

**FORM 13
INITIAL BRIEF OF APPELLANT**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr, Judge

Case No. 2017-CP-04-02099
Appellate Case No. 2020-000421.

RECEIVED

Sep 22 2020

SC Court of Appeals

John Harbin,

Appellant,

v.

April Blair, Tracy Dunn, HUB Enterprises, Inc.,
Shawn Conway, Gallivan White & Boyd,
Sam Nikopoulos, and John Doe,

Respondents,

INITIAL BRIEF OF APPELLANT

Anderson, South Carolina
September 21, 2020

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- Franks v. Ross, 313 F.3d 184,192 (4th Cir. 2002)
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- Jackson v. Bi-Lo Stores, Inc., 437 S.E.2d 168, 171 (S.C. Ct. App. 1993)
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- Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995)
- Storey v. Cello Holdings, L.L. C., 347 F.3d 370, 391 (2d Cir. 2003)
quoting O'Brien v. Alexander, 101 F.3d 1479, 1589 (2d Cir. 1996)
- U.S. Midgett, 342 F.3d 321 (4th Cir. 2003), citing Nix v. Whiteside, 475 U.S. 157 (1986)
- Webb v. Elrod, 418 S.E.2d 559, 561 (S.C. Ct. App. 1992)
- Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct.App. 2001)
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STATUTES

SC Rules of Civil Procedure

Rule 12(b)(6), SCRPC

S.C. Code Annotated

§ 15-36-10(A)(4)(a)(ii) (2005

§ 15-36-10(C)(1).

§15-36-10(E)

§ 15-36-10(G).

Other Statutes

Restatement (Third) of Torts, §§ 16-17,

STATEMENT OF ISSUES

- I. **WHETHER THE LOWER COURT ERRED IN DISMISSING APPELLANT’S COMPLAINT.**
- II. **WHETHER THE LOWER COURT ABUSED ITS DISCRETION IN IMPOSING SANCTIONS AGAINST APPELLANT UNDER SCFPSA.**

STATEMENT OF FACTS

I. **THE GENESIS OF THIS ACTION (2014 Lawsuit)**

Sometime in 2012, Respondents April Blair (hereinafter referred as “Blair”) and Tracy Dunn (hereinafter referred as “Dunn”), who were living together, invited Appellant John Harbin (hereinafter referred as “Appellant”) to stay with them in exchange for his performance of general labor on Blair’s house. Appellant had just finished work on Blair’s mother’s house and had received her vote of confidence. Initially, the three co-existed satisfactorily. At some point, Blair and Dunn had a misunderstanding, causing Blair to throw Dunn out of her home.

Blair and Appellant had a brief sexual relation, which the former immediately regretted. To assuage her conscience, Blair called Dunn after a night of “lovemaking” (according to Blair) and gave him reason to believe Appellant had raped her. Dunn, armed with a gun, arrived shortly thereafter on his moped under the auspices of bringing dog food. Dunn immediately confronted Appellant. Appellant recognized Dunn’s furor; grabbed his things; and went to the front yard to await a ride. Dunn made his way to the front yard and approached Appellant, ultimately shooting him in the lower leg. Appellant sustained serious injuries and had to be airlifted to Anmed, where he had to be confined.

Blair, in an attempt to justify her boyfriend’s actions, claimed Appellant had raped her that morning, though she admitted spending the previous evening making love with him. She also maintained he had molested her when she was much younger. Despite this fact, she had

made love to him and allowed him to reside in her home with Dunn and her son.

Following the shooting, Dunn was picked up from the house by a passing motorist. He was eventually found at Blair's home. After he was picked up, he made several conflicting statements about his involvement in the shooting. Dunn first claimed Appellant shot himself. He also offered he was attempting to shoot the ground in front of Appellant.

On December 29, 2014, Appellant brought a case for damages against Blair and Dunn for the latter's act of shooting and injuring the former. Dunn resumed his romantic relationship with Blair, upon her release from jail (she had been arrested for drug possession on the day of the shooting).

At some point, Blair had Dunn arrested for Criminal Domestic Violence of a High and Aggravated Nature. It was alleged Dunn had held a gun to Blair's head. Dunn was on probation having pled guilty to Assault and Battery of a High and Aggravated Nature (for the shooting of Appellant) on February 15, 2016 and was swiftly incarcerated where he would remain, until the CDV charge and violation of probation were addressed.

On June 21, 2016, Respondent Gallivan White & Boyd (hereinafter referred to as "GWB") sent its attorney on the case, Robert Corney to the Abbeville Detention Center to visit Dunn. Shortly after Corney's visit to Dunn at the jail, the latter was deposed. It was during this deposition Dunn admitted, for the first time, he intended to shoot Appellant, and denied Blair's responsibility.

A trial was held November 28-30, 2016. Since Dunn had already pled guilty and been sentenced for the shooting, Double Jeopardy applied to any statements Dunn made. Thus, Dunn stuck to his statements in his deposition, taking sole responsibility for the shooting. Blair denied involvement in the shooting incident.

A jury verdict was rendered in favor of Blair, the jury finding she was not liable for Appellant being shot. Following the trial, Respondent Blair informed the Public Defender's Office of her preference to dismiss the CDV case she filed against Respondent Dunn, despite the fact he had allegedly pointed a gun at her. She requested the dismissal within days of the verdict.

With their victory in hand, Blair and GWB moved for costs pursuant to an Offer of Judgment. Blair sought to be reimbursed for expenses spent on surveillance of Appellant provided by Respondents HUB and Conway. This was the first time Appellant learned of the involvement of a private investigator. Appellant challenged the same as neither the investigator nor the surveillance report was provided during the discovery stage. Appellant was deposed on November 2015, while the surveillance was conducted on June 4, 7 and 8, 2016.

Appellants made post-trial motions which were denied.

II. PRESENT LAWSUIT

Believing in good faith GWB and its agents performed acts to cheat Appellant of his day in court, he filed suit. It was his contention the acts of the defendants interfered with counsel's ability to try the case. The defense, recognizing the strength of Appellant's case, had extended an offer of \$100,000.00. Being unaware of the clandestine dealings amongst Co-defendants and counsel, Appellant declined the offer based on the magnitude of the permanent injuries he had sustained. Appellant filed this action on October 9, 2017 in an effort to recoup what was lost in the prior trial.

Tortious Interference by Blair and Dunn

Appellant believed Blair and Dunn conspired to defeat his claims by entering into a quid pro quo arrangement where Dunn was to take sole responsibility for Appellant's shooting and

in turn Blair was to dismiss her CDV case against Dunn.

Tortious Interference by GWB and its agents

Appellant claimed GWB was liable for tortious interference when it allowed its agent(s) to act as go-between and/or facilitator for the quid pro quo agreement. Appellant posits it was during Corney's visit to Dunn on June 21, 2016, when he relayed Blair's intent to dismiss the CDV case against Dunn if the latter confessed to the shooting, and absolved Blair.

Tortious Interference by HUB and Conway

Conway submitted a surveillance report and an affidavit indicating his surveillance had never included Appellant. Appellant and his live-in girlfriend executed affidavits which opined they had never left their home citing his injuries and a lack of finances. According to Appellant's affiant, also a private investigator, the surveillance video had been altered.

Appellant believes HUB is responsible for the conduct of Conway pursuant to respondeat superior and in presenting and/or submitting manufactured surveillance and its accompanying report to GWB.

On November 8, 2017, GWB moved to dismiss the Complaint against it, alleging as the lawyer for Blair, it could not be held liable for actions it took in representation of Blair. On November 13, 2017, Appellant amended his Complaint. On December 6, Respondent HUB moved to dismiss the case against it, while Blair moved to dismiss the case against her on December 13, 2017. Appellants opposed each of Respondents' motions.

On February 5, 2019, the Court granted GWB's Motion to Dismiss and dismissed Appellant's Amended Complaint. On February 15, 2019, Appellant moved to reconsider the dismissal of his Complaints against each Respondent.

GWB filed its Opposition to Appellant's Motion for Reconsideration, February

25, 2019, while HUB filed their opposition on March 13, 2019. The Court denied Appellant's Motion for Reconsideration against GWB in its Order dated October 2, 2019, and against HUB and Conway in its Order dated October 7, 2019.

GWB's Motion for Sanctions

On February 13, 2019, GWB moved for sanctions against Appellant's counsel. It was opposed by Appellant. The Court granted GWB's Motion for Sanctions in its Order, dated October 9, 2019.

Appellant moved to reconsider but was denied by the lower court in its Order dated February 3, 2020. Appellant perfected his appeal on March 3, 2020.

STANDARD OF REVIEW

FOR THE DISMISSAL OF THE COMPLAINT

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCPP, the appellate court applies the same standard of review as the trial court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct.App. 2001). A motion to dismiss can only be granted if there is no set of facts would entitle Appellant to a verdict on the claims in issue. Applicable standards state the facts alleged in the complaint are accepted as true. *Scheuer v. Rhoades*, 416 U.S. 232, 236 (1974); *Franks v. Ross*, 313 F.3d 184,192 (4th Cir. 2002). In addition, all reasonable inferences must be made in favor of Appellants. *Johnson v. Mueller*, 415 F.2d 354 (4th Cir. 1969); *MacKethan v. Peat. Marwick. Mitchell & Co.*, 439 F. Supp. 1090 (E.D. Va. 1977).

In ruling on a motion to dismiss for failure to state a claim, it must be recalled the purpose of a 12(b) (6) motion is to test the sufficiency of the complaint, not to decide the merits of the action. *Schatz v. Rosenberg*, 943 F.2d 485, 489 (4th Cir. 1991). At this stage of the litigation, Appellant's allegations are to be taken as true and the complaint, including all

reasonable inferences therefrom, are liberally construed in the Appellant's favor. McNair v. Lend Lease Trucks, Inc., 95 F.3d 325, 327 (4th Cir. 1996).

LEGAL STANDARD FOR SCFCSPA

The South Carolina Frivolous Civil Proceedings Sanctions Act (hereinafter referred to as "SCFCPSA") provides an attorney or party filing a frivolous pleading may be sanctioned if "a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of existing law." S.C. Code Ann. § 15-36-10(A)(4)(a)(ii) (2005). A court shall proceed to determine if a claim or defense was frivolous after a case has been dismissed by summary judgment. S.C. Code Ann. § 15-36-10(C)(1).

The SCFCPSA provides an attorney shall be sanctioned for a frivolous claim or defense if the court finds the attorney failed to comply with one of the following conditions:

- (a) a reasonable attorney in the same circumstances would believe that under the facts, his claim or defense was clearly not warranted under existing law and that a good faith or reasonable argument did not exist for the extension, modification, or reversal of law;
- (b) a reasonable attorney in the same circumstances would believe that his procurement, initiation, continuation, or defense of the civil lawsuit was intended merely to harass or injure the other party; or
- (c) a reasonable attorney in the same circumstances would believe that the case or defense was frivolous as not reasonably founded in fact or was interposed merely for delay, or was merely brought for a purpose other than securing proper discovery, joinder of proposed parties, or adjudication of the claim or defense upon which the proceedings are based.

S.C. Code § 15-36-10(C)(1)(a)-(c).

Upon this determination, a court may award sanctions including the reimbursement of

reasonable costs and attorney's fees of the prevailing party under a motion pursuant to SCFCPSA. S.C. Code § 15-36-10(G). Costs shall include, but are not limited to, the time required of the prevailing party by the frivolous proceeding, and travel expenses, mileage, parking, costs of reports, and any additional reasonable consequential expenses of the prevailing party resulting from the frivolous proceeding. Id. Following the determination of facts, an appellate court applies an abuse of discretion standard in reviewing the decision to award sanctions and the specific sanctions awarded under SCFCPSA. Horry County v. Parbel, 378 S.C. 253, 662 S.E.2d 466 (Ct. App. 2008).

ARGUMENTS

I.

THE LOWER COURT ERRED IN DISMISSING THE COMPLAINT.

Under South Carolina law, the elements of a cause of action for tortious interference with contract are: (1) the existence of the contract; (2) the other party's knowledge of the contract; (3) the other party's intentional procurement of a breach of the contract; (4) the absence of justification; and (5) resulting damage. Webb v. Elrod, 418 S.E.2d 559, 561 (S.C. Ct. App. 1992). A tortious interference claim, thus "presupposes the existence of a valid, enforceable contract." Jackson v. Bi-Lo Stores, Inc., 437 S.E.2d 168, 171 (S.C. Ct. App. 1993).

The Respondents were very much aware of the attorney-client contract between Appellant and his counsel. The intentional act of breach of contract was Corney acting as a messenger for his client to broker a deal with his client's co-Respondent. He also closed the deal by instructing Dunn double jeopardy prevented the State from going back on his plea agreement for shooting Appellant. The explanation cleared the way for Dunn to say without reservation he meant to shoot Appellant, though he had never stated it previously. The agreement was for Dunn

to admit sole responsibility over the shooting of Appellant, in exchange for the dismissal of the Blair's CDV charges against him.

There is no justification in Respondents' agent's actions, other than to ensure a positive result for their side. The agreement entered into outside the confines of the courtroom played a significant role in the outcome of the trial. Appellant was not privy to the agreement; and, therefore, could not put it before the jury to illustrate the conduct of the Respondents. As a result, he was deprived of due process and the opportunity to be awarded for the damages he sustained.

With regard to the HUB and Conway, the act of submitting manufactured evidence was an intentional act breached attorney-client contract. By presenting falsified evidence, such as Conway's Affidavit and Surveillance Report, HUB and Conway assisted Blair in not only claiming a baseless reimbursement, but also deprived Appellant of the economic advantage he may be derived from the attorney-client contract.

Appellant asserts the individual and collective acts of the Respondents significantly impaired his counsel's performance of his legal duties to herein Appellant. This is the breach of attorney-client relationship which was the basis for the filing of this suit.

Appellant believes all the elements of tortious interference with contract are present in this case. The Court should have allowed Appellant to flesh out his claims against GWB and its agents.

II.

THE LOWER COURT ABUSED ITS DISCRETION IN GRANTING THE SANCTIONS AGAINST APPELLANT AS THE CLAIM DOES NOT SATISFY THE REQUIREMENTS OF SCFPSA.

A. The claim has a basis in law and fact and is warranted by existing caselaw.

1. Basis in Law

The Restatement (Third) of Torts, §§ 16-17, address liability for economic harm. Specifically, Section 16 sets out the elements of the intentional interference with a contract. It defines what conduct creates liability:

- (1) A defendant is subject to liability for interference with contract if:
 - (a) a valid contract existed between the plaintiff and a third party;
 - (b) the defendant engaged in wrongful conduct as defined in Subsection (2);
 - (c) the defendant intended to cause a breach of the plaintiff's contract or disruption of its performance; and
 - (d) the defendant's wrongful conduct caused a breach of the contract or disruption of performance.

- (2) Conduct is wrongful for purposes of this Section if:
 - (a) the defendant acted for the purpose of appropriating the benefits of the plaintiff's contract; or
 - (b) the defendant's conduct constituted an independent and intentional legal wrong; or
 - (c) the defendant engaged in the conduct for the sole purpose of injuring the plaintiff.

(Restatement (Third) of Torts: Liability for Economic Harm § 16).

As discussed in the previous section, Appellant satisfied the elements of tortious interference with contract. To briefly sum up:

(a) Appellant had a valid and enforceable contract with his counsel.

Appellant entered a valid contract with his counsel shortly after being shot in 2014. Counsel for Appellant is required to have a contract in order to represent his interests to others. The act of commencing litigation illustrated to Respondents that a contract existed between Appellant and his attorney of record.

(b) Respondents had knowledge of Appellant's contract with his counsel.

Respondents knew of the contract existing between Appellant and his counsel as most of them were parties to the 2014 Lawsuit. Respondents were served with the Summons and

Complaint seeking damages for Appellant's injuries. Appellant's counsel set out the actions by Blair obligating her to pay damages to Appellant.

(c) The interference of Respondents caused damage to Appellant.

As previously discussed, the acts of interference each Respondent committed were as follows:

- i. Blair instigated a quid pro quo arrangement with Dunn, that if he absolved Blair of any connection on Appellant's shooting, that she will in turn dismiss her CDV charges against him.
- ii. Corney and Nikopoulos visited Dunn at the detention center and relayed Blair's proposition and advised Dunn on legal issues such as double jeopardy. Blair and Dunn could not communicate pursuant to the bond conditions given to Dunn. Despite the fact Dunn could not make bond, he was prohibited from interacting with Blair, whether directly or indirectly. Blair's defense counsel circumvented the Order of the Court. He broached the topic of Dunn admitting intent to shoot Plaintiff. He used the admission and the statement regarding Blair's lack of liability to ultimately influence the jury in reaching the verdict depriving Plaintiff of a fair trial.
- iii. HUB and Conway submitted surveillance video created when it was subpoenaed. The video provided did not display anything related to Appellant. Appellant and his girlfriend did not leave the residence due to their lack of funds and the significance of injuries suffered by him.

As proof of this quid pro quo arrangement, Counsel for Appellant obtained an Affidavit from Clarence Tillman, Dunn's cousin who was present during the shooting incident. In his Affidavit, Tillman mentioned that he was detained in the same detention center as Dunn when the latter was awaiting the result of his CDV charges. Tillman stated Dunn confided to him he was working with and/or corresponding with Blair's lawyer to eliminate the pending CDV charge filed by Blair against him. Dunn was to deflect any liability for the shooting away from Blair and deny her calling him about Appellant allegedly raping her. Dunn was to admit during his deposition and the trial he intentionally shot Appellant. Dunn had no chance of any further persecution due to Double Jeopardy applying.

Kami Granade, a public defender in charge of Dunn's defense in the CDV case (and who happened to represent Tillman for his charge/s) executed two Affidavits. Granade attested among others: (a) she represented both Dunn and Tillman in separate charges, when both were detained during late 2016 and early 2017; (b) sometime in December 2016, Blair contacted her about her CDV charge against Dunn and informed her she intended to dismiss the charge against Dunn; (c) Blair was present at Dunn's CDV plea hearing but did not stay for the plea; (d) Granade communicated to the court Blair's intent not to proceed with the CDV charge.

24. County, Your Honor. Mr. Dunn's long-time girlfriend and the
25. victim in this case her name is April Blair. She was
01. actually here earlier, but she had to leave. I can tell
02. the court that Ms. Blaire did not want to pursue these charges.
03. She preferred that they had been dismissed, but of course
04. that is not within her power...

(Transcript of Plea Hearing of Tracy Dunn, June 21, 2017, p. 9, 24.25 & p. 10, 1.4).

The shooting incident was on June 24, 2014. On the same date, Dunn released his signed initial statement to the deputies, denying shooting Appellant. Corney visited Dunn at the detention center on June 17 and 21, 2016. Dunn's deposition was on July 14, 2016. where he first admitted sole responsibility for Appellant's shooting. Dunn testified during the trial of the case on November 30, 2016. Tillman's Affidavit was signed on February 2017. Dunn's plea hearing for his CDV charge was June 2017. Granade's Affidavit was signed February 8, 2018.

Clearly, Tillman knew Blair would ask for the dismissal of the charges against Dunn, months prior to the scheduled plea hearing. This only bolsters the veracity of his statements in his Affidavit.

(c) Respondents' unethical conduct was not justified.

Appellant recognizes the Respondents as adversaries in the litigation process. As such, they had a duty to refute his contentions. However, using extrinsic fraud to accomplish their objectives is unacceptable. It is the wrongful conduct that interfered with his contract with his counsel.

Extrinsic fraud is a “fraud that induces a person not to present a case or deprives a person of the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action.” Hilton Head Ctr. of South Carolina v. Public Serv. Commission, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987). Extrinsic fraud is "collateral or external to the matter tried such as misleading acts which prevent the movant from presenting all of his case." Evans v. Gunter, 294 S.C. 201 525, 529, 366 S.E.2d 44, 46 (Ct.App.1988).

(d) Appellant suffered significant damages as result of the unethical interference.

Appellant opines Respondents’ pre-trial offer of \$100,000.00 constitutes the floor of the damages resulting from their conduct. Appellant was confident a jury would see the conduct of Blair, fabricating rape scenarios involving Appellant and offering them to her violently jealous boyfriend, to be outrageous. Clearly, Respondents recognized the potential for a significant verdict given the value of the offer-an offer made with knowledge of the *quid pro quo* agreement.

2. Case Law

In its Order, dated February 5, 2019, the Court dismissed Appellant’s complaint for tortious interference with contract against GWB, affirming the doctrine laid down in Gaar v. North Myrtle Realty Co., Inc. 287 S.C. 525, 399 S.E.2d 887 (Ct. App. 1996). Appellants submit

this Court failed to appreciate the aforesaid doctrine of immunity is not absolute.

The case of Stiles v. Onorato, 318 S.C. 297, 457 S.E.2d 601 (1995) and Douglas ex rel. Louthian v. Boyce, 344 S.C. 5, 542 S.E.2d 715 (S.C., 2001) discussed an exception to the general rule a lawyer is not liable to a non-client or third person from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client. Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions, 388 S.C. 394, 697 S.E.2d 551 (S.C., 2010). The Court in *Stiles* and *Douglas* held an “attorney may be held liable where, in addition to representing his client, 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.” This exception to the doctrine of immunity was not applied in Douglas, because the attorney representing the personal representative in a wrongful death action has no independent duty to the statutory beneficiaries. Douglas ex rel. Louthian v. Boyce, 344 S.C. 5, 542 S.E.2d 715 (S.C., 2001). The exception does not apply as well in the *Argoe* case cited by this Court.

In *Argoe*, the appellant took out a loan against a condominium she owned in Beaufort County, South Carolina. She allowed the same to go in default. Prior to this, appellant appointed her Son as Attorney-in -Fact. The Son procured respondent’s services. Respondent assisted Son in the transfer of title to the Beaufort Property to a trust for the benefit of appellant. Ibid. Appellant filed a case against Respondent for breach of fiduciary duty, breach of trust, invasion of privacy, intentional infliction of emotional distress, violation of civil rights, conspiracy, conversion, and abuse of process. Ibid.

The Court held since appellant was not respondent’s client, he had owed her no duty of care. The case did not fall under the exception to the rule. In the instant case however, Appellant submits GWB has acted outside the scope of its representation of its client.

Appellant believed in good faith based on affidavits of Michael Moske and Lewis Tillman that Rob Corney, the attorney representing Respondent Blair and an associate of GWB, facilitated and conspired with Respondent Blair and her co-Respondent Tracy Dunn to manufacture testimony in a prior case to attempt to eliminate the CDV charge.

Corney did not disclose GWB and Blair hired HUB Enterprise and Shawn Conway as private investigators, until the prior case was over. Appellant was unable to depose the private investigators. GWB submitted videos and reports written by Conway and HUB Enterprise which were found to have been altered. (Affidavit of Michael Moske). To aggravate the situation, GWB and Respondent Blair claimed fees paid to the investigator as reimbursement for their client's expenses. Appellant believes it is inequitable to require him to pay for something that had not been previously provided in discovery. GWB and Blair acted in an unethical manner.

Appellant insists that GWB's non-disclosure of the services of private investigator deprived him of his right to confront, and present his case, against Respondents Blair and Dunn. Furthermore, allowing the introduction of, and submitting altered videos by GWB's agent, HUB Enterprise and Conway, constitute fabrication of evidence. GWB's acts take this case outside the scope of its representation of Blair.

Tillman in his Affidavit stated his cousin, Respondent Dunn, confided in him about the plan for Dunn to testify in court, claiming sole responsibility for the shooting of Appellant. (Exhibit 2-Affidavit of Lewis Tillman). This would clear Blair from any culpability. In turn, Blair would withdraw her pending CDV charge against Dunn.

This belief was bolstered by Corney's visit in the jail where Dunn was incarcerated. (GWB Counsel visit to Dunn). This visit was in June 2016. Prior to this visit, Dunn denied shooting Appellant. (Dunn's Incident Report). On July 14, 2016,

Respondent Dunn changed his tune and admitted to intentionally shooting Appellant. (Deposition Transcript, Tracy Dunn). On November 30, 2016, Appellant's case against Blair was dismissed due to Dunn's admission, and thereafter, Blair dismissed her CDV case against Dunn. (Trial Transcript, Tracy Dunn, June 21, 2017). There can be no other conclusion than something made Dunn change his statements. The circumstances preceding and subsequent to his admission of sole culpability showed a deliberately planned and carefully executed scheme to defeat Appellant's cause. Appellant believes Dunn and Blair engaged in a *quid pro quo* agreement, which was facilitated by Blair's counsel. This is a subornation of perjury and is outside of the scope of GWB's representation of Blair.

Counsel's duty of loyalty to and advocacy of his client's cause is limited to legitimate, lawful conduct. Although counsel must take reasonable lawful means to attain his client's objectives, a counsel may not assist a client in making material misrepresentation nor in presenting false evidence or otherwise violating the law. As ruled in the case of *Nix v. Whiteside*, "the right to counsel includes no right to have a lawyer who will cooperate with planned perjury". *Nix v. Whiteside*, 475 U.S. 157 (1986) cited at *U.S. Midgett*, 342 F.3d 321 (4th Cir. 2003).

Appellant submits GWB acted outside the scope of its representation of its client, and as such, it fell under the exception to the doctrine of immunity of lawyer.

B. Appellant's counsel has conducted a reasonable inquiry into the allegations contained in the Complaint.

A complaint . . . is frivolous where it lacks and arguable basis either in law or fact." *Neitze v. Williams*, 490 U.S. 319, 325 (1989). Appellant submits the allegations and factual contentions in this case have evidentiary support. Jurisprudence provides sanctions may not be imposed unless a particular allegation is utterly lacking support. *Storey v. Cello Holdings, L.L.*

C., 347 F.3d 370, 391 (2d Cir. 2003) quoting O'Brien v. Alexander, 101 F.3d 1479, 1589 (2d Cir. 1996).

Prior to filing this suit, Appellant and his counsel conducted investigation of the facts he would be required to prove to substantiate his claim. Appellant was able to procure, and has in fact submitted the following material evidence: (1) Affidavit of Clarence Tillman (Dunn's cousin), who swore Dunn confided in him about the arranged testimony; (2) Incident Report showing Dunn's statements to the investigating officers which did not contain any verbiage describing an intentional shooting of Appellant; (3) document denoting Corney's visit to Dunn immediately prior to Dunn announcing he purposefully shot Appellant in his deposition; 4) excerpts of Dunn's trial transcript, in which he admitted deliberately shooting Appellant ; and, (5) Affidavit of Dunn's defense counsel, Kami Granade, stating that Blair communicated her desire to dismiss the CDV charge against Dunn immediately following completion of the trial for Appellant's shooting.

Appellant presented concrete evidence a reasonable attorney would find justifiable for the initiation of the present case. Appellant asserts the complaint was well-grounded in fact. Appellant provided evidence from different sources which was essentially the same. Based on the facts and circumstances regarding the conspiracy which were presented, a reasonable attorney would logically deduce the actions of the Respondents were improper and tainted the litigation. Based on that attorney's obligation to his client, he would have no alternative than to seek the damages rightfully due Appellant from those who fixed the game. The willful and wanton conduct of Respondents stripped Appellant and his counsel of the ability to get due process.

C. The initiation of this lawsuit was intended to right a wrong and did not cause any injury nor harassment to other party.

Contrary to Respondents' contention, this suit was not an attempt to relitigate a prior lawsuit. Since the cause of action in this case was an offshoot of the acts and omission of parties involved in the previous action, the involvement of similar factual allegations may not be avoided.

Appellant states he was not motivated solely by the financial gain in pursuing his claim against the Respondents. Appellant filed the instant case upon discovery that the Mr. Corney and other agents of GWB met with Dunn, and after such meeting, Dunn changed his statement on the shooting incident. Also, Appellant found out GWB performed surveillance on him, without providing him a copy of the video during the trial. In addition, when Appellant was presented with the video and report of the surveillance, the same was found manufactured and/or altered. Presented with this evidence, any reasonable attorney would believe in good faith GWB performed acts which were intended to subvert justice and interfere with Appellant's professional relationship with his counsel. In fact, given these facts, an attorney would be required to zealously advocate for his client as done in this case.

In its Order, dated October 9, 2019, the court stated, "that any reasonable attorney would believe that the filing of the Current Lawsuit was frivolous." During the hearing for Appellant's Motion for Reconsideration of the Order granting GWB's Motion for Sanctions, the Circuit judge recognized that the acts performed by Corney may be cognizable by the Office of Disciplinary Counsel. This, in and of itself, shows that the judge found colorable argument to be made.

22. MR. SMITH: Your Honor, in Stiles versus Onorato,
23. an attorney may be held liable for conspiracy where, in
24. addition to representing his client, he breaches some
25. independent duty to a third person or acts in his own
01. personal interest, outside of the scope of the

02. representation of his client.
03. The idea of going to the person that doesn't
04. represent and telling him that if he should help her in
05. her civil action, then she's going to help him in the
06. criminal action, that's not -- that's outside his
07. scope.
08. THE COURT: Wouldn't that be more -- I mean,
09. assuming those facts are true, wouldn't that be
10. something for the office of disciplinary counsel to
11. deal with?
12. MR. SMITH: My guy doesn't work for the
13. disciplinary counsel. He got shot in the leg. He got
14. cheated out of a trial.
15. THE COURT: I mean the lawyer. If you really
16. thought a lawyer was suborning perjury -- I would never
17. say that -- I represented lawyers -- in front of them.
18. But seems to me a civil case, it's something that
19. should be reported to them and let them deal with it.
20. I would never -- I had a nine-day hearing one time
21. on behalf of a lawyer, but I don't think there is a
22. civil case here.

(Hearing Transcript for Motion for Reconsideration, July 11, 2019, p. 13, 22.25 & p. 14, 1.22).

D. The complaint was filed in good faith.

Appellant filed this Complaint in good faith and did not seek to perpetrate fraud nor cause unnecessary delay on this Court. Respondents have not alleged nor proved Appellant's filing of this complaint is a reprehensible act, going beyond mere negligence and evincing intent. Appellant believes he has a valid cause of action against the Respondents, based on evidence such as affidavits of witnesses, statements of Dunn as well as actions of the other Respondents in this case. GWB's motion for sanctions is based on a limited reading (or misreading) of the case of Gaar, supra. Appellant reasonably believes under the facts and evidence he submitted; his claim is a valid exception to the doctrine of immunity of lawyers.

E. The sanction was not warranted under provisions of SCFCPSA.

S.C. Code Ann. §15-36-10(E) lists down factors that may be considered by the court in granting sanctions.

- (E) In determining if an attorney, party, or a pro se litigant has violated the provisions of this section, the court shall take into account:
- (1) the number of parties;
 - (2) the complexity of the claims and defenses;
 - (3) the length of time available to the attorney, party, or pro se litigant to investigate and conduct discovery for alleged violations of the provisions of subsection (A)(4);
 - (4) information disclosed or undisclosed to the attorney, party, or pro se litigant through discovery and adequate investigation;
 - (5) previous violations of the provisions of this section;
 - (6) the response, if any, of the attorney, party, or pro se litigant to the allegation that he violated the provisions of this section; and
 - (7) other factors the court considers just, equitable, or appropriate under the circumstances.

In determining whether sanctions are appropriate or the severity of a sanction, the court shall consider previous violations of the provisions of this section.

As previously discussed, GWB and its agent's failure to disclose important facets of the 2014 case led Appellant to file the present case. Appellant believed in good faith had he been informed of the GWB's agents' visit with Dunn, as well as the surveillance, and the report and video related to it, then Appellant's counsel would have been able to appropriately prepare for the trial.

In its Motion for Sanctions, GWB cited the case of *Battersby v. J. Kirkman Moorhead, Krause, Moorhead & Draisen, P.A. All State Insurance Company and Allstate Northbrook Indemnity Insurance Company*, C.A. No. 2015-CP0400667, as proof of Appellant's counsel's previous violation of this section.

Appellant submits that this was a vile attempt to influence the lower court's decision, especially considering at that point, there was no final determination in the Battersby court since counsel for Appellant challenged the sanction Order and no judgment has been made as of the time GWB raised it in quest to retaliate against Appellant's counsel who exposed its agent's illegal practices. This conduct by GWB is defamatory on its face. It should be noted the aforementioned matter is also on appeal.

F. The sanction was improper.

Appellant argues that GWB failed to establish the billing rates they propose are consistent with the "fee customarily charged in the locality for similar legal services". Rules of Professional Conduct, Rule 1.5.

GWB contends that the filing of the Motion for Reconsideration is an attempt by Appellant's counsel to avoid the sanctions imposed against him. As previously discussed, Appellant filing of his Motion for Reconsideration was proper and has basis under the law. Appellant has every right to challenge the substantive basis for the imposition of sanctions against him. On the other hand, GWB fails to justify its request for the court to increase the sanctions imposed upon Appellant. GWB has not cited any legal jurisprudence, nor statute to support its claims. This recent motion to increase sanctions against Appellant's counsel is GWB's attempt to intimidate and bully Appellant. In fact, Appellant believes that GWB has, at several instances in this case, revealed its agents' unethical practices of: (a) facilitating a quid pro quo agreement between its client Blair and Dunn to procure false testimony to benefit its client; (b) allowing its agent/s (HUB and Shawn Conway) to submit manufactured surveillance report; and (c) utilizing what could only be deemed as a "prior bad act", wherein Counsel was ordered to pay sanctions, but his Motion to Reconsider was never finalized with a written Order. Appellant

believes that GWB has taken a vindictive stance against his counsel for exposing its agents' questionable conduct. Penalizing Counsel for utilizing the procedure necessary to ensure the Court has not overlooked a fact or facts which led to the issuance of sanctions has a chilling effect on those who attempt to follow the Rules of Civil Procedure.

Appellant asserts that the sanction imposed against Appellant's counsel was improper for the following reasons: (a) the complaint filed was not frivolous and was based on facts and documentary evidence; (b) there was no finding of bad faith on the part of Appellant and/or his counsel that would warrant the imposition of the sanctions; (c) the sanction was not appropriately tailored to achieve a fair result; (d) GWB specifically targeted Appellant's counsel, which shows that the same was meant as a retaliatory measure against the latter. Sanctions are meant to restore the balance to the matter, not to harass or injure the other party.

G. The Motion for Sanctions was not timely filed.

As to when a motion for sanctions must be filed, subsection 15-36-10(C)(1) provides,

At the conclusion of a trial and after a verdict for or a verdict against damages has been rendered or a case has been dismissed by a directed verdict, summary judgment, or judgment notwithstanding the verdict, upon motion of the prevailing party, the court shall proceed to determine if the claim or defense was frivolous.

South Carolina appellate courts have interpreted this subsection to require a party to file its motion for sanctions under the FCPSA within ten days of the entry of judgment. See, e.g. , Russell , 370 S.C. at 20, 633 S.E.2d at 730 (stating "a motion for sanctions [under the FCPSA] must be filed within ten days of the notice of entry of judgment" (citing Pitman v. Republic Leasing Co. , 351 S.C. 429, 570 S.E.2d 187 (Ct. App. 2002)) as cited in Pee Dee Health Care, P.A. v. Estate of Thompson, 424 S.C. 520 (S.C. 2018).

In this case, the lower court issued its Order granting GWB's Motion to Dismiss Appellant's Complaint on February 5, 2019. By law, Appellant has ten (10) days to file a motion

to alter judgment or a motion for reconsideration, to which Appellant filed his Motion to Reconsider on February 15, 2019.

The Motion for Sanction was filed by GWB on February 13, 2019. Appellant submits the same was filed prematurely since the lower court had ruled upon Appellant's motion to reconsider the dismissal of his complaint on October 2, 2019. It was only then that the issue on frivolity of his complaint came to finality. As such, GWB's motion for sanction should have been filed within ten (10) days after October 2, 2019.

H. Respondents came to court in unclean hands.

When deciding whether to exercise its discretion to award sanctions, the court may consider the conduct of the moving party. Appellant submits that the doctrine of unclean hands applies in this case. This doctrine precludes a party from recovering in equity if he acted unfairly in a matter which is the subject of the litigation to the prejudice of the defendant. Wilson v. Landstrom, 281 S.C. 260 (1984), 315 S.E.2d 130, citing Arnold v. City of Spartanburg, 201 S.C. 523, 23 S.E. (2d) 735 (1943).

Appellant avers GWB knowingly and willingly presented manufactured/altered evidence in court. In an attempt to collect its post-trial expenses from Appellant, GWB presented manufactured and/or questionable surveillance report, videos and Affidavit of Conway, all of which were never brought to his attention.

The courts have held "the unclean hands doctrine closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant." Precision Instrument Mfg. CO. v. Auto. Maint. Mach. Co. 324 US 806, 814 (1945) as cited in Wells Fargo Bank v. Sanders, Appellate No. 2016-001217 (S.C. Ct. App. Mar. 7, 2018).

CONCLUSION

Based upon the foregoing, Appellant requests this Honorable Court to reverse the lower court's dismissal of Appellant's Complaint and imposition of sanctions against herein Appellant.

s/Donald L. Smith

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Anderson, SC 29621

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attorneydonaldsmith@gmail.com

Attorney for Appellant

Anderson, South Carolina

Date: September 21, 2020

**FORM 7
PROOF OF SERVICE**

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

J. Cordell Maddox, Jr, Judge

Case No. 2017-CP-04-02099
Appellate Case No. 2020-000421.

RECEIVED
Sep 22 2020
SC Court of Appeals

John Harbin,

Appellant,

v.

April Blair, Tracy Dunn, HUB Enterprises, Inc.,
Shawn Conway, Gallivan White & Boyd,
Sam Nikopoulos, and John Doe,

Respondents,

PROOF OF SERVICE

Pursuant to Supreme Court of South Carolina's Amended Order 2020-05-29-02, I certify that I have served a copy of Initial Brief of Appellant, Designation of Matter to be Included on Record on Appeal, and Proof of Service, upon The Honorable Jenny Abbott Kitchings, Clerk of South Carolina Court of Appeals, The Honorable Richard Shirley, Anderson County Clerk of Court and the Respondents, by and through their respective counsel of record, via the Attorney Information System in the addresses as follows:

Ms. Jenny Abbott-Kitchings

ctappfilings@sccourts.org

Attorneys for Defendants Gallivan White & Boyd, PA and Sam Nikopoulos:

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For Defendant Tracy Dunn
Office of General Counsel

legalmailservice@doc.sc.gov

A copy of this Notice and Motion are served upon Defendant Tracy Dunn, by and through the Office of General Counsel, at his last known address at the South Carolina Department of Corrections, Post Office Box 21787, Columbia, SC 29221-1787, by depositing a copy of it in the United States Mail, postage prepaid, on September 21, 2020.

The above-mentioned documents have been served on September 21, 2020.

Anderson, South Carolina
September 21, 2020

s/Donald L. Smith
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attorneydonaldsmith@gmail.com
Attorney for Appellant

FORM 8
LETTER TO THE COURT OF APPEALS CLERK OF COURT
FILING SECOND NOTICE OF APPEAL

September 21, 2020

The Honorable Jenny Abbott Kitchings
Clerk of Court South Carolina Court of Appeals
P.O. Box 11629, Columbia, SC 29211

RECEIVED

Sep 22 2020

SC Court of Appeals

RE: John Harbin v. April Blair, Tracy Dunn, HUB Enterprises, Inc., Shawn Conway, Gallivan White & Boyd, Sam Nikopolous, and John Doe
C.A. No. 2017-CP-04-02099
Appellate Case No. 2020-000421

Dear Ms. Kitchings:

Please find enclosed for filing Initial Brief of Appellant, Designation of Matter to be Included on Record on Appeal, and Proof of Service of same.

Sincerely,

s/Donald L. Smith
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CC:

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Ms. Katie Towery, Esquire
Mr. Alfred Johnston Cox, Esquire
Ms. Jessica W. Laffitte, Esquire
Mr. R. Wilder Harte, Esquire
Mr. Steven J. Pugh, Esquire
Mr. James P. Walsh, Esquire
Mr. Tracy Dunn