

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Doyet A. Early, Circuit Court Judge

Appellate Case No. 2019-000648
Civil Action No. 2018-CP-40-02425

Jefferson Davis, Jr. Appellant,

v.

Ellen Weaver, Chad Connelly, Oran P. Smith, Neil J. Mellen, Howard S. Rich, Rick Reames, Stephen D. Kirkland, Palmetto Promise Institute, Palmetto Family Council, Palmetto Family Action, South Carolinians for Responsible Government, SCRG Foundation, Access Opportunity South Carolina, Friedman Foundation for Educational Choice, Inc., Cato Institute, South Carolina Educational Credit for Exceptional Needs Children Fund, South Carolina Education Oversight Committee, South Carolina Dept. of Revenue, South Carolina Dept. of Labor, Licensing and Regulation, First Impressions, Inc. d/b/a/ Richard Quinn & Associates, First Tuesday Strategies, LLC, Bill Wilson, Jason Bedrick, Jim DeMint, Randy Page, Tony Denny, Phillip Cease, Melanie Barton, Doris Cubitt, Susan Thomas, John McCormick, Nate Leupp, Institute of Management Consultants USA & John Doe(s) 1-40

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SC Court of Appeals

Respondents.

BRIEF OF RESPONDENT FIRST TUESDAY STRATEGIES, LLC

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COUNTER-STATEMENT OF THE ISSUES ON APPEAL

- I. Did the trial court properly dismiss Mr. Davis' claims against First Tuesday because Mr. Davis failed to serve the Amended Complaint on First Tuesday within the time frame required by the trial court's prior order?
- II. Was the dismissal of Mr. Davis' claims against First Tuesday further supported by the additional sustaining ground that the Amended Complaint fails to state *any* factual allegations against First Tuesday that would constitute a cause of action or injury to Mr. Davis and also fails to allege any basis upon which First Tuesday could be liable for the alleged wrongdoing of others?
- III. Was the dismissal of Mr. Davis' claims against First Tuesday further supported by the additional sustaining ground that the claims Mr. Davis attempts to assert are totally deficient?
- IV. Was the dismissal of Mr. Davis' claims against First Tuesday further supported by Mr. Davis' failure to properly serve First Tuesday with the Amended Summons and Complaint?
- V. Did the trial court properly dismiss Mr. Davis' claims against First Tuesday with prejudice because Mr. Davis failed to comply with a prior order of the court, failed to timely and sufficiently serve First Tuesday, has already been given an opportunity to amend his Complaint and *still* failed to assert viable claims or to allege facts capable of supporting them, and has identified no new facts in his post-dismissal filings that could remedy his deficient claims?

STATEMENT OF THE CASE AND FACTS

In the interest of judicial economy and efficiency, First Tuesday Strategies, LLC ("First Tuesday") adopts and incorporates by reference the Statement of the Case and the Statement of the Facts found in the brief of co-Respondents Cato Institute and Howard S. Rich filed on October 7, 2019. *See* Rule 208(b)(6), SCACR ("In cases involving more than one appellant or respondent, . . . any party may adopt by reference all or any part of the brief of another."). Adding to the procedural history, First Tuesday filed its Motion to Dismiss on January 7, 2019, arguing dismissal was warranted under Rules 8(a), 12(b)(4),

12(b)(5) and 12(b)(6), SCRCF because the Amended Complaint (i) fails to state facts sufficient to constitute any causes of action against First Tuesday, (ii) fails to make any factual allegations against First Tuesday with the degree of specificity necessary for asserting any valid and plausible cause of action, (iii) craves reference to the Court's October 29, 2018 Order dismissing certain claims, and (iv) was not sufficiently served on First Tuesday as Dr. Davis attempted service by email. *See* First Tuesday Mot. to Dismiss (R. pp. 201-202). First Tuesday filed its Answer on January 7, 2019 and its memorandum of law in support of the motion to dismiss on February 11, 2019. First Tuesday Ans. (R. pp.107-117); Mem. in Supp. (R. pp. 357-363).

STANDARD OF REVIEW

First Tuesday adopts and incorporates by reference the Standard of Review found in the brief of co-Respondents Cato Institute and Howard S. Rich.

ARGUMENT

First Tuesday further adopts and incorporates by reference the arguments and authorities found in the brief of co-Respondents Cato Institute and Howard S. Rich and other co-Respondents, which arguments are equally applicable to First Tuesday. *See* Rule 208(b)(6), SCACR. First Tuesday supplements those arguments only by noting that this Court should affirm the dismissal of the claims against First Tuesday on additional sustaining grounds. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

First, the Amended Complaint fails to allege facts that could give rise to First Tuesday's liability. First Tuesday is mentioned in only seven (7) paragraphs of the forty-

five (45) page Amended Complaint. None of the paragraphs identify any action or omission by First Tuesday, much less one affecting Mr. Davis or injuring him:

- ¶ 22, stating First Tuesday is a South Carolina limited liability company with an office in Richland County, (R. p. 36);
- ¶ 179, alleging “Defendant First Tuesday has picked up where RQA left off with respect to Defendants and John Doe(s),” (R. p. 62);
- ¶180, alleging only that First Tuesday provides services to Defendants ECENC Fund and DOR, (R. p. 63);
- ¶181, alleging that First Tuesday provides services to charter school groups, (R. p. 63);
- ¶184, alleging First Tuesday has a natural conflict in representing both charter schools and the ECENC program “plus the obvious issues of political access and influence that comes with their representation of legislators and campaign consulting business,” (R. p. 63);
- ¶185, alleging First Tuesday assisted Defendant ECENC Fund with fundraising, (R. p. 63); and
- ¶186, alleging First Tuesday had an employee on their website who was working on the ECENC Fund program and when “exposed by Plaintiff Davis, that individual was removed from the First Tuesday website and has now been listed officially as the “Administrator” at Defendant ECENC Fund, (R. p. 63).

Even if taken as true, none of those allegations support a cause of action against First Tuesday. The Amended Complaint contains only general and vague causes of action for defamation, invasion of privacy, negligence, intentional infliction of emotional distress, tortious interference with prospective contractual relations, unfair trade practices, and conspiracy. *See generally* (R. pp. 31-75). Absent from the Amended Complaint are any factual allegations about First Tuesday that could support *any* claim against First Tuesday either directly or vicariously.

Among other things, Mr. Davis' causes of action for defamation fail to allege any false statements made by First Tuesday, any publication of false statements, or damages as against First Tuesday. (R. pp. 270-271). The invasion of privacy claim fails to allege any publication, unwarranted appropriation, or wrongful intrusion by First Tuesday into any private matter of Mr. Davis. (R. p. 271); *see generally Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 478, 514 S.E.2d 126 (1999). The negligence claim fails to identify any duty owed by First Tuesday, fails to identify any breach of duty by First Tuesday, and altogether fails to allege damages proximately resulting from any breach. (R. p. 272); *see generally Shaw v. City of Charleston*, 351 S.C. 32, 40, 567 S.E.2d 530 (Ct. App. 2002). The Amended Complaint further fails to identify any intentional or reckless act by First Tuesday that was so extreme or outrageous that it exceeded all possible bounds of decency and which no reasonable person could be expected to endure. *Id.* As to the claim for tortious interference with prospective contractual relations, the Amended Complaint fails to allege any intentional interference with any prospective contract or improper purpose. (R. pp. 272-273); *see generally United Education Distributors, LLC v. Educational Testing Service*, 350 S.C. 7, 14, 564 S.E.2d 324 (Ct. App. 2002). The Amended Complaint further fails to allege any unfair competitive or deceptive acts by First Tuesday in trade or commerce or damage therefrom. (R. p. 273); *see S.C. Code Ann. §39-5-10, et. seq.* Lastly, the Amended Complaint fails to allege any conspiratorial acts done for the purpose of injuring Mr. Davis much less any acts involving First Tuesday. (R. pp. 274-275); *see generally LaMotte v. Punchline of Columbia, Inc.*, 296 S.C. 66, 69, 370 S.E.2d 711, 713 (1988).

In the absence of such allegations, there can be no claim against First Tuesday and dismissal of the Amended Complaint is warranted. *See generally* authorities cited in the Brief of Cato Institute and Mr. Rich at Argument II.A and briefs of other co-Respondents. Mr. Davis has had two attempts with his original and Amended Complaint to state facts upon which relief can be granted but has failed to do so. This failure is an additional sustaining ground for the trial court's dismissal of Mr. Davis' causes of action against First Tuesday.

Second, Mr. Davis' failure to properly serve First Tuesday is another further sustaining ground warranting the dismissal of Appellant's claims. Mr. Davis attempted to serve the Amended Complaint upon First Tuesday by email which is not proper under Rule 4, SCRCP, and the record contains no proof of service on First Tuesday. *See* First Tuesday Mot. to Dismiss (R. pp. 201-204); S.C. Code Ann. §15-9-210. Accordingly, dismissal of Appellant's claims as to First Tuesday is also warranted based on improper and insufficient service.

CONCLUSION

For the foregoing reasons, Respondent First Tuesday respectfully requests this Court affirm the trial court's Order dismissing Mr. Davis' claims against it.

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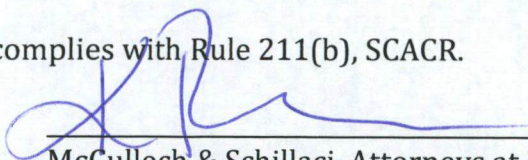
March 18, 2020

Columbia, South Carolina

Attorney for Respondent First Tuesday

CERTIFICATION

I certify that the Final Brief complies with Rule 211(b), SCACR.



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