiff. Therefore, this Court finds Attorneys are entitled to summary judgment in their favor on all of Plaintiff's claims.


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Assuming arguendo Attorneys owed a duty to Plaintiff, this Court finds Attorneys breached no such duty. Plaintiff alleges Attorneys should have recognized Client was lying when she informed them Plaintiff was wearing a robe during the alleged incident, but then reported later to law enforcement that Plaintiff was wearing a towel. First, the Court finds these are subtle differences of no material distinction, both figuratively and literally, so as to put Attorneys on notice that Client may be lying. Second, the police report which contains the allegedly different descriptors of Plaintiff's attire was not created until *after* Attorneys advised Client to report to the police – the very act Plaintiff claims Attorneys should have advised their Client against doing. The Attorneys therefore would not have had the benefit of the very report Plaintiff claims should have put them on notice.

**CONCLUSION**

For the foregoing reasons, it is hereby ordered that Attorneys' Motion for Summary Judgment is GRANTED. There being no just reason for delay, FINAL JUDGMENT is hereby entered against the Plaintiff and in favor of the Defendants J. Kirkman Moorhead and Krause, Moorhead and Draisen, P.A.

**AND IT IS SO ORDERED.**

  
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R. LAWTON MCINTOSH, JUDGE

Anderson, South Carolina

7-8, 2015

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