

REPLY 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.

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Nov 30 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,

**REPLY BRIEF OF APPELLANT
TO RESPONDENTS GWB, SAM NIKOPOULOS AND JOHN DOE**

s/Donald L. Smith
Donald L. Smith, (Bar No.: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellant

Anderson, South Carolina
November 30, 2020

Other Counsels:

Mr. Samuel W. Outten, Esquire
Ms. Katie Towery, Esquire
NELSON MULLINS RILEY & SCARBOROUGH, LLP
104 South Main Street/Ninth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601

T: (864)373-2300 F: (864)-373-2925

Mr. Alfred Johnston Cox, Esquire
Ms. Jessica W. Laffitte, Esquire
Gallivan, White & Boyd, P.A.
55 Beattie Place , Suite 1200
Greenville SC 29601
T. (864) 271-9580
F. (864) 271-7502

Attorneys for Gallivan White & Boyd & Sam Nikopoulos

Mr. James P. Walsh, Esquire
1164A Woodruff Road
Greenville, SC 29607
T: (864) 232-4400
F: (864) 2365-4399

Attorneys for Respondent April Blair

Mr. Steven J. Pugh, Esquire
Mr. R. Wilder Harte
RICHARDSON PLOWDEN & ROBINSON, P.A.
1900 Barnwell Stree (29201)
Columbia, SC 29202
(803) 771-4400

Attorneys for Respondent HUB Enterprises and Mr. Shawn Conway

Mr. Tracy Dunn
Inmate No. 00279454
Office of General Counsel
South Carolina Department of Corrections
Post Office Box 21787
Columbia, SC 29221-1787

Respondent

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STATEMENT OF ISSUES

- I. **WHETHER THE CIRCUIT COURT ERRED IN GRANTING GWB'S MOTION TO DISMISS THE AMENDED COMPLAINT.**
- II. **WHETHER THE CIRCUIT COURT ERRED IN IMPOSING SANCTIONS AGAINST APPELLANT PURSUANT TO THE SOUTH CAROLINA FRIVOLOUS PROCEEDINGS SANCTION ACT.**

STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Case and Facts presented in his Initial Brief. This appeal is brought pursuant to the dismissal by the trial court of Appellant's Complaint against April Blair on October 2, 2019 and its denial of Appellant's Motion to Reconsider the Grant of Sanctions against him. Appellant timely filed his Notice of Appeal and filed his Initial Brief on September 21, 2020. Respondent filed its Initial Brief on November 16, 2020.

ARGUMENTS

I.

THE CIRCUIT COURT ERRED IN GRANTING GWB'S MOTION TO DISMISS THE AMENDED COMPLAINT.

- A. **The Circuit Court has erred in failing to apply the standard of review applying to the dismissal of a case.**

GWB states "(T)hat standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Rydde, 381 S.C. at 646, 675 S.E.2d at 433. In the instant case, the Circuit Court has not read nor interpreted the factual statements and allegations averred by Appellant in his Amended Complaint in a light most favorable to him. In fact, it was the opposite. The Circuit dismissed Appellant's allegations as conclusory.

A conclusory statement is one that does not provide the underlying facts that support the conclusion. *Rizkallah v. Conner*, 952 S.W.2d 580, 587 (Tex.App.-Houston [1st Dist.] 1997, no pet.). Appellant has provided evidence to prove each of his factual statements and allegations in the Amended Complaint. The Circuit Court chose to view Appellant's cause of action in the most restricted and strictest sense of the law, and as such, no amount of evidence presented by Appellant would change the Circuit Court's ruling.

B. Appellant did not abandon any argument regarding the dismissal Order.

In their Initial Brief, GWB Respondents advanced since Appellant had not cited any legal authorities, he had abandoned his arguments with regard to the sufficiency of the allegations in his Complaint. While there was lack of supporting case law in the first section of Appellant's Initial Brief, it did not translate to his abandoning his Appeal.

A cursory look of the first statement of issues assigned by Appellant showed it only necessitated a discussion of the specific acts of each Respondents corresponding to each element of the cause of action for tortious interference of contract. An in-depth discussion of each element as well as the evidence submitted by Appellant was addressed in the second section of Appellant's Brief. (Appellant's Initial Brief, p. 9-11).

Contrary to GWB's claim, Appellant cited at least two (2) cases to establish what constitutes as cause of action. Appellant challenged the propriety of the Circuit Court Judge's Order by showing the presence of said elements in the instant case.

In sum, Appellant did not abandon his Appeal for failure to saturate his arguments with legal citations. Appellant seeks this Court to view his arguments in its entirety, and not on a piecemeal basis.

C. Appellant has established a Cause of Action Against GWB Respondents.

In its Initial Brief, GWB Respondents contend the Circuit Court properly relied on the legal doctrine laid down in *Gaar*, that a lawyer has no liability to a non-client third party for actions taken in the representation of a client. *Gaar v. North Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 399 S.E.2d 887 (Ct. App., 1986). GWB Respondents further claim Appellant “has not and cannot plead allegations suggesting that GWB and GWB Respondents acted outside the scope of its representation of Respondent Blair, nor that it breached any independent duty it owed to Appellant”.

Appellant maintains the Circuit Court failed to consider the above-mentioned legal doctrine is not absolute and admits of exception. The Fourth Circuit Court had an occasion to restate the *Gaar* doctrine in its decision in *Fleming v. Asbil*, 42 F.3d 886, 890 (4th Cir. 1994) where it ruled “So long as an attorney acts in his client’s interests, and not for personal or malicious reasons, he is immune from suit to an opposing party.” Ibid. Even out of state courts recognized the exception to attorney immunity: Wisconsin Courts in *Goerke v. Vojvodich*, 67 Wis.2d 102, 105, 226 N.W.2d 211 (1975) and *Auric v. Continental Casualty Co.*, 111 Wis.2d 507, 331 N.W.2d 325 (1983) ruled immunity does not apply when the attorney acts in a malicious, fraudulent or tortious manner which frustrates the administration of justice or to obtain something for the client to which the client is not justly entitled.

South Carolina courts have discussed exceptions to the Attorney Immunity doctrine in several cases such as *Moore v. Weinberg*, 373 S.C. 209, 225, 644 S.E.2d 740, 748 (Ct. App. 2007) (where court held debtor’s attorney owed a duty of care to creditor), *Gordon v. Busbee*, 397 S.C. 119, 133-34, 723 S.E.2d 822, 830 (Ct. App. 2011), (where court held attorney liable to third person for aiding and abetting the breach of fiduciary duty, by another person or his client.

In his Initial Brief, Appellant claimed GWB acted outside the scope of its representation of its client. Appellant outlined how the firm and its agent perpetrated acts that could only be described as malicious and unlawful. (Initial Brief of Appellant, p. 14-15).

First, Appellant averred GWB Respondents went to Dunn's detention center, allegedly to interview him in preparation for his discovery deposition. GWB Respondents made this visit despite the fact Dunn's bond conditions prohibited him from speaking to Blair whether directly or indirectly.

GWB Respondents blatantly disregarded the conditions of the bond Order not only when they fostered and facilitated Dunn "speaking with" Blair, or her attorney, but also when they conducted a quid pro quo arrangement between Blair and Dunn. This act is not a simple mistake or oversight on the part of GWB Respondents, if one follows and analyzes the ensuing aftermath of said visit. GWB's Respondents talked the co-defendant to Dunn for a lengthy period of time, Dunn changed his statements about the shooting, Blair was absolved of her participation in Plaintiff's shooting, and Dunn's CDV charges were dismissed.

Secondly, GWB Respondents willfully and knowingly submitted reports, documents and video to the Circuit Court, which were testified by Appellant's witness as altered, manufactured and therefore unreliable.

"If the challenged action were taken for the indirect purpose of doing injury to appellant, or of benefiting respondents at the former's expense, it is a wrongful act, unless done in the exercise of an equal or superior right, and therefore a malicious act, and actionable." 113 N.J.L. at pages 588, 589, 175 A. at page 67, 99 A.L.R. 1.

D. The Dismissal Order should not be affirmed pursuant to Rule 220 (c) SCACR.

With regard to the Circuit Court's denial of GWB liability over the torts committed by HUB and Conway, Appellant submits he has not abandoned nor waived his right to challenge said ruling. Appellant has consistently raised GWB Respondent's responsibility for introducing and submitting HUB's reports, documents and videos which were manufactured in his Opposition to the Motion to Dismiss and Motion for Reconsideration for both Respondents, as well as his Initial Brief.

The Court has declared "a party need not use the exact name of a legal doctrine in order to preserve [an issue], but it must be clear that the argument has been preserved on that ground." *State v. Dunbar*, 356 S.C. 138, 142, 587 S.E.2d 691, 694 (2003). A party's wording can change between court and a Rule 59(3) motion without jeopardizing preservation of the issue. *Conits vs. Conits*, 422 S.C. 74, 77, 819 S.E.2d 253, 254 (2018).

E. Appellant sufficiently established the elements of the cause of action for tortious interference.

That the Circuit Court misappreciated and/or refuse to appreciate the allegations and evidence submitted by Appellant is the gravamen of this Appeal. Appellant has consistently referred to GWB Respondents' specific acts of tortious interference in all his pleadings subsequent to GWB's Motion to Dismiss. The specific conduct Appellant alleged included the intentional act of sending its agents (including Defendant Nikopoulus and/or Blair's counsel, Robert Corney, Esquire, to Abbeville Detention Center) to visit Defendant Dunn to convince the latter to admit sole liability in shooting Appellant, in exchange for their client Blair withdrawing her CDV charge against him. Appellant has submitted the following evidence as proof of a quid pro quo arrangement between the Blair and Dunn: (1) Affidavit of Willie Clarence Tillman (Exhibit 2, Motion for Reconsideration for Order Granting GWB's Motion to Dismiss); (2) Document of GWB Agents' visit of Dunn (Exhibit 3, *Ibid.*), (3) Incident Selected Supplemental

Report (Exhibit 4, Ibid); (4) Excerpts of Trial Transcript of Tracy Dunn (Exhibit 5, Ibid.), and (5) Excerpts of Transcript of Tracy Dunn's Plea Hearing for CDV Charge (Exhibit 6, Ibid.). The Circuit Court arbitrarily dismissed Appellant's Amended Complaint, writing off all the submitted evidence.

Appellant maintains he has submitted substantial circumstantial evidence, sufficient for the Circuit Court to submit the case to a jury.

Circumstantial evidence, however, gains its strength from its combination with other evidence, and all the circumstantial evidence presented in a case must be considered together to determine whether it is sufficient to submit to the jury. *See Frazier*, 386 S.C. at 532, 533, 689 S.E.2d at 613, 614 (viewing circumstantial evidence "collectively" and "as a whole" to hold directed verdict properly denied); *Cherry*, 361 S.C. at 595, 606 S.E.2d at 478.

By facilitating the quid pro quo agreement between Blair and Dunn, GWB Respondents ensured the defeat of Appellant's action against their client, with her benefitting from the wrongful and unlawful conduct while crippling Appellant counsel's performance of his contractual obligations to him. The only deduction that can be made is GWB's conduct was made with the intent to injure Appellant, depriving him of the damages due him as a result of their willful and wanton conduct.

Appellant submits the law does not require an actual separation or severance of attorney-client relationship to claim tortious interference with a contract. It is clear that South Carolina recognizes a cause of action for interference with the professional relationship between attorney and client. This tortious interference with the relationship which creates the actionable tort. Interference may be present if an attorney is prevented from performing his professional duties or simply made more difficult or burdensome. Restatement (Second) of Torts 766 A (1977).

F. The Circuit Court did not dismiss appellant's complaint based upon the doctrine

of res judicata and/or collateral estoppel.

In their Initial Brief, GWB Respondents proposed Appellant's Amended Complaint should be dismissed based on the application of res judicata and collateral estoppel. However, a careful reading of GWB Respondent's Motion to Dismiss, dated November 22, 2017, they only raised the doctrine of attorney immunity and respondeat superior as grounds for dismissal of Appellant's Amended Complaint. Nowhere did they challenge the same as having been barred by res judicata and collateral estoppel.

Under Rule 8(c) of the South Carolina Rules on Civil Procedure (SCRCP), res judicata is an affirmative defense that is available for a party to a case. It is an affirmative defense that must be pleaded in a responsive pleading or a motion. Under Rule 12 (b) SCRCP, if an affirmative defense is pled in a motion, such motion shall be made before an answer. A party may be held to have waived the affirmative defense of res judicata when the party has not properly and timely asserted the same. Rule 12(b) SCRCP.

Furthermore, in his Orders dated February 5, 2019 and October 2, 2019, Judge Maddox ruled based on the doctrines of attorney immunity and respondeat superior. The issue not having been raised by GWB Respondents and the Circuit Court Judge not making a finding that the instant case was barred by res judicata nor collateral estoppel, this issue was not preserved on appeal.

G. Appellants arguments were properly preserved for appeal.

As a general rule, an issue may not be raised for the first time on appeal but must have been raised to the trial judge to be preserved for appellate review. Issues not raised in the trial court will not be considered on appeal. Anonymous v. State Board of Medical Examiners, 323 S.C. 360, 473 S.E.2d 870, 879 (Ct. App. 1996).

“Issues on which the trial judge never ruled and which were not raised in a post-trial motion are not preserved for appeal.” *Dixon v. Besco Engineering*, 320 S.C. 174, 463 S.E.2d 636, 638 (Ct. App. 1995); see also *Bivens v. Watkins*, 313 S.C. 228, 437 S.E.2d 132 (Ct. App.1993).

Contrary to GWB Respondents’ contentions, Appellant has specifically cited extrinsic fraud as an example of their unethical conduct in his Motion to Reconsider. (Motion to Reconsider the Order Granting GWB’s Motion to Dismiss). Also, in discussing extrinsic fraud in his Initial Brief, Appellant did not raise an independent issue for determination of this Court but as the result of GWB Respondents’ act of interference with Appellant’s contract with his counsel.

It should be noted Appellant has consistently submitted to the trial court that the deal between Blair and Dunn which was brokered and/or facilitated by GWB Respondents, was the reason Dunn changed his statement regarding the shooting incident. (Reply in Opposition to GWB’s Motion to Dismiss). Appellant maintains such acts by GWB Respondents were tantamount to “fixing the trial”. (Motion to Reconsider, *supra.*). As such, the subornation of perjury by an attorney and/or the intentional concealment of documents by an attorney are actions which constitute extrinsic fraud. *Rozier v. Ford Motor Co.*, 573 F.2d 1332 (5th Cir. 1978) as cited in *Aaron v. Mahl*, 381 S.C. 585 (S.C. 2009).

Thus, having been raised to and ruled upon by the trial judge, the unethical conduct of Respondents, which can be characterized as extrinsic fraud, is an issue that has been preserved for appeal. *Ex parte McMillan*, 319 S.C. 331, 335, 461 S.E.2d 43, 45 (1995). Furthermore, the principle of *res judicata* may not apply where extrinsic fraud has been utilized to procure the judgment. *Mahl, supra.*

II.

THE COURT IMPROPERLY AWARDED SANCTIONS AGAINST APPELLANT'S COUNSEL.

The Circuit Court incorrectly awarded sanctions.

That Appellant's case for tortious interference with attorney-client contract (relationship) does not provide overwhelming precedence. This fact alone does not make his claim frivolous. If the only indication of a valid cause of action is prior successful litigation using the same strategy, there can be no advancement of novel issues to be addressed by the Courts.

Appellant is aware of the difficulty in providing direct proof for a claim of tortious interference of contracts based on a quid pro quo scheme. This can be likened to proving conspiracy, where direct proof of agreement is very rare to obtain. United States v. Koenig, 856 F.2d 843, 854 (7th Cir., 1988).

In its Initial Brief, GWB Respondents claim the Circuit Court was justified in awarding sanctions against Appellant for the very same reason they moved to dismiss the Amended Complaint: (1) that it was barred by res judicata and collateral estoppel; (2) it was based on unfounded theories riddled with speculation; (3) the attorney immunity from third party suit; (4) and (4) a previous matter in which the Court levied sanctions against Appellant's counsel (which is also on appeal) for suing defense counsel for unethical conduct which injured his client. The first three reasons have been addressed in previous section of this Brief and are summarized as follows:

GWB Respondents' motion for sanctions was based on a limited reading (or misreading) of the case of Gaar v. North Myrtle Beach Realty Co., Inc., 287 S.C. 525, 399 S.E.2d 887 (Ct. App. 1986). Appellant reasonably believes that under the facts and evidence he submitted, his claim is a valid exception to the doctrine of immunity of lawyers, considering the malicious,

fraudulent and unlawful acts perpetrated by the firm.

Appellant submits his counsel's pre-filing efforts constitute reasonable investigation. His counsel conducted reasonable inquiry and obtained evidence to substantiate his allegations. While most of such evidence was circumstantial, they were not speculative. Just analyzing the succession of events that led to Dunn's changing testimony and his subsequent discharge from the CDV case, a reasonable lawyer and a reasonable jury can infer something made Dunn change his story. Furthermore, Appellant submitted Affidavits from third persons who had direct contact with Blair and Dunn.

Contrary to GWB Respondents' contentions, this case was not filed to relitigate the issues in the previous damages suit, but to assert his right to a fair trial which was violated when GWB Respondents engaged in a conduct that can reasonably be seen as fixing the result of the trial. He believes the collective actions of each wrongdoer prevented Appellant from getting a verdict based on the evidence. Instead, the jury reached a verdict based on evidence manufactured by the clandestine agreement between Blair and Dunn arranged by GWB. GWB Respondent's conduct, considering it was discovered after the trial, deprived Appellant of the proper assistance of his counsel. Appellant submits this is the breach of contract for which Respondents were liable.

Appellant offers his filing of this Complaint was done in good faith and not motivated to perpetrate fraud nor cause unnecessary delay on this Court. Respondents have not alleged nor substantiated a claim Appellant's filing of the Amended Complaint was 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 Respondents' assertion of the application of res judicata and collateral estoppel was not preserved for appeal.

With regard to GWB Respondents' allegations of prior sanctions imposed upon Counsel for Appellant, at the time of the filing of this case, there were no prior sanctions as the Court in the Battersby case has not issued a final order on the matter. The Court in that matter issued a Form 4 denying counsel's Motion to Reconsider the imposition of sanctions on April 21, 2016. The Form 4 stated the Defendants were to provide a formal order, which they did on May 2, 2016. The Court never signed the formal order. However, he signed an Order entering a judgment against the undersigned on *December 16, 2019*. Said Order was issued subsequent to Respondents using the Order in their argument.

Furthermore, under the Rules of Evidence, past prior acts cannot be used as evidence of character of a person. Considering there was no final determination in the Battersby court on the issue of sanctions, Appellant submits this was a vile attempt to influence the lower court's decision.

Appellant reiterates his position that the sanction imposed against his counsel was improper for the following reasons: (a) the complaint filed was not frivolous and was based on facts and documented 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) 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; and (e) Respondents came in court with unclean hands. Sanctions are meant to restore the balance to the matter, not to harass or injure the other party.

The Motion for Sanctions was not timely filed.

GWB Respondents contend the issue of timeliness of the filing of Motions for Sanctions was not raised in and ruled upon in the Circuit Court and therefore is not properly preserved for appeal. Appellants do not challenge the general doctrine that "(I)ssues raised for the first time on appeal are generally not considered absent exceptional circumstances."); *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993). A fundamental exception to the general rule, of course, involves issues relating to the court's subject-matter jurisdiction. Accordingly, questions of subject-matter jurisdiction may be raised at any point during the proceedings and may (or, more precisely, must) be raised sua sponte by the court. See *Bender*, 475 U.S. at 541, 106 S.Ct. 1326, as cited in *Brickwood Contrs. v. Datanet Engineering*, 369 F.3d 385 (4th Cir. 2004).

("The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their right to a verdict, uninfluenced by the appeals of counsel to passion or prejudice. Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error.") (internal citation omitted); *Washington Gas Light Co. v. Virginia Elec. Power Co.*, 438 F.2d 248, 251 (4th Cir. 1971)

Ibid.

The Court in *Brickwood* recognized that before the courts can exercise their discretion to correct not raised the requirements of [*Olano*] must be satisfied." Under the *Olano* standard, there must be an error, that error must be plain, and the error must affect the appellant's substantial rights. See *Olano*, 507 U.S. at 732, 113 S.Ct. 1770.

Applying such standard in this case, the FCPSA and jurisprudence 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. The final judgment in this case was filed on October 2, 2019. Deviation from a legal rule is 'error' unless the rule has been waived. *Olano, supra*.

This error has affected Appellant's substantive rights, because he was subjected to sanctions under FCPSA.

CONCLUSION

Based on the foregoing, in addition to the arguments made in the opening brief, Appellant respectfully requests this Honorable Court to grant Appellant's appeal, and to reverse the imposition of sanctions against Appellant's counsel. If Respondents herein had not orchestrated the testimony of the co-defendants in the original matter, thereby denying Appellant of his "day in court", they would never have been sued.

s/Donald L. Smith
Donald L. Smith (SC Bar#6699)
122 N. Main Street
Anderson, SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellant

Anderson, South Carolina
Date: November 29, 2020.