

**FINAL BRIEF OF APPELLANT**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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**Aug 05 2020**

**SC Court of Appeals**

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2019-CP-26-01113

Essie Ford,

Appellant,

v.

Ralph Kline,

Respondent.

**FINAL BRIEF OF APPELLANT**

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE LOWER COURT ERR BY RELYING ON PLEADINGS OUTSIDE OF THE COMPLAINT TO GRANT RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS?
  
- II. DID THE LOWER COURT IMPROPERLY GRANT REPSONDENT'S SCRCP 12(C) MOTION BY RELYING ON EXTRINSIC AND CONTESTED EVIDENCE?

### STATEMENT OF THE CASE

Appellant appeals a ruling of the Court of Common Pleas dismissing her case under a Rule 12(c) Motion for Judgment on the Pleadings based on the doctrine of res judicata. On February 26, 2019, the Appellant filed a Summons and Complaint alleging the Respondent breached an express warranty, breached an implied warranty, breached their contract, and committed negligence when the Respondent failed to provide the Appellant with a new waterproof roof. (R. p. 4). On September 3, 2019, the Respondent filed an Answer containing multiple affirmative defenses including a bar under the doctrine of res judicata. (R. p. 11). Appellant filed a Reply to Defendant's Answer on September 18, 2019. (R. p. 17). The Respondent filed a Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure on October 24, 2019. (R. p. 31). The Respondent also filed a Memorandum of Law supporting his Motion. (R. p. 32). The Appellant filed a Memorandum of Law opposing Respondent's Motion on November 18, 2019. (R. p. 36). A hearing was held on December 17, 2019 in Horry County, South Carolina, wherein the court granted the Respondent's motion. (R. p. 2). The Appellant subsequently filed and served a Notice of Appeal on January 14, 2020. (Notice of Appeal.)

### STANDARD OF REVIEW

In reviewing a Motion for Judgment on the Pleadings the Appellate Court "applies the same standard of review implemented by the circuit court." Hambrick v. GMAC Mortg. Corp., 370 S.C. 118, 122, 634 S.E.2d 5, 7 (Ct. App. 2006)(citations omitted).

"When considering such motion, the court must regard all properly pleaded factual allegations as admitted. On review of the motion, the court may not consider matters outside the pleadings. 'A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment. . . . When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment. Moreover, a complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled

to any relief whatsoever. Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties.’. Furthermore, “‘a judgment on the pleadings is considered to be a drastic procedure by our courts.’”

Falk v. Sadler, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000) (*quoting Russell v. City of Columbia*, 305 S.C. 86, 406 S.E.2d 338 (1991))(citations omitted). *See* Jean Hoefler Toal et al., Appellate Practice in South Carolina 243-44 (Jennifer M. Aldrich et al. eds., 3rd ed. 2016).

### STATEMENT OF FACTS

The Appellant and Respondent entered into a contract on January 11, 2018 wherein the Respondent agreed to install a new roof on Appellant’s mobile home for a total of \$5,520.00. (R. p. 7). Respondent promised to use heavy weight tiles and new sealant to keep the roof watertight with a waterproof guarantee. (R. p. 7). Respondent began and completed the work, but the roof began leaking after installation. (R. p. 7). The Appellant contacted the Respondent to repair the roof, but the Respondent refused. (R. p. 7). As a result of the failure to install a watertight new roof, the Appellant experienced excessive mold growth and termites in her home. (R. p. 7). The Appellant initially filed a Pro Se Magistrate Court case in 2018. (R. pp. 13, 23). Following a hearing, the magistrate dismissed the case neither with nor without prejudice and without any written record showing an adjudication of the facts. (R. pp. 23-24, 36-38). The Appellant subsequently hired an attorney and filed a civil case in the Court of Common Pleas alleging a breach of express warranty, a breach of implied warranty, a breach of contract, and negligence. (R. pp. 8-9).

The Respondent’s Answer pled res judicata as a second defense. (R. p. 13). He asserted the Appellant previously filed a complaint in Magistrate Court case number 2018CV261070719, it contained the same claims in the Complaint in this case, it was heard on July 23, 2019 in the Conway Magistrate Court, and that during the trial the “Plaintiff was afforded an opportunity to

present all her evidence...and, that after Plaintiff rested, Defendant's Motion for a Directed Verdict was granted by the [magistrate]." (R. p. 13). The Respondent asserted that "the claims set forth in the Plaintiff's Complaint are barred under the doctrines of res judicata and collateral estoppel." (R. p. 13). The Appellant filed a Reply inadvertently admitting the claims except for paragraph 24 of the Defendant's Answer which states, "Defendant asserts that the claims set forth in Plaintiff's Complaint are barred under the doctrines of res judicata and Collateral Estoppel." (R. pp. 13, 17).

Respondent subsequently filed a 12(c) Motion for Judgment on the Pleadings on October 24, 2019, (R. p. 31), and a Memorandum supporting the motion. (R. pp. 32-35). He asserted the Reply entitled him to a Judgment on the Pleadings based on the defense of res judicata (R. pp. 32-35). The Appellant opposed the motion due to the ambiguous and conflicted facts in the pleadings. (R. pp. 23-24). A hearing was held on December 17, 2019 wherein the lower court granted the Motion for Judgment on the Pleadings (R. pp. 2-5, 25). The lower court found that based on the admission in the Reply to paragraphs 20-23 of the Answer, the doctrine of res judicata barred the Complaint. (R. p. 3).

## ARGUMENTS

### **I. THE LOWER COURT ERRED WHEN IT RELIED ON PLEADINGS OUTSIDE OF THE COMPLAINT TO GRANT RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS.**

In granting the Respondent's 12(c) motion, the lower court relied on the affirmative defense of res judicata raised by the Respondent in their Answer, and the response to this defense by the Appellant in her Reply. This was an error of law, as the trial court is constrained to reviewing only the allegations in the Complaint when ruling on a 12(c) motion.

Under the South Carolina Rules of Civil Procedure, Rule 12(c) provides:

"after the pleadings are closed . . . , any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, 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(c), SCRCP.

In interpreting the rule, our courts have held that a Motion for a Judgment on the Pleadings should be granted “only where the pleadings are *so defective* that, taking all the facts alleged in the pleadings as admitted, no cause of action or defense is stated.” Diminich v. 2001 Enters., Inc., 292 S.C. 141, 355 S.E.2d 275 (Ct. App. 1987)(emphasis added).

More specifically, in determining whether to grant a 12(c) motion, our courts have looked solely to the four corners of the *Complaint* – not to other pleadings. “A Complaint is sufficient if it states any cause of action or it appears that the plaintiff is entitled to any relief whatsoever.” Falk v. Sadler, 341 S.C. 281, 287, 533 S.E.2d 350, 353 (Ct. App. 2000)(citation omitted). “The court must take all well pleaded factual allegations in the Complaint as true.” Id. (citations omitted). Pleadings in a case should be construed liberally so that substantial justice is done between the parties.” Id. at 287, 533 S.E.2d at 353; *See Manning v. Dial*, 271 S.C. 79, 245 S.E.2d 120 (1978)(citations omitted).

In Falk v. Sadler, Falk filed a Complaint against Sadler “asserting causes of action regarding her actions as a Guardian ad Litem for negligence, breach of fiduciary duty, and malicious use or abuse of the legal process.” Falk at 285. The lower court dismissed the case on a 12(c) Motion. On appeal, this Court looked at the four corners of the Complaint and held that the Complaint properly alleged facts that, if true, could result in a possible finding for Falk. Id. at 289-90. The Court then denied the 12(c) Motion and remanded for further proceedings.

In Diminich v. Enterprises, Diminich filed a Complaint alleging breach of express and implied covenants to quit enjoyment of leased premises. Diminich at 142. The lower court granted the Judgment on the Pleadings. Id. On appeal, this Court found that the judgement was erroneous

because “on motions for judgement on the pleadings, the allegations of the complaint must be considered by the court as admitted.” Id. at 144. This Court reversed and remanded the case. Id. at 142. In Falk and Diminich, the Court relied on the Complaint when determining whether a 12(c) Motion should be affirmed or not. Diminich at 144; Falk at 286. They did not rely on the Answer or the Reply.

Like Falk, the Appellant’s Complaint factually pled that she and the Respondent entered into a written agreement wherein the Respondent would provide a “new watertight roof” for the Appellant in exchange for \$5,520.00. (R. p. 1). The Respondent was to “use heavy weight tiles and a new sealant to keep the roof watertight with a waterproof guarantee,” (R. pp. 1, 28-30). He was to “work in a careful, diligent, workmanlike manner.” (R. pp. 1, 28-30) (citation omitted). The Respondent did not do what was contractually stated and failed to “install the roof in a careful, diligent, and workman like manner.” (R. p. 9). This breach of duty actually damaged the Appellant’s home. (R. pp. 9-10). It was “foreseeable that the Respondent’s failure to install a watertight roof would cause water to get into the home and cause water damage like mold termites, and a collapsed roof, and that the Appellant suffered ‘actual damages from the mold affecting the sheetrock in her home, the termites affecting the wooden structure of the home, and the collapsing roof in the master bathroom.’” (R. pp. 9-10).

The Appellant’s Complaint alleges facts and multiple causes of action, that if taken to be true, would show that the Respondent breached warranties, breached a contract, and committed negligence. These facts would result in a finding for the Appellant. In this case, the lower court looked outside of the Complaint and relied on the affirmative defense of res judicata pled by the Respondent in their Answer, and the subsequent Reply by the Appellant. *See* R. pp. 12-13, 25. This contravenes our courts’ interpretation of SCRCR Rule 12(c).

Furthermore, the lower court's reliance on the Appellant's Reply to the Respondent's affirmative defense is particularly improper because a plaintiff is not required to reply to an affirmative defense. Rule 8(c) of the South Carolina Rules of Civil Procedure provides: "in pleading to a preceding pleading, a party shall set forth affirmatively the defenses [of]... res judicata... A party *may* file a reply to any of the foregoing affirmative defenses." (emphasis added).

In this case, the lower court improperly ruled on a 12(c) Motion when it relied upon the Reply instead of focusing the basis for its decision on the Complaint. Given the claims alleged in the Complaint and the reliance on an optional Reply, it was improper to grant the drastic relief of Judgment on the Pleadings.

## **II. THE LOWER COURT IMPROPERLY RELIED ON EXTRINSIC AND CONTESTED EVIDENCE TO GRANT RESPONDENT'S SCRCP 12(c) MOTION.**

In granting the Respondent's Rule 12(c) Motion, the lower court found that the Appellant was barred by res judicata from bringing this action. However, to determine if a claim is barred by res judicata, a court must inherently look to the contents of a prior court order. Such a court order is extrinsic evidence and, as such, improperly relied upon to grant a SCRCP Rule 12(c) Motion.

"To establish res judicata, three elements must be established: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." Sealy v. Dodge, 289 S.C. 543, 545, 347 S.E.2d 504 (1986); Owenby v. Owens Corning Fiberglas, 313 S.C. 181,183, 437 S.E.2d 130 (Ct. App. 1993). Even when the defendant meets all of the required elements, res judicata will not be applied "where it will contravene other important public policies; the courts must weigh the competing public policies." Johns v. Johns, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992).

In Sealy, the court found that Summary Judgment was not properly granted under the

doctrine of res judicata because the third element was not established according to the lower court order. Sealy at 545. Johns affirmed the dismissal of the lower court case under the doctrine of res judicata relying on testimony and the lower court order. Johns at 202-203. Finally, the court in Owenby found that res judicata barred the action relying on the written order. Owenby at 183-84. None of these decisions relied on pleadings to establish the elements of res judicata but relied on lower court orders.

Case law dictates that all three elements of res judicata must be established. In practice, the courts use evidence outside of the pleadings. The courts in Sealy, Johns, and Owenby looked to a written order to determine all the elements. The doctrine of res judicata cannot inherently be the sole ground for dismissal on a Motion for Judgment on the Pleadings because it relies on evidence outside of the pleadings. *See Sealy v. Dodge*, 289 S.C. 543, 545, 347 S.E.2d 504 (1986); *Owenby v. Owens Corning Fiberglas*, 313 S.C. 181,183, 437 S.E.2d 130 (Ct. App. 1993); and *Johns v. Johns*, 309 S.C. 199, 203, 420 S.E.2d 856, 859 (Ct. App. 1992).

A Motion for Judgment on the Pleadings is limited only to the Complaint. Therefore, it is impossible to grant a 12(c) Motion on the doctrine of res judicata. Instead, a motion to dismiss on the doctrine of res judicata should be heard pursuant to a Rule 56 Motion for Summary Judgment, just as SCRCP 12(c) itself anticipates.<sup>1</sup>

Furthermore, whether the relevant “prior court order” was, in fact, adjudicated on the issues set forth in the Complaint, is disputed. (R. pp. 23-24). To determine a prior adjudication on the

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<sup>1</sup> Rule 56(c) states that “A judgment sought shall be rendered forthwith 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.” Rule 56(c), SCRCP. In our case, this most likely would have resulted in a ruling for the Appellant because the lower court, in determining if res judicata was met, would have relied on Pleadings, Discovery, and Affidavits of the parties. All these documents compiled would more likely than not show the elements of res judicata were not satisfied, thereby finding in favor of the Appellant.

merits of a case, there must be an order demonstrating adjudication. Rules 41, 52, and 58 of the South Carolina Rules of Civil Procedure govern the issuance of an order in magistrate court.<sup>2</sup>

Rule 41 of the South Carolina Rules of Civil Procedure states “if the court renders Judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a).” Rule 41, SCRCPP. Under Rule 52(a), “the court shall find the facts specifically and state separately its conclusion of law thereon, and judgment shall be entered pursuant to Rule 58...” Rule 52(a), SCRCPP. Rule 58 states “the clerk .... shall forthwith prepare, sign, and enter the Judgment...the court shall promptly prepare the form of the Judgment, or direct counsel to promptly prepare the form of judgment, to which may be attached the decision, order or opinion of the court. . .every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and entered in the record...” Rule 58(a)-(b), SCRCPP. A judgment requires the preparation of a written document stating the facts, conclusions of law, and judgment which was signed by the judge and entered into the record.

To date, there is no final order or official disposition of the case the Appellant filed Pro Se in the Magistrate Court in 2018. (R. pp. 23-24). The parties directly dispute the final result of that case. (R. pp. 22-24). As such, the Respondent cannot prove all the required elements for dismissal on the doctrine of res judicata. Therefore, it was premature to rule that the defense of res judicata bars this action without such evidence. Reversal of the lower court does not preclude a later determination of this issue after the parties are able to gather the evidence that applies to a determination of res judicata.

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<sup>2</sup> The South Carolina Rules of Magistrate Court “shall govern...If no procedure is provided by these rules, the court shall proceed in a manner consistent with the statutory law applicable to magistrates and with circuit court practice in similar situations but not inconsistent with these rules.” Rule 2, SCRMC. No rules in Magistrate Court Rules discuss how a Judgment or order shall be presented. The Rule only states that “every order...shall be delivered to each of the parties unless otherwise ordered by the court.” Rule 8(a), SCRMC. Therefore, the Rules of South Carolina Civil Procedure govern the requirement of an order.

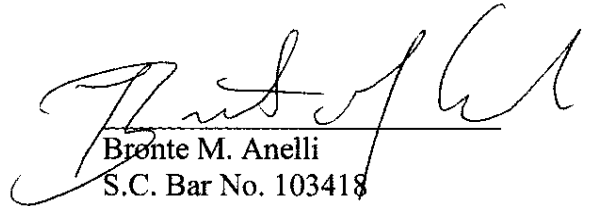
The Motion for Judgment on the Pleadings based on the doctrine of res judicata should have been denied.

### CONCLUSION

For the reasons stated, this Court should reverse the lower court's granting of Respondent's 12(c) Motion and remand this case to the lower court.

Respectfully submitted,

August 5, 2020



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The Honorable Benjamin H. Culbertson, Circuit Court Judge

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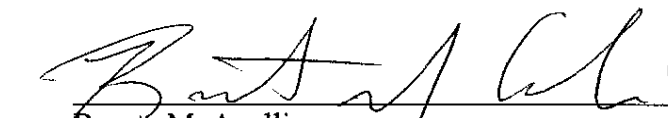
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**SC Court of Appeals**

The undersigned hereby certifies that the Appellant's Final Brief and Final Reply Brief comply with Rule 211(b) of the South Carolina Appellate Court Rules.

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