THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Marvin H. Dukes III, Master in Equity & Special Circuit Court Judge

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Appeal Case No. 2017-002270
Circuit Court Case No. 2014-CP-07-00943

JOSEPH C. SUN ..... **Appellant**

v.

TOWN OF BLUFFTON, BLUFFTON POLICE DEPARTMENT, BRYAN NORBERG, ANGELA TUBBS, JOSEPH BABKIEWICZ, CLAUDIA HEBDA, JEFFERY DICKSON and CHRISTIAN GONZALES. ..... **Respondents**

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES

1. Should Rule 203(b)(1), SCACR, be interpreted to require the appellant to serve his notice of appeal on all respondents within thirty (30) days from the date when he first has knowledge of the order, even when he has not received a written notice of entry of the order or judgment, but that he incidentally obtained a copy of the order or judgment from the circuit court's public index website. Subsequently, should the denial of his appeal of the order of which he obtained a copy from a public index website and failed to serve his notice of appeal within 30 days, be considered a denial of Appellant's right to due process.
2. It is error of the circuit court to grant Respondent's motion to dismiss entered on December 10, 2014 and treated the order entered as a final order ending the case against Defendants Town of Bluffton and Bluffton Police Department.
3. It is error of the circuit court to deny Appellant's motion to reconsider in its Form 4 Order entered on April 17, 2015.
4. It is error of the circuit court to grant Respondents' motion for summary judgment as to Causes of Actions One through Five of the Amended Complaint in its Order of December 28, 2015.

5. It is error of the circuit court to enter a Form 4 Order and an order on December 7, 2016 granting certain Respondents' motion for summary judgment and denying Appellant's motion to compel discovery.

6. It is error of the circuit court to enter an amended order granting Respondents Motion for Summary Judgment on May 23, 2017 and subsequently a Form 4 Order entered on May 24, 2017, both entered electronically.

7. It is error of the circuit court to enter an order on August 29, 2017 denying Appellant's motion to vacate and set aside judgment.

STATEMENT OF THE CASE

Appellant Joseph Sun filed the within summons and complaint against all the Respondents on April 24, 2014. All respondents were served in May 2014 and they filed their answers soon after. On May 28, 2014, Respondents Town of Bluffton and Bluffton Police Department filed a motion to dismiss. After a hearing, the circuit court entered an order dismissing Town of Bluffton and Bluffton Police Department from the case on December 10, 2014.

On about November 26, 2014 Appellant filed a motion to amend complaint by adding a sixth cause of action of malicious prosecution and a seventh cause of action pursuant to 42 U.S.C.A. § 1983 of denial of civil rights under color of state law. On April 17, 2015 Circuit Court entered a Form 4 Order acknowledging Appellant's motion and held a hearing on November 13, 2015, entered an order granting Appellants aforesaid motion to amend.

On December 22, 2014 Appellant filed a motion to reconsider the aforesaid December 10, 2014 order which his counsel received on December 14, 2014. On April 17, 1915, circuit court

entered a Form 4 order denying Appellant's aforesaid motion to reconsider. Neither Appellant nor his counsel had received a copy of the order denying his motion for reconsideration, and according to court record, there was no certificate of service of the motion from the Respondents' counsel or the court. On October 14, 2015, Appellant and his counsel signed and filed a consent decree of relieving his counsel from the case. After that due to financial reasons, Appellant proceeded in the case pro se without counsel.

Appellant immediately sent his request for discovery to Respondents counsels. All his request for admissions were summarily denied. Respondents' counsel refused to answer his interrogatories using grounds of "inapplicable" or "irrelevant" and claimed that there were more than 20 interrogatories for the total six (6) respondent -defendants when Rule 33, SCRCP, allows 50 interrogatories for each party defendant, not all defendants together, therefore, the respondents should have responded to many more Appellant's interrogatories.

Appellant filed a motion to compel discovery on July 2, 2016. Circuit court in its order of December 7, 2016 summarily denied Appellant's motion without a hearing. On June 13, 2016, Respondents filed a motion for summary judgment on Counts six and seven of Appellant's amended complaint. After a hearing before Master in Equity and Circuit Judge Marvin Duke, Judge Duke instructed respondents counsel to prepare their proposed order and send in by email to which Appellant objected and filed his objection in court. Appellant also filed his Verification of the Amended Complaint on September 16, 2016.

Appellant had not been served with a copy of the order. He checked on the Beaufort County Public Index from time to time and saw the Order granting Respondents' motion for summary judgment. Appellant filed his motion to reconsider on December 22, 2016. After a

hearing on May 9, 2017, Appellant found on the Public Index website that on May 24, 2017 circuit court entered a Form 4 Order denying Appellant's motion to reconsider and stated that the Amended Order granting respondents' motion for summary judgment was the result of hearing on May 9, 2017 on Appellant's motion to reconsider.

There was no written order served on Appellant regarding respondents' Motion for summary judgment or Appellant's motion to reconsider. Appellant had to find and copy most of the court orders and Form 4 Orders throughout the case, sometimes at the clerk's office and most of the orders online at the public index website. Sometimes he could find and copy some of the orders in the case within the period required to file motion for reconsideration or notice of appeal, but sometimes he could not. Appellant was informed by the clerk of court that the time to trigger the next step whether it was reconsideration or appeal would not start until he received the service copy of the court order by mail.

On June 16, 2017 Appellant filed a motion to vacate and set aside judgment and a hearing was scheduled for August 1, 2017. Respondents filed their opposition. On August 1, 2017 Appellant filed an amendment to his motion to vacate and set aside judgment. Judge Marvin Duke denied Appellant's motion to vacate and set aside on August 29, 2017. Appellant timely served his Notice of Appeal on the respondents on October 19, 2017 after he received his service copy by Certified Mail.

STATEMENT OF FACTS

Appellant filed the within action against the respondents in April 2014 after he had been arrested repeatedly in 2009 through 2010 and required to post several large bonds for his release. The respondents were authorized and condoned by the Town of Bluffton and the police department to do harm to Appellant without any probable cause except false and pretentious allegations from Appellant's ex-wife and her former counsel at the Citizens Opposed to Domestic Violence (hereinafter CODA).

Appellant was charged and arrested of pretenses and false accusation of trespassing his own home bought and paid for by his mother in Canada, going to the yard of his marital home to give a sprinkler pool to his minor daughter, and calling his ex-wife to ask for visitation with his daughter. The respondents acted with intentional malice because Appellant has testified that Officers Joseph Babkiewicz, Christian Gonzales and Bryan Norberg yelled at him and said they would make sure Appellant would repeatedly stay in jail for a long time. Not only the respondents have not shown probable cause of any crime committed by the Appellant, even their witnesses, to wit, Appellant's ex-wife and her counsel at CODA could not show any evidence except empty words of any wrong done by the appellant which did not show any crime committed, but at best family court order being violated, such as returning to his empty marital home and yard.

Appellant wrote letters to Bluffton mayor and Police Chief asking for investigation, but his letters were ignored. Appellant was required to report to roll-calls every month for over a year. During the entire period, the respondents could not show a scintilla of evidence that Appellant had committed any crime. The respondents simply did harm to Appellant only because they did not like him and they wanted to pay back the lawsuits and letters of complaints Appellant had filed against them. The actual malice of all the respondents were shown by their words of threat and

acts of malicious intent and the fact that all the officer respondents after the town and police department received complaints from the Appellant, were promoted to a higher rank official positions afterwards.

There were a total of three (3) indictments and three (3) misdemeanor charged filed against the Appellant. All the misdemeanor charges were tried and found not guilty or dismissed at the municipal court in Bluffton. The indictments were nolo prosed at the Beaufort County Court of General Sessions.

Appellant has suffered great financial losses. His old aged mother in Canada after repeated news of arrests and charges and demand for money from Appellant's ex-wife and her counsel from CODA fell down the stairs and went into a coma. She died several months later.

After three years in about 2014, and after all charges against him were dismissed, acquitted or nolo prosed, Appellant filed the within action.

ARGUMENT

Appellant herein makes his arguments in the order stated in the Statement of the Issues:

1. Respondents filed a motion to dismiss Appellant's Appeal for Lack of Jurisdiction in this case. After Appellant responded and showed that he timely served the notice of appeal after he received written notice of the "Order Denying Plaintiff's Motion to Vacate and Set Aside Judgment" by Certified Mail, an Order was issued by this court that the appeal from aforesaid order shall proceed.

However, the court found that "Because Appellant has failed to timely serve a notice of appeal from any other order listed in Appellant's notice of appeal, these appeals are dismissed. *See*

Rule 203(b)(1), SCACR ("A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.") As shown in the Beaufort County, Fourteenth Judicial Circuit Public Index, Item 1 in the Designation of Matter to be Included in the Record of Appeal, there was no Certificate of Service for the Amended Order Granting Motion for Summary Judgment electronically entered on May 23, 2017, and the Form 4 Order entered electronically on May 24, 2017 have no date of service, the spaces to be filled for the service date are blank. Appellant obtained copies of those two orders from the website. (R.p.2)

Therefore, pursuant to Rule 203(b)(1), SCACR, the date of receipt by the Appellant (or the filing of Certificate of Service by the Respondents) of the aforesaid Amended Order Granting Motion for Summary Judgment is the controlling factor in the determination of timely service of the notice of appeal by the Appellant. Therefore, until Appellant has received a written notice of entry of the order or judgment, Appellant's notice of appeal is timely served for those two orders because the date to trigger the 30 days period to file the notice of appeal has not begun. Appellant should be allowed to proceed on this appeal on the two orders aforesaid. (R.p.18 and 65)

2. The circuit court granted respondents Town of Bluffton and Bluffton Police Departments' motion to dismiss on December 10, 2014 based on statute of limitation on the initial five (5) Counts of causes of action. However, based on Appellant's allegations of false arrest/false imprisonment, gross negligence on the several arrests and groundless fabricated charges of trespassing, burglary, possession of burglary tools, stalking, illegal use of telephone, Defendants Town of Bluffton and Bluffton Police should know that Appellant's acquittal and/or dismissal of the charges (including nolo prossed) would lead to the causes of action of malicious prosecution and deprivation of civil rights under color of state law. A motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to

relief on any theory. *McCormick v. England, 328 S.C. 627, 494 S.E.2d 431 (Ct.App.1997)*

Doe v. Marion, 361 S.C. 463, 605 S.E.2d 556 (S.C. App., 2004)

Therefore, circuit court should not have ended the case against these two defendants, and particularly, not against the Town of Bluffton should the police department be considered as a part of Town of Bluffton. In this case, the Town of Bluffton was served a second time with the summons and the amended complaint (R.p. 134-145) where the town is alleged to have committed gross negligence in failing to properly supervise and train its officers and allowing the respondent officers to commit retaliation, prejudice and malice as their vengeance against Appellant for his free speech of criticism against the officers and the town and the federal civil rights lawsuits against some of the officers in the past.

The town of Bluffton is guilty of allowing and promoting a policy by which the officers' wrong doings against a local citizen Appellant Sun would be ignored or even rewarded.

3. Appellant's motion to reconsider should not have been denied. The town of Bluffton should be kept as defendant all along. Appellant's notice of appeal would include defendant Town of Bluffton should the case against it not be ended.

4. Appellant withdraws the appeal of the order of December 28, 2015.

5. The circuit court granted Respondents' motion for summary judgment in its order of December 7, 2016 and its Form 4 order because the respondents erroneously claim that the accrual of the cause of action for both malicious prosecution and violation of civil rights under color of state law also started at the same time as Counts 1 through 5 in the original complaint. (R.p. 141-144)

The South Carolina Supreme Court in *Pallares v. Seinar*, 407 S.C. 359, 756 S.E.2d 128 (2014) held that,

"[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the

institution or continuation of original judicial proceedings; [4] (2) by or at the instance of the defendant; (3) termination of such proceedings in [the] plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage."

Plaintiff Joseph Sun in his Amended Complaint (Page 3 of 11) alleges that,

> "12. All of the Defendants' wrongful, malicious and unconscionable acts were motivated and instigated by their prejudice and malice against the Plaintiff, their lack of proper training, and the lack of proper oversight of these officers by Bluffton Police Department. These Defendants were influenced by each other and wrongfully directed by their superiors to target the Plaintiff for harassment and other tortuous acts due to the defendants lack of training, their personal malice and prejudice against the Plaintiff, and their lack of proper oversight and training.
>
> 13. ..... All Defendants committed wrongful and tortuous acts against the Plaintiff with actual fraud and actual malice, and with the intent to cause harm to the Plaintiff.
>
> 14. All Defendant Officers, ... knowingly and intentionally conspired with and aided and abetted each other, including Plaintiff's ex-wife, in a scheme of malicious and wrongful activity, to repeatedly have Plaintiff arrested and put in jail for numerous fabricated and unwarranted charges. They then maliciously attempted to prosecute the Plaintiff in Bluffton Municipal Court and the Beaufort County Court of General Sessions. ....."

Plaintiff in his Amended Complaint adequately alleges all the requirements to maintain an action for malicious prosecution. His Affidavit and Supplemental Affidavit of Joseph Sun (R.p. 100-106, 128-131) filed in opposition to defendants motion furnished evidence of the dates of the termination in his favor of all charges lodged by the defendants against him. Plaintiff also provided testimony showing that some officers wanted him imprisoned maliciously without lawful reasons.

Defendants' motion for summary judgment contains only an empty statement indicating what they like to show, with no evidence or argument in support. Defendants have furnished nothing that could pierce Plaintiff's allegations. As genuine issues of material facts alleged in the Amended Complaint exist, Defendants are not entitled to a summary judgment as a matter of law.

Defendants submitted a motion governed by Rule 56(c) of the South Carolina Rules of Civil Procedure. This rule provides a motion for summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

"Under Rule 56(c), the party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). This initial responsibility may be discharged by pointing out to the trial court that there is an absence of evidence to support the non-moving party's case, and it is not necessary for the moving party to support its motion with affidavits or other similar materials negating the opponent's claim. *Id.*

"In determining whether any triable issues of fact exist, the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party." *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). "[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid–South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Lanham v. Blue Cross & Blue Shield of S.C.*, 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002). Moreover, because summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006). Appellant in his two affidavits (Affidavit of Joseph Sun and the Supplemental Affidavit of Joseph

Sun) provided numerous evidence showing there were disputed facts and that he has prevailed in all the six(6) charges that were fabricated against him by the respondents.

The attached Family Court Pendente Lite Order with the Supplemental Affidavit of Joseph Sun shows that he was allowed to call his ex-wife for visitation of his daughter. (R.p.109-114) The pick up and delivery of his daughter would obviously require the "trespassing" on the marital home where Appellant's ex-wife was residing with his daughter. The respondents recklessly disregarded the truth of the Family Court Order to have Appellant repeatedly arrested.

Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson v. Southern Ry. Co., 420 F.Supp. 483, 486 (D.S.C.1975)*; see also *Holloman v. McAllister, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986)* ("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. *10A Wright & Miller, Federal Practice and Procedure s 2741, p. 543 (1983); 6 Moore's Federal Practice P 56.02[6], p. 56-39 (2d ed. 1990); see, e.g., First Chicago Int'l v. United Exchange Co., 836 F.2d 1375 (D.C.Cir.1988); Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 756 F.2d 230 (2d Cir.1985); Tyler v. City of Enterprise, 521 So.2d 951 (Ala.1988); Gangadean v. Leumi Fin. Corp., 13 Ariz.App. 534, 478 P.2d 532 (1970); Commercial Bank of Kendall v. Heiman, 322 So.2d 564 (Fla.Dist.Ct.App.1975); Board of Education v. Van Buren & Firestone, Architects, Inc., 165 W.Va. 140, 267 S.E.2d 440 (1980); cf. **544Rule 56(f), S.C.R.C.P.FN4*

Under the circumstances, we agree with Plaintiffs that the grant of partial summary judgment on the personal injury claims was premature.

FN4. Rule 56(f) provides: Should it appear from the affidavits of a party opposing the motion

that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just.

Although Plaintiffs did not file an affidavit invoking this provision, other courts have not mandated strict compliance with the technical requirements of Rule 56(f) where, as here, the need for further discovery is otherwise made known to the trial court. *First Chicago Int'l, supra; Snook v. Trust Co. of Ga. Bank of Savannah*, 859 F.2d 865 (11th Cir.1988). *Baughman, supra.*

It was error of the circuit court to enter an order granting Respondents' motion for summary judgment on Grounds six (malicious prosecution) and Ground seven (deprivation of civil rights under color of state law) and entered a Form 4 Order afterwards.

6. Appellant immediately and timely filed his motion to reconsider. After a hearing, circuit judge simply duplicated the original order granting respondents summary judgment, issued an amended order on May 23, 2017, double granting respondents motion for summary judgment, and issued a subsequent Form 4 Order on May 24, 2017 as its denial of Appellant's motion to reconsider. But Appellant did not know this strategy of the circuit judge as he was not served a copy of the order denying his motion to reconsider. He was just waiting for the court's Order denying his motion to reconsider so he could serve his notice of appeal.

Circuit court's special and abnormal way of denial of Appellant's motion to reconsider with an identical order granting summary judgment but added the word "Amended" at the beginning of the title, then used a Form 4 Order to purportedly explain the court's special but confusing strategy of its denial of Appellant's motion to reconsider. Because the order denying Appellant's motion to reconsider was not properly issued therefore a nullity and that his final notice of appeal is timely for the denial of his motion to reconsider because the 30 days to serve notice of appeal was never

triggered. (R.p.34,35) For a period of time, it appeared to Appellant that the Amended Order granting summary judgment was an amendment to the original order granting summary judgment.

7. Appellant filed a motion to vacate and set aside the judgment of the circuit court on the grounds that respondent Christian Gonzales committed perjury and fraud and respondents' counsel knowingly and repeatedly used the conflicting false statement in Gonzales' affidavit in their motion for summary judgment against Appellant.

The falsity of two (2) dates March 16 and March 17, 2010 on Paragraph 8, Page 2 of the Gonzales affidavit which he signed on July 7, 2016 in support of his motion for summary judgment. At about 11:00 p.m. when Sun was sleeping in his temporary home in Ridgeland, SC Gonzales called him to come to Bluffton Police Department for interrogation and told Sun that they impounded Sun's truck near his marital home in Bluffton and that he would help to release the truck if Sun come to the interrogation immediately. Gonzales also repeatedly assured Sun that he would not be arrested that night. Sun had just been released from Beaufort Detention late in the afternoon of March 17, 2010 and went to his Ridgeland home as aforesaid.

During the interrogation at the Bluffton Police Department, Gonzales video recorded everything and Sun was given a copy on a later date. The video showed that Gonzales relentlessly harassed Sun to admit that he was in his marital home that day. After over half an hour of harassment and Sun knew Gonzales was pressuring an admission, therefore, Sun told Gonzales that surely he had been in the marital home with no dates given[1] because Sun had been residing in the home, a house owned by his mother, ever since 2007. When repeatedly asked about the Chinese Characters "You Die" which Sun had denied involvement because he had never been in China and

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[1] Gonzales video CD can verify that no dates were given. Circuit Judge denied motion without allowing CD be heard.

could not read or write Chinese, Sun finally said in the interrogation that "it is not a crime to say You Die as long as there is no action." Again Gonzales used that opportunity to use his perjury to falsely claim that Sun "admitted being in the house on March 16 and 17, 2010" and wrote the two words "You Die" in Chinese.

Respondents counsel have copies of the affidavits and the video, therefore knew or should know, the perjury committed by Gonzales and the respondents used the perjury to fabricate "probable cause" for Sun's arrests on March 17, 2010 and other dates for charges of burglary and stalking. The list of perjury and false testimony could go on regarding charges of trespassing and burglary against Sun. This is a case similar to *Chewning v. Ford Motor Co.,* 346 S.C. 28 550 S.E.2d 584 *(2001)* cited by Appellant in his motion.

In *Chewning*, this court reversed the circuit court's dismissal [346 S.C. 37] order and remand the fraud upon the court claim and held that, "Although perjury alone will not serve to vacate a judgment, it is considered fraud upon the court when it involves or is suborned by an attorney. See generally Moore's Federal Practice, supra, at § 60.21[4][b] & [c]. "Involvement of an attorney, as an officer of the court, in a scheme to suborn perjury would certainly be considered fraud on the [346 S.C. 36] court." *Great Coastal Express, Inc. v. Int'l Bhd. of Teamsters*, 675 F.2d 1349, 1357 (4th Cir.1982)

CONCLUSION

For all the foregoing reasons, the judgment of the circuit court should be reversed and the case be remanded for further proceeding.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

July 7, 2018

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PROOF OF SERVICE

I certify that I have this date served the Appellant's Final Brief on Respondents' counsel by depositing a copy of same in the U.S. Mail postage prepaid:

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This 7th day of July, 2018

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