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

RECEIVED
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SC Court of Appeals

James John Todd Kincannon, ...Appellant,

v.

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

RESPONDENTS' FINAL BRIEF

James Edward Bradley, SC Bar #66130
Moore Taylor Law Firm, P.A.
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
Ward@mttlaw.com
Attorney for Respondents

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STATEMENT OF THE CASE

On April 6, 2015, the Lexington County Solicitor's Office charged James John Todd Kincannon ("Kincannon") with criminal domestic violence arising out of an assault on his then wife, Ashley Griffith that occurred on March 26, 2015. On September 1, 2015, Griffith filed for divorce from Kincannon in Lexington County Family Court. Griffith hired Vance Stricklin and Amber Fulmer to represent her in the divorce. Mr. Stricklin and Ms. Fulmer were employed as attorneys at the Moore Taylor Law Firm.[1] The next day, the Honorable W. Greg Seigler granted Griffith an *Ex Parte* Restraining Order against Kincannon. The Family Court case ended with a hearing on January 24, 2017, at which time the Honorable Peter R. Nuessle approved an agreement between Kincannon and Griffith and granted a divorce to Griffith. The Decree of Divorce and Order Approving Agreement were issued on February 17, 2017, and filed on March 1, 2017, with the Lexington County Clerk of Court Office.

Two years later, on March 21, 2019, Kincannon filed a Complaint alleging the following causes of action: abuse of process, civil conspiracy, trespass on the case, unfair trade practices, negligent supervision, and a violation of the South Carolina Omnibus Adult Protection Act. On April 23, 2019, Griffith, Stricklin, Fulmer, and the Moore Taylor Law Firm (collectively "Moore Taylor") filed an Answer and Motion to Dismiss with Prejudice. Moore Taylor moved to dismiss on the following basis: Kincannon was charged with Criminal Domestic Violence by a Solicitor in the Lexington County Solicitor's Office; Moore Taylor is not in control of the actions of the Lexington County Solicitor's office; and Moore Taylor cannot be held liable for actions of the Lexington County Solicitor's Office. On May 24, Moore Taylor filed a Memorandum in Support

[1] Mr. Stricklin has since left Moore Taylor to become a Richland County Family Court Judge. Ms. Fulmer is also no longer with Moore Taylor.

of its Motion to Dismiss. Subsequently, Kincannon filed a Memorandum in Opposition to Moore Taylor's Motion to Dismiss on May 29, 2019, which was the day the parties came before The Honorable Robin B. Stilwell to argue said Motion to Dismiss. On July 2, 2019, Judge Stilwell granted Respondents' Motion to Dismiss with Prejudice. Then, on July 22, 2019, Appellant made a Motion to Reconsider. Judge Stilwell denied Appellant's Motion for Reconsideration on July 30, 2019.

The Notice of Appeal was received on August 31, 2019, from Kincannon. This appeal arises from Judge Stilwell's Order of Dismissal of Kincannon's Complaint with Prejudice pursuant to Rule 12(b)(6), SCRCP and the Order denying Kincannon's motion for reconsideration of the dismissal order.

ARGUMENT

I. JUDGE STILWELL PROPERLY ALLOWED MOORE TAYLOR TO SUPPORT ITS MOTION WITH A MEMORANDUM AND AN AFFIDAVIT.

Kincannon argues that Moore Taylor improperly filed a memorandum of law and an affidavit to support its Motion to Dismiss. (Appellant's Initial Br., p. 7). He asserts that Moore Taylor's Memorandum in Support of its Motion to Dismiss contains arguments that are entirely unrelated to its motion to dismiss. (Appellant's Initial Br., p. 7). This is not the case. In Moore Taylor's motion to dismiss, it specifically lists each and every cause of action that Kincannon raised in his Complaint as follows:

> Defendants move to dismiss the allegations of this Complaint as they fail to state a claim upon which relief may be granted. In particular, the Complaint alleges claims for Abuse of Process, Civil Conspiracy, Trespass on the Case, South Carolina Unfair Trade Practices Act, Negligent Supervision, and the South Carolina Omnibus Adult Protection Act.

(R. p. 54).

Moore Taylor's memorandum addresses every cause of action that Kincannon alleges and shows that Kincannon failed to state a claim upon which relief could be granted. (R. pp. 57-61). Memoranda are commonly submitted to support legal arguments. For a Memorandum in Support of a Motion to Dismiss to be helpful, efficient, and relevant to the court, it should address why each cause of action fails to state a claim upon which relief could be granted.

Furthermore, Kincannon asserts that Moore Taylor has violated Rule 7(b)(1) of the South Carolina Rules of Civil Procedure. (Appellant's Initial Br., p. 8). Rule 7(b)(1), SCRCP requires that motions "shall state with particularity the grounds therefor, and shall set forth the relief or order sought." The particularity requirement "is to be read flexibly in 'recognition of the peculiar circumstances of the case.'" *Camp v. Camp*, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010). "By

requiring notice to the court and the opposing party of the basis for the motion, rule 7(b)(1) advances the policies of reducing prejudice to either party and assuring that 'the court can comprehend the basis of the motion and deal with it fairly.'" *Id.* Therefore, when a motion is challenged for a lack of particularity, the court should ask "whether any party is prejudiced by a lack of particularity or 'whether the court can comprehend the basis for the motion and deal with it fairly.'" *Id.* "The particularity requirement should not be applied in an overly technical fashion when the purpose behind the rule is not jeopardized." *Id.*

In *Camp*, the Supreme Court of South Carolina held that the lower Court was able to comprehend the motion and deal with it fairly and neither party was prejudiced. *Id.* This was a dispute in Family Court over who would pay their son's tuition. *Id.* The family court concluded that the father would pay seventy percent of the tuition. *Id.* The father filed a motion for reconsideration which stated:

> PLEASE be advised that the Defendant through his undersigned attorney, will move before the Honorable David Sawyer, Jr., to reconsider the ruling in his Order dated July 26, 2006, in awarding Plaintiff, William James Camp's college expenses and costs.

Id.

The mother argued that the father's motion failed to state with particularity the grounds upon which the motion was based or the specific relief sought. *Id.* The Supreme Court reasoned that applying an overly technical analysis of the particularity requirement in this instance would not reduce prejudice to either party nor would it assure the court that it would be able to deal with the motion fairly. *Id.* Since neither party was prejudiced and the court dealt with the motion fairly, the father's motion for reconsideration did not violate Rule 7(b)(1), SCRCP. *Id.*

Kincannon argues that Moore Taylor did not state with particularity the grounds for its Motion to Dismiss. (Appellant's Initial Br., p. 8). Similar to *Camp*, Moore Taylor's motion was

easily understood by the court and did not prejudice either party. The motion lists each claim and alleges that each claim fails to state a cause of action. Moore Taylor filed its Motion to Dismiss on April 23, 2019. The Motion hearing in front of Judge Stilwell was not until May 29, 2019. Mr. Kincannon had over a month to prepare his arguments against Moore Taylor's Motion and even submitted a Memorandum in Opposition to the Motion to Dismiss on that same day. Since Rule 7(b)(1) SCRCP is to be read flexibly, and there is no evidence of prejudice to either party, Moore Taylor's Motion to Dismiss was proper.

Next, there was nothing in Moore Taylor's Memorandum unrelated to its Motion to Dismiss. Kincannon argues that the motion to dismiss contains a "single 'prosecutorial control' ground" for which the motion was made. (Appellant's Initial Br., p. 8). However this motion to dismiss includes every cause of action that is alleged in Kincannon's complaint. Judge Stilwell properly allowed Moore Taylor to file its Memorandum in Support of the Motion to Dismiss. Mr. Kincannon cites no authority to support his argument that a trial court commits error by reviewing a memorandum. And, Moore Taylor knows of no authority to support this argument. Trial Courts in general have inherent authority and discretion to decide what motions to review and what arguments to accept or deny. *See generally Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888 (2014) (reviewing filed Memorandum of Law when ruling on a declaratory judgment action). With this in mind, Judge Stilwell properly exercised his discretion in reviewing Moore Taylor's memorandum.

Next, Kincannon argues that Moore Taylor submitted an improper and untimely affidavit in support of its Motion to Dismiss. (Appellant's Initial Br., p. 10). Rule 12(b)(6) of the South Carolina Rules of Civil Procedure provides:

> [I]f on a motion asserting the defense numbered (6) to dismiss for failure to state facts sufficient to constitute a cause of action, matters outside the pleading 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.

S.C. R. Civ. P. 12(b)(6).

Moore Taylor submitted an affidavit on May 24, 2019 to support its Motion to Dismiss. (R. p. 62). The Order of Judge Stilwell does not indicate that he relied upon the affidavit in ruling on the motion to dismiss. Instead, he ruled on the pleadings alone. Judge Stilwell had the discretion to change the 12(b)(6) motion into a summary judgment motion to which Kincannon could submit affidavits in response. Nothing indicates that he did so. Instead, he ruled on the motion without relying upon the affidavit of Mr. Stricklin. Judge Stilwell did review Mr. Kincannon's long history of filing lawsuits against his ex-wife, but this information is in the public record and not solely obtained from Mr. Stricklin's affidavit. In addition, Judge Stilwell did not rely on Mr. Kincannon's extensive history of *pro se* litigation to rule. Instead, he ruled on the law and the pleadings. Judge Stilwell's order does mention Mr. Kincannon's extensive litigation history as an additional determining factor. (R. p. 8). This history was a topic of oral argument to the Judge and readily available to the Judge as a matter of public record. (R. p. 38, line 18-p. 39, line 25). Therefore, the affidavit of Mr. Stricklin was not determinative to Judge Stilwell's ruling, and his review of it is not a basis for overturning his order.

In addition, Judge Stilwell offered the opportunity to both parties to submit proposed orders. Mr. Kincannon did not submit any additional motions or respond to the statements regarding his extensive history of *pro se* litigation or submit any affidavit in response to Mr. Stricklin's affidavit. (R. p. 52, lines 4-10).

II. JUDGE STILWELL PROPERLY TOOK NOTICE OF PREVIOUS PLEADINGS AND COURT RULINGS.

Kincannon argues that Judge Stilwell referenced material outside of the record in his Order granting the Rule 12(b)(6) motion. (Appellant's Initial Br., p. 14). In the Order of Dismissal, Judge Stilwell judicially noticed that the Family Court had issued an Interim Temporary Order in favor of Ms. Griffith after a hearing about the return of her pet. (R. p. 4). Rule 201 of the South Carolina Rules of Evidence titled "Judicial Notice of Adjudicative Facts" states that: "[a] court may take judicial notice, whether requested or not." S.C. R. Evid. 201. For a fact to be subject to judicial notice, "it must be so notorious that the court may properly assume its existence without proof." *Masters v. Rodgers Dev. Group*, 283 S.C. 251, 255, 321 S.E.2d 194, 196 (Ct. App. 1984).

Judge Stilwell took notice of prior judicial findings in cases involving Mr. Kincannon himself. "The Court also takes judicial notice that the Family Court issued an Interim Temporary Order on July 1, 2016 from a June 30, 2016 hearing ordering a return of the pet." (R. p. 4). Those proceedings are matters of public record which are available in the Courthouse or on electronic filing systems. Mr. Kincannon cannot complain of surprise that the Court reviewed his extensive filing history. The history is a public record of proceedings in which Mr. Kincannon was involved.

Kincannon cannot dispute his own actions found in court records. Therefore, Rule 201 of the South Carolina Rules of Evidence and Appellant's constitutional due process rights were not violated by Judge Stilwell properly taking notice of previous pleadings and court rulings.

III. JUDGE STILWELL PROPERLY DISMISSED KINCANNON'S COMPLAINT WITH PREJUDICE WITHOUT LEAVE TO AMEND BECAUSE THE AMENDMENT WOULD BE FUTILE.

Rule 15(a) SCRCP states that "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." S.C. R. Civ. P. 15(a). Although leave to amend should generally be "freely given," it may be denied where the proposed amendment would be futile. *Doe v. Charleston County Sch. Dist.*, 2019 S.C. C.P. LEXIS 2386. In *Doe*, the Court held the Plaintiff's Complaint against one defendant should be dismissed with prejudice. *Id.* There, the Plaintiff sued multiple Defendants based on alleged sexual abuse of a minor. *Id.* One Defendant filed a Rule 12(b)(6), SCRCP, motion to dismiss with prejudice. *Id.* They argued that the claim was barred by the Tort Claims Act, and since the Plaintiff had alleged no additional facts or theories of recovery, their motion should be granted. *Id.* The Court agreed and dismissed the Complaint with prejudice. *Id.* The Court reasoned that allowing the Plaintiff to amend the Complaint would be futile because the Plaintiff proposed no additional facts or theories of recovery that could survive a 12(b)(6) motion. *Id.*

Here, like in *Doe*, the Judge has the discretion and power to dismiss a Complaint with prejudice if there are no additional facts or theories of recovery which the Plaintiff can point to which would make leave to amend futile. Since Mr. Kincannon did not allege any additional facts or theories of recovery before the motion hearing, at the hearing, or after the hearing, Judge Stilwell granted Moore Taylor's Motion to Dismiss with Prejudice. Judge Stilwell had the discretion to dismiss a complaint with or without prejudice. He properly decided to grant Moore Taylor's Motion to Dismiss with Prejudice based on the complete record.

However, even if the Appellate Court decides that the dismissal with prejudice was erroneous and Kincannon should have been granted leave to amend, the Court of Appeals may still affirm the dismissal with prejudice.

> When a complaint is dismissed with prejudice and the plaintiff erroneously is denied the opportunity to file and serve an amended complaint, but the plaintiff fails to present additional factual allegations or a different theory of recovery which may give rise to a claim upon which relief may be granted, the appellate court may in its discretion affirm the dismissal of the complaint with prejudice.

Spence v. Spence, 368 S.C. 106, 131, 628 S.E.2d 869, 882 (2006).

In *Spence*, the Second Owner of real property brought action against the original owner, third owners, ultimate purchasers, and agent, seeking reformation of deeds due to a mutual mistake about lot size. *Id.* at 131, 628 S.E.2d at 869. Ultimate Purchasers brought a motion to dismiss for failure to state a claim. *Id.* The Second Owner asked the Court to grant her at least fifteen days to file and serve an amended complaint instead of dismissing the complaint with prejudice. *Id.* at 128, 628 S.E.2d at 880. The court refused and granted Ultimate Purchaser's Motion to Dismiss with prejudice. *Id.* Second Owner appealed contending that the Court erred in denying her motion to amend the complaint. *Id.* The Supreme Court states that while ordinarily the dismissal should have been without prejudice, Second Owner failed to present any additional factual allegations or a different theory of recovery which may give rise to a cause of action upon which relief may be granted against Ultimate Purchaser. *Id.* at 131, 628 S.E.2d at 882. Second Owner merely reiterated the same allegations on appeal as originally plead in her complaint. *Id.* Therefore, the Supreme Court affirmed the lower Court's dismissal with prejudice of Second Owner's complaint against Ultimate Purchaser. *Id.*

Similar to *Spence*, Kincannon has failed in his Initial Brief to present any additional factual allegations or theories of recovery which would give rise to a valid Complaint and compel the

Court of Appeals to allow him leave to amend. Kincannon listed eleven (11) ways in which he would "cure" the pleading defects. (Appellant's Initial Br., pp. 20-25). However, he listed no additional facts or no additional theories of recovery, and he wants to remove one theory of recovery initially pled. Additionally, Kincannon states he "would include substantially more facts" but he does not list or include any. (Appellant's Initial Br., p. 24). Kincannon has had more than enough time to include additional facts and research new theories of recovery, but he has not. Therefore any amendment would be futile.

IV. JUDGE STILWELL PROPERLY DENIED KINCANNON'S MOTION FOR RECUSAL.

On July 30, 2019, Judge Stilwell denied Kincannon's Motion to Reconsider the Court's Order Granting Defendants' Motion to Dismiss and for Additional Relief. (R. p. 11). Kincannon included several paragraphs in his Motion for Reconsideration alleging Judge Stilwell had a duty to recuse himself. (R. pp. 119-22).

> Because a review of the dismissal order indicates the Presiding Judge evidently had or *sua sponte* gained personal knowledge of matters relating to the case that are not part of the record and intended to rely on such knowledge in the ruling, the Presiding Judge had a duty to recuse. The Presiding Judge should also recuse at this juncture due to multiple, apparently intentional, violation of Plaintiff's due process rights incident to the consideration of the Rule 12(b)(6) motion filed by Defendants. The record of proceedings in this matter and the dismissal order itself indicate that the Presiding Judge's ruling was based, in whole or in part, on personal prejudice against the Plaintiff entirely unrelated to the sole issue before the Court, i.e. whether or not Plaintiff's Complaint adequately stated facts sufficient to constitute a cause of action for abuse of process and other causes of action asserted in the Complaint. The dismissal order in particular that the Presiding Judge considered numerous matters that were entirely improper in the context of the one-issue Rule 12(b)(6), SCRCP motion made by Defendants and the Presiding Judge should vacate the dismissal order and recuse from further proceedings in this matter due to the realistic possibility that future rulings in this case by the Presiding Judge will be tainted by matters outside the record that the Presiding

> Judge became personally familiar with and, in whole or in part, animated his decision-making process at the Rule 12(b)(6) stage. Plaintiff respectfully submits that non-recusal at this point would violate Plaintiff's rights to a judge whose rulings are untainted by outside-the-record personal research secured by South Carolina common law, the South Carolina Constitution, and the United States Constitution.

(R. pp. 122-23).

This motion was denied in its entirety by Judge Stilwell.[2] (R. p. 11). Under South Carolina law, if there is no evidence of judicial prejudice, a judge's refusal to disqualify himself will not be reversed on appeal. *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114, 118 (2004). Pursuant to Canon 3(E)(1) of the Judicial Code of Conduct, a judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to, instances where he has a personal bias or prejudice against a party. Canon 3(E)(1), Rule 501, SCACR. It is not sufficient for a party seeking disqualification to simply allege bias; the party must show some evidence of bias or prejudice. *Mallett v. Mallett*, 323 S.C. 141, 473 S.E.2d 804 (Ct. App. 1996). If there is no evidence of judicial bias or prejudice, a judge's refusal to disqualify himself will not be reversed on appeal. *Ellis v. Procter & Gamble Dist. Co.*, 315 S.C. 283, 433 S.E.2d 856 (1993). Appellate courts accord great weight to the trial judge's assurance of his own impartiality. *Patel*, 359 S.C. at 524, 599 S.E.2d 114, 118. It is the movants responsibility to provide some evidence of the existence of the judge's impartiality. *Davis v. Parkview Apts.*, 409 S.C. 266, 285, 762 S.E.2d 535, 545 (2014).

In *Davis*, the Supreme Court of South Carolina held that the presiding circuit judge was not required to recuse himself. *Id.* at 289, 762 S.E.2d at 547. There, the presiding judge had

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[2] "After having had the opportunity to carefully review the Plaintiff's Motion, this Court elects to respectfully deny the same."

multiple past relationships with counsel to one of the parties. *Id.* at 285, 762 S.E.2d at 545. This includes officiating one of the lawyers' weddings, being a fraternity brother with the lawyer's ex-husband, going on a fishing trip with one of the lawyer's brothers, and many more instances of prior relationships with counsel. *Id.* The Court reasoned that there was no evidence proving bias or prejudice for recusal other than the adverse rulings. *Id.* at 288, 762 S.E.2d at 547. "The fact that a trial judge ultimately rules against a litigant is not proof of prejudice by the judge." *Id.*

Mr. Kincannon presents no evidence of bias or prejudice against him from the Judge. Kincannon alleges that Judge Stilwell relied on knowledge of matters outside of the record but does not state what those matters are. Since the party alleging bias or prejudice must show evidence of the impartiality and not merely allege there was bias, Judge Stilwell's decision not to recuse himself is proper. Mr. Kincannon's only real criticism of Judge Stilwell is the ruling against Mr. Kincannon. This is not proof of prejudice or bias.

V. JUDGE STILWELL CORRECTLY DISMISSED ALL OF KINCANNON'S CAUSES OF ACTION.

Kincannon contends that Judge Stilwell "dismissed a complaint that Appellant did not file." (Appellant's Initial Br., pp. 26-38). He argues that Judge Stilwell misapprehended the nature of a multitude of the causes of action and misapplied the facts alleged in the complaint itself. (Appellant's Initial Br., pp. 26-38).

Kincannon's first alleged misapprehension was the Court's understanding of "process." According to Kincannon, the process that Moore Taylor allegedly abused was the plea bargaining process itself, not the original charge brought against him for criminal domestic violence. (Appellant's Initial Br., pp. 27-28). Kincannon asserts that "Respondents persuaded the prosecutor to abuse the plea bargaining process by demanding that Appellant make concessions to Respondent on entirely unrelated civil disputes incident to a divorce action in exchange for termination of the

criminal domestic violence prosecution against him." (Appellant's Initial Br., p. 28). Moore Taylor did not enlist the Solicitor in a scheme to condition the dismissal of a criminal charge against Kincannon, and Moore Taylor does not have the ability to make the Solicitor's office prosecute or not prosecute a crime. Because Moore Taylor does not have the power to control the Solicitor, Moore Taylor cannot be liable for the Solicitor's decisions.

It is not an abuse of process for a crime victim to agree to a dismissal conditioned on payment of medical bills. *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (1983). In *Johnson*, the Supreme Court of South Carolina held that it was not abuse of process for a victim of a crime to agree to drop charges if the suspect paid for his medical expenses. *Id.* at 391, 307 S.E.2d at 860. This case arose from a fight between Mr. Johnson and Mr. Painter which resulted in physical injuries to the Mr. Painter. *Id.* Mr. Johnson was charged with assault and battery of a high and aggravated nature. *Id.* Mr. Painter agreed to drop all charges upon payment of his medical expenses by Mr. Johnson. *Id.* Mr. Johnson denied the offer, and the case went to trial where he was acquitted. *Id.* He then sued Mr. Painter alleging abuse of process. *Id.* Mr. Johnson won at the Trial Court. *Id.* But the South Carolina Supreme Court reversed. *Id.* The Court reasoned that it has always looked with favor upon restitution and reconciliation. *Id.* And held that offering to consent to dismiss a criminal charge for restitution is not abuse of process, by definition, because it is not a wrongful act. *Id.*

Mr. Kincannon alleges that Ms. Griffith, through her lawyer, Mr. Stricklin, consented to the Solicitor dismissing the criminal domestic violence charge if Mr. Kincannon would return Ms. Griffith's dog, which he refused to do. Thus, like the injured defendant in *Johnson*, Ms. Griffith cannot be sued for attempting to agree to dismiss criminal charges. There is no abuse of the plea bargaining process because no unlawful act was committed. (R. p. 42, line 19-p. 43, line 1).

Kincannon next argues Judge Stilwell misapplied the *Broadmoor Apts. v. Horwitz*, 306 S.C. 482, 413 S.E.2d 9 (1991) and *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 153 S.E.2d 693 (1967) cases. Kincannon argues Judge Stilwell applied these two cases to the incorrect process. (Appellant's Initial Br., pp. 28-29). The *Broadmoor* and *Huggins* cases set out the same essential elements required for an abuse of process action: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings. *Broadmoor*, 306 S.C. 482, 413 S.E.2d 9; *Huggins*, 249 S.C. 206, 153 S.E.2d 693. Kincannon argues the Judge would not have dismissed his abuse of process claim because it was a textbook claim based on Kincannon's own plea bargain. (Appellant's Initial Br., pp. 28-29). There is no allegation that Moore Taylor had control of the Solicitor's decision to offer Kincannon a plea bargain. This duty resides entirely with the solicitor. In addition, Moore Taylor did not initiate criminal proceedings. Kincannon was arrested without any involvement of Moore Taylor. Mr. Kincannon does not allege a wrongful act undertaken by Moore Taylor.

Kincannon next alleges Judge Stilwell misapplied the *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (1983) case. The *Johnson* case provides that a Solicitor and a victim may agree to drop charges in exchange for out-of-pocket medical expenses. *Johnson*, 279 S.C. at 391, 307 S.E.2d at 861. Even if Moore Taylor suggested that the Solicitor drop charges in exchange for the return of Ms. Griffith's dog, this is allowed by the *Johnson* case which encouraged people to resolve disputes by restitution. *Id.* Likewise it is proper for a Solicitor and a victim to agree to drop charges in exchange for the return of a pet. Thus, Kincannon fails to distinguish the alleged facts from the facts of *Johnson*, and Moore Taylor is entitled to dismissal as a matter of law.

Kincannon also argues that Judge Stilwell improperly treated probable cause as an element of an abuse of process claim. (Appellant's Initial Br., pp. 31-33). The Order of Dismissal states

"[Kincannon] has failed to sufficiently allege an ulterior purpose to his criminal domestic violence charge or a willful act as required by South Carolina Law." (R. p. 3). There is no indication that Judge Stilwell relies upon probable cause in his ruling. Judge Stilwell did note that Kincannon was arrested with probable cause.[3] His noting that probable cause existed to initiate Kincannon's prosecution does not alter his analysis of South Carolina Law.

Kincannon's next alleged error is Judge Stilwell's Additional Determining Factor. (Appellant's Initial Br., pp. 33-35). Judge Stilwell recited Mr. Kincannon's extensive pro se litigation history as follows:

> As an additional determining factor, it is instructive for this Court to state what is obvious to any person who reviews the relevant history of Plaintiff's litigation, claims, and prosecutions. The Plaintiff is no doubt aggrieved by the circumstances of the dissolution of his marriage. The Court is sensitive to the inexorable effect of obsessive interpersonal passion. However, lawsuits against third parties who may have had some connection to the marital fallout are not the responsible or legally appropriate method of redressing interpersonal grievances. These Defendants, in part, were the Wife's lawyers who were simply representing her interests in keeping with their prescribed ethical duties. The Plaintiff is flailing about wildly through misplaced litigation to recover something which has been lost. Sadly, the Courts are not the venue for recovering this type of loss or for exacting personal retribution. It is simply contrary to sound public policy to allow this lawsuit, given all attendant and obvious circumstances, to proceed against faultless third parties.

(R. p. 8).

Judge Stilwell's comments on the impropriety of Kincannon's reported lawsuits do not affect the soundness of his reasoning for granting the Motion to Dismiss. Also, Judge Stilwell's comments regarding public policy and Mr. Kincannon's history are proper considerations for a judge. And, they are court statements of public policy.

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[3] "It is also curious to note that there is no contest from any party but that probable cause existed to initiate the prosecution." (R. p. 3).

Kincannon next alleges Judge Stilwell relied on knowledge of proceedings outside of the record. (Appellant's Initial Br., pp. 35-36). Moore Taylor filed an affidavit of Mr. Stricklin in support of its Motion to Dismiss. This affidavit was in the record. This affidavit set forth the relevant history of Kincannon's litigation, claims, and prosecutions. It recites matters of public record. Kincannon's claim that Judge Stilwell conducted a "global view of all litigation involving the parties before him conducted in other courts and involving other matters and has developed a bad taste in his mouth with respect to one of the litigants" is baseless. (Appellant's Initial Br., p. 36). The Court rightly considered this lawsuit in the context of Kincannon's litigation history, his previous claims, and prosecutions. Judging a person and the pleadings in the context of all that person's actions is fair and appropriate.

Kincannon also faults Judge Stilwell's reliance on public policy to dismiss the Complaint. (Appellant's Initial Br., p. 37). Judge Stilwell properly noted that Kincannon's obsessive litigation history has burdened the court system, the public, and the people he sues. Judge Stilwell had already concluded that Kincannon's Complaint failed to set forth any cause of action upon which relief could be granted. Here, Judge Stilwell determined that public policy was an additional factor to consider in dismissing Kincannon's Complaint with Prejudice based upon Kincannon's own actions.[4] This was proper and within Judge Stilwell's discretion.

Finally, Kincannon argues that Judge Stilwell dismissed the Civil Conspiracy claim solely because Kincannon had plead other causes of action. (Appellant's Initial Br., pp. 37-38). In the Order of Dismissal, Judge Stilwell laid out the elements to establish a claim for civil conspiracy and additional common law rules to prevail on the claim. (R. p. 5). Kincannon did not meet these

[4] "It is simply contrary to sound public policy to allow this lawsuit, given all attendant and obvious circumstances, to proceed against faultless third parties." (R. p. 8)

elements for his civil conspiracy claim. To establish a claim for civil conspiracy, the plaintiff must prove three elements: (1) a combination of two or more persons, (2) for the purpose of injuring plaintiff, and (3) causing plaintiff special damage. *Hackworth v. Greywood at Hammett, LLC*, 335 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 2009). "In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim." *Id.* See *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 292, 278 S.E.2d 607, 611 (1981) (dismissing plaintiff's civil conspiracy claim because "the civil conspiracy action does no more than incorporate the prior allegations and then allege the existence of a civil conspiracy and pray for damages resulting from the conspiracy. No additional acts in furtherance of the conspiracy [were] plead"). Similarly, "if plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed." *Id.* at 117.

In *Hackworth*, the Court held that the civil conspiracy counterclaim should be dismissed because Defendant repeated verbatim the same allegations and damages in its civil conspiracy claim as were alleged in its claim for breach of contract accompanied by a fraudulent act. *Id.*

Here, Kincannon relied on allegations contained in his cause of action for abuse of process. Specifically he alleges as follows: "Plaintiff alternatively pleads a cause of action for civil conspiracy as to such conduct" without informing Moore Taylor of what acts have been committed in furtherance of the alleged conspiracy they are being accused of. (R. p. 21). Furthermore, he "seeks all damages available under the tort of civil conspiracy" without identifying any special damages that have been caused as a result of the alleged civil conspiracy. (R. p. 21). Mr. Kincannon has sued his former wife and her lawyers for essentially being engaged in a domestic lawsuit. This

is an attorney-client relationship required at law for the purpose of representing a client and not a wrongful conspiracy.

CONCLUSION

The Circuit Court properly granted Moore Taylor's Motion to Dismiss with Prejudice against Mr. Kincannon based on the facts and the pleadings. This Court should affirm the dismissal with prejudice.

Respectfully submitted,

s/James Edward Bradley
James Edward Bradley, SC Bar #66130
Moore Taylor Law Firm, P.A.
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
Ward@mttlaw.com
Attorney for Respondents

West Columbia, South Carolina

September 25, 2020

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
Sep 25 2020
SC 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.

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

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of Respondent complies with Rule 211(b), SCACR.

s/James Edward Bradley
James Edward Bradley, SC Bar #66130
Moore Taylor Law Firm, P.A.
P.O. Box 5709
West Columbia, SC 29171
(803) 796-9160
Ward@mttlaw.com
Attorney for Respondents

West Columbia, South Carolina
September 25, 2020