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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2019-001501

James John Todd Kincannon,

Appellant,

v.

Ashely Suzanne Griffith, Moore Taylor Law Firm, P.A., Vance Stricklin, and Amber Fulmer,

Respondents.

APPELLANT'S INITIAL REPLY BRIEF

Other Counsel of Record:
Ward Bradley
Moore Taylor Law Firm
1700 Sunset Blvd.
West Columbia, SC
Attorney for Respondents

James John Todd Kincannon
216 Jones Avenue
Simpsonville, SC 29681
864-963-4374
ToddKincannon@gmail.com
Appellant Pro Se

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INTRODUCTION

Appellant respectfully submits this brief in reply to Respondents' Brief in this matter. Appellant does not wish to waste this Court's time reading a rehash of arguments in Appellant's main brief. This brief principally seeks to (a) address matters that Appellant's main brief does not address but which have been raised in some fashion by Respondents in their brief and (b) point out apparent waivers of issues by Respondents where they have elected not to respond to some argument raised by Appellant's main brief.

ARGUMENTS

I

In reply to Respondents' argument numbered "I" in Respondents' Brief

Respondents' contention that their memorandum in support of their Rule 12(b)(6) was appropriate is obviously wrong and must be rejected by this Court. Respondents' contention that their untimely and improper supporting affidavit was not relied on by the circuit court is also wrong and must be rejected by this Court.

Respondents' Brief attempts to characterize Respondents' memorandum filed in support of their Rule 12(b)(6) motion to dismiss as a perfectly proper supporting memorandum. It is anything but. The South Carolina Rules of Civil Procedure do not expressly address what is proper for inclusion in a memorandum filed in support of a motion (also known as a brief). But by clear implication, the South Carolina Rules of Civil Procedure prohibit a party from including arguments in a supporting brief that are unrelated to the grounds stated in the motion itself. Respondents chide Appellant for not citing a reported South Carolina case on this point, but Appellant cannot find one, and the reason is obvious: this is such a clear point of law that no controversy has ever arisen over this particular issue that generated a published appellate opinion.

It is beyond obvious that a supporting memorandum may not include argument on grounds outside those raised in the motion itself, particularly where the supporting memorandum is filed a single day before the hearing on the motion. A trial court might choose to give some leeway to a party who filed a motion and memorandum at the same time more than ten days prior to the motion hearing—in that sort of situation, the party opposing the motion cannot complain

about unfair surprise. But no court can permit the proceedings to occur as they have in this case, where the movant filed a dispositive motion—a Rule 12(b)(6) motion—alleging only a single ground, then waited until the day before the hearing to serve a "supporting memorandum" that does not actually support the motion filed but, in truth, advances all sorts of different and additional grounds for dismissal that are not included in the motion itself and are entirely unrelated to the single ground for dismissal asserted in the motion itself.

Appellant trusts this Court to compare Respondents' single-ground motion to dismiss with Respondents' memorandum in support and conclude that the supporting memorandum makes all sorts of arguments for dismissal that have nothing to do with the single ground for dismissal raised in the motion to dismiss. Because of this, the circuit court should have sustained Appellant's objection to Respondents' supporting memorandum and should not have considered such improper material when issuing its ruling, which is plainly what happened—Respondents' memorandum in support tracks closely with the circuit court's order of dismissal, and it appears to be undisputed that the circuit court did in fact rely on Respondents' memorandum in support when issuing its ruling in this case.

Of note, Respondents do not appear to contest Appellant's claim that even if Respondents' memorandum complies with the South Carolina Rules of Civil Procedure, the fact that Respondents waited until the day before the hearing to serve and file the memorandum violates Appellant's federal and state due process rights by depriving Appellant of any reasonable opportunity to prepare and submit a well-researched and well-prepared response to all the various arguments for

dismissal which first appear in Respondents' memorandum and are entirely absent from Respondents' motion to dismiss. This Court should regard Respondents failure to dispute Appellant's constitutional claims on this issue as a waiver and rule that Appellant's constitutional due process rights were violated by Respondents' filing of a single-ground motion to dismiss then waiting until the day before the hearing to serve and file a "supporting memorandum" adding all sorts of different and additional grounds for dismissal that Appellant had no reasonable opportunity to respond to prior to the hearing.

Respondents' Brief also appears to concede Appellant's arguments that the affidavit Respondents filed in support of their Rule 12(b)(6) motion to dismiss—served one day prior to the hearing—was untimely (per Rule 6(d), SCRCP) and improper (per the well known principle of law that, with rare exceptions inapplicable to this case, Rule 12(b)(6) motions may not be supported by affidavits). Respondents obviously have no choice but to concede these points—the affidavit was indisputably untimely per Rule 6(d), SCRCP and is not within the very narrow category of affidavits that may properly support a Rule 12(b)(6) motion.

It appears that the only argument Respondents have elected to advance with respect to the affidavit is that the circuit court's failure to sustain Appellant's timely objection was harmless error, on the theory that the circuit court did not rely on the affidavit in issuing its ruling. A fair-minded comparison of the Order of Dismissal and the three filings Respondents made ((1) Respondents' motion to dismiss, (2) Respondent's memorandum in support of their motion to dismiss, and

(3) Respondents' affidavit in support of their motion to dismiss) shows that various material towards the end of the Order of Dismissal did not come from either the motion to dismiss nor the supporting memorandum but did come from the untimely and improper supporting affidavit. Specifically, the material where the circuit court concluded that Appellant is an "obsessive" litigant based on a review of the history of other litigation involving these parties, which was not and is not part of the record in this case, could only have come from Respondents' supporting affidavit and original research the circuit judge performed based on information contained in Respondents' supporting affidavit.

This is the only conclusion that can be supported by the record. Neither the motion to dismiss nor Respondents' memorandum in support of their motion to dismiss make any mention of Appellant being an "obsessive" litigant, nor do they suggest to the trial judge that outside-the-record research into other cases would be either necessary or advisable with respect to this case. The only filing made by Respondents that contains any material of that nature is the untimely and improper supporting affidavit, which the circuit judge plainly relied on, at least in part, in concluding that dismissal of Appellant's complaint with prejudice was proper because, as an "additional determining factor," Appellant is an "obsessive" litigant. See Order of Dismissal at 8. There is no possible source for these findings other than Respondent's untimely and improper affidavit (and whatever research the circuit judge was motivated to perform sua sponte upon reviewing Respondents' untimely and improper affidavit).

Respondents' contention that the foregoing errors are harmless is absurd.

By permitting Respondents to proceed in the manner they did, the circuit court prevented Appellant from preparing and filing a memorandum of his own in opposition to the arguments raised in Respondents' memorandum. Appellant had no time to prepare such a memorandum since Respondents served their memorandum introducing numerous additional grounds for dismissal only one business day prior to the hearing. The same thing happened with the affidavit—Appellant would ordinarily have prepared one or more counteraffidavits and submitted it to the court but because Respondents served their supporting affidavit in an untimely fashion, only one business day prior to the hearing, Appellant had no opportunity to prepare any counteraffidavits to contest the claims made in Respondents' supporting affidavit, many of which are patently false or intentionally misleading.

By permitting Respondents to—one business day prior to the hearing—serve a supporting memorandum which introduced numerous additional grounds for dismissal not part of the motion and a supporting affidavit which introduced numerous factual matters which Appellant had no time to respond to with counteraffidavits, the circuit court erred, and the error is clearly not harmless. The circuit court issued a ruling dismissing Appellant's complaint without giving Appellant a full and fair opportunity to be heard in opposition to Respondents' arguments and without giving Appellant a full and fair opportunity to counter Respondents (substantively improper) affidavit with counteraffidavits that would likely have prevented the circuit court from making many of the patently erroneous findings in this case.

II

In reply to Respondents' argument numbered "II" in Respondents' Brief

Respondents' contention that the circuit court's efforts to take judicial notice of interlocutory rulings in the divorce action between Appellant and Respondent Griffith is wrong and must be rejected by this Court.

Next, Respondents' Brief seeks to defend the indefensible manner in which the circuit court attempted to take judicial notice of three interlocutory orders issued in the divorce action between Appellant and Respondent Griffith. Yet the circuit court's actions with respect to judicial notice cannot be defended for two reasons: first, although the circuit court's Order of Dismissal purports to sua sponte take judicial notice of three interlocutory orders in the divorce action between Appellant and Respondent Griffith, at no point in time did the circuit judge or Respondents ever seek to include such orders in the record in this case (and Appellant obviously did not). Obviously a court cannot take judicial notice of the existence of a court order in some other litigation without making that order part of the record in the case where judicial notice is to be taken, but that did not happen here. The interlocutory orders the circuit court purported to take judicial notice of are not, and never have been, made a part of the record in this case. On that basis alone, the circuit court's decision to take judicial notice of the orders must be reversed—courts obviously cannot take judicial notice of documents that are never made part of the record.

Appellant has no doubt that if Respondents could respond to this reply brief, they would chide Appellant for failing to support this contention with a citation to caselaw. Appellant is unable to do so, however, because Appellant

cannot locate a single reported South Carolina appellate decision where a trial court attempted to take judicial notice of a document that none of the parties nor the judge ever sought to enter into the record in the case. Such a bizarre situation has never apparently come before a South Carolina appellate court before, but the novelty of the issue in no way makes the correct result hard to figure out. A court cannot take judicial notice of a document—a court order or otherwise—that is never made part of the record by any party or by the judge sua sponte. If the document is never made part of the record by any party or the judge, it is a nullity with respect to the case at hand. This is obviously a correct statement of the law, but the issue is so bizarre that Appellant cannot find any South Carolina caselaw to support it. Nonetheless, Appellant trusts this Court to rule correctly on the matter because, quite frankly, the opposite ruling—that a court can take judicial notice of a document that is never entered into the record—is patently absurd.

Amazingly, Appellant tried to correct this issue by way of his motion for reconsideration but the circuit judge refused Appellant's request for correction. Appellant expressly pointed out to the circuit court that the Order of Dismissal referenced three interlocutory orders (that it purportedly took judicial notice of) that were not part of the record below and that no party, nor the court, had ever sought to make part of the record below. Despite Appellant pointing out this problem in proceedings below both to the court and to Respondents, neither the circuit judge nor Respondents took any action whatsoever to include the interlocutory orders at issue in the record below.

This Court must therefore regard these interlocutory orders as nullities for

the purpose of this litigation and rule that even if the circuit court could have properly taken judicial notice of them, the circuit court failed to do so when it failed to make them part of the record in this case and denied Appellant's motion for reconsideration which sought to correct this error. This is a weird ruling but it is mandated in this case by the odd decisions of the circuit judge and Respondents to take no effort to correct the omission of the interlocutory orders from the record when Appellant raised the matter in good faith in his motion for reconsideration.

All that being said, even if the circuit court had properly entered the interlocutory orders in the record in this case when taking judicial notice of them, the manner in which the circuit court took judicial notice of the interlocutory orders nonetheless violates the due process protections in Rule 201(e), SCRE and independently Appellant's constitutional due process rights. Neither party asked the trial court to take judicial notice of anything, either in their filings prior to the hearing on the motion to dismiss or during the oral argument itself. The circuit judge elected to take judicial notice of the interlocutory orders referenced in the Order of Dismissal after the hearing was over. Appellant had no idea the circuit court intended to take judicial notice of anything until Appellant was served with the Order of Dismissal dismissing Appellant's complaint with prejudice.

This clearly violates the intent of Rule 201(e), SCRE, which purports to guarantee parties affected by judicial notice the opportunity to be heard with respect to judicial notice:

> **(e) Opportunity to Be Heard.** A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence

> of prior notification, the request may be made after judicial notice has been taken.

Rule 201(e), SCRE.

The record below indicates that the circuit court never gave Appellant any opportunity to be heard as to the propriety of taking judicial notice of the interlocutory orders referenced in the Order of Dismissal. The court had already taken judicial notice of these matters *and* issued an order dismissing the entirety of Appellant's complaint with prejudice before Appellant had any idea that the circuit court was even considering taking judicial notice of anything. This is plainly not what Rule 201(e), SCRE intends, nor is it permissible under constitutional due process considerations.

Whenever a participant in a case attempts to introduce evidence—whether that participant be a party or the judge acting sua sponte—every other party has a constitutional right to be heard on any objections the party might have *and* to introduce his own responsive evidence. These constitutional due process principles apply just as much to judicial notice as they do to ordinary means by which parties present evidence in a case. Even if Rule 201(e), SCRE did permit the circuit court to proceed in the fashion that it did in this case, Appellant's federal and state constitutional due process rights would still be violated. Appellant had and has a clear right to respond to any judicially noticed matter both with objections and with the submission of additional evidence related to the matter judicially noticed *prior* to the circuit court issuing a final ruling in the matter. Respondents would likely chide Appellant for failing to cite a reported

South Carolina judicial decision for this proposition but, as is the case with much of what has happened in this case, the situation is so bizarre that it doesn't appear that any prior South Carolina appellate court has dealt with this precise issue before.

The absence of precedent, however, in no way makes this decision difficult. The essence of constitutional due process is notice and an opportunity to be heard. To whatever extent Rule 201, SCRE permits a trial court to do what was done in this case, it is unconstitutional as applied to Appellant. The circuit court had a duty to advise Appellant of its intention to take judicial notice of the interlocutory orders referenced in the Order of Dismissal *prior* to issuing the Order of Dismissal, and the circuit court had a duty to hear any objections Appellant might have and receive any additional argument or evidence Appellant might wish to submit in good faith responsive to the judicially noticed matters prior to issuing a final ruling dismissing Appellant's complaint with prejudice. This is basic constitutional due process, and it is crystal clear that Appellant was denied basic constitutional due process in this case.

III

In reply to Respondents' argument numbered "III" in Respondents' Brief

Respondents contend that any effort Appellant might make to cure or avoid the various pleading deficiencies Respondents have alleged would be futile because the pleading deficiencies are incurable. Appellant has outlined to this Court what he would do if given a single opportunity to amend his pleading, and a review of Appellant's intentions with regard to an amendment pleading indicates that Appellant has a good faith belief that he can amend the complaint such that it will survive a Rule 12(b)(6) motion, at least in part. In accordance with the policies underlying Rule 15, SCRCP, Appellant respectfully submits that this Court should freely give Appellant one single

opportunity to submit an amended complaint to the circuit court.

Appellant has nothing to add to the foregoing except this: Appellant twice sought leave to file an amended complaint in the circuit court, once at the hearing on Respondents' motion to dismiss and once by way of Respondents' motion for reconsideration of the order of dismissal. Respondents did not oppose Appellant's request for leave to amend in either case. Based on that alone, this Court should remand this case to the circuit court with instructions to permit Appellant to file a single amended complaint which Respondents will then be free to attack by way of Rule 12(b)(6) or any other grounds for dismissal or summary judgment they can come up with in good faith.

IV

In reply to Respondents' argument numbered "IV" in Respondents' Brief

Respondents contend that the circuit judge in this matter properly denied Appellant's motion for judicial disqualification. Appellant contends that the circuit judge did not rule on the motion for judicial disqualification, and the record supports Appellant's contention. The only relief Appellant seeks is that if this Court is so minded to affirm the rulings of the circuit court and deny Appellant an opportunity to file an amended complaint, the Court first remand the case to the circuit court with instructions for the circuit judge who ruled on the motion to dismiss to either (a) rule on Appellant's motion for judicial disqualification or (b) state that he has already done so and thereby create a record that Appellant can appeal from.

Appellant has nothing to add to the foregoing.

V

In reply to Respondents' argument numbered "V" in Respondents' Brief

Respondents contend that the circuit court correctly dismissed each of Appellant's causes of action. Appellant's contention is that the circuit court's ruling was improper because the court relied on Respondents' improper supporting memorandum and untimely and improper supporting affidavit in

deciding Respondents' Rule 12(b)(6) motion. Had the circuit court limited itself to what was properly before it—Respondents' motion and Appellant's memorandum in opposition—the circuit court would have ruled for Appellant and denied Respondents' motion to dismiss.

Respondents contend that the circuit court correctly dismissed each of Appellant's causes of action. But this argument presumes that the circuit court correctly considered Respondents' memorandum in support of the motion to dismiss and Respondents' affidavit in support of the motion to dismiss. As Appellant argued in his main brief, and in section I of this brief, the circuit court erred by permitting Respondent to make any arguments for dismissal beyond the single "prosecutorial control" ground asserted in Respondents' motion to dismiss itself.

CONCLUSION

In conclusion, Appellant respectfully requests this Court fashion a ruling that will allow Appellant an opportunity to submit an amended complaint in this matter or to otherwise proceed on the original unamended complaint.

Respectfully submitted,

August 13, 2020

James John Todd Kincannon
216 Jones Avenue
Simpsonville, SC 29681
864-963-4374
ToddKincannon@gmail.com
Appellant Pro Se

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CERTIFICATE OF SERVICE

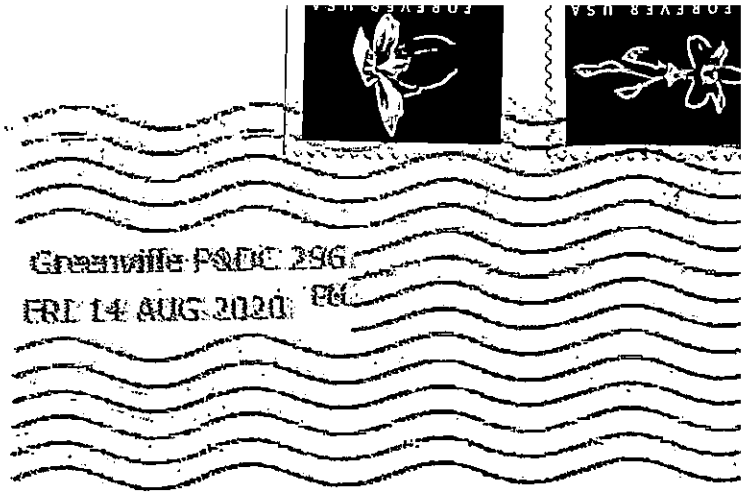
The undersigned Appellant hereby certifies that he has, on the date below, properly served the foregoing on opposing counsel at the address submitted by opposing counsel to the Court for service in this case.

August 13, 2020

James John Todd Kincannon

216 Jones Ave

Simpsonville, SC 29681



South Carolina Court of Appeals

Attn: Clerk's Office

P.O. Box 11629

Columbia, SC 29211