THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY
COURT OF COMMON PLEAS
THE HONORABLE J. CORDELL MADDOX
CIRCUIT COURT JUDGE

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SC Court of Appeals

APPELLATE CASE NO. 2020-000421
CIVIL ACTION NO. 2017-CP-04-02099

John Harbin,

APPELLANT,

v

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

RESPONDENTS.

FINAL BRIEF OF RESPONDENTS GALLIVAN WHITE & BOYD AND SAM NIKOPOULOS

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STATEMENT OF ISSUES ON APPEAL

II. DID THE CIRCUIT COURT CORRECTLY GRANT GWB RESPONDENTS' MOTION TO DISMISS THE AMENDED COMPLAINT?

III. DID THE CIRCUIT COURT CORRECTLY IMPOSE SANCTIONS AGAINST APPELLANT PURSUANT TO THE SOUTH CAROLINA FRIVOLOUS PROCEEDINGS SANCTION ACT?

INTRODUCTION

The Circuit Court's dismissal of the Amended Complaint in favor of Respondents Gallivan, White & Boyd, PA ("GWB") and Sam Nikopoulos (collectively "GWB Respondents") and the Circuit Court's grant of GWB Respondents' Motion for Sanctions should be affirmed. This lawsuit is nothing more than Appellant's attempt to re-litigate the very issues and claims which were decided by a jury in a prior lawsuit based upon the same exact facts. Having lost the trial, Appellant brought this lawsuit against the same defendants and added several new ones, to include GWB Respondents.

The circuit court properly dismissed the lawsuit against GWB Respondents on the grounds that Appellant failed to allege facts sufficient to constitute a cause of action, as GWB Respondents could not be liable to a non-client third party for actions taken in the representation of its client and that GWB Respondents could not be liable for the alleged torts of the private investigation company, its independent contractor. The circuit court also granted GWB Respondents' Motion for Sanctions for the very same reasons – Appellant filed a frivolous lawsuit, lacking support in both the facts and the law, in an attempt to have second bite at the apple after his unsuccessful jury trial. These decisions should be affirmed.

STATEMENT OF THE CASE

On October 9, 2017, Appellant John Harbin, along with his attorney Donald L. Smith ("Attorney Smith") as a named plaintiff, filed the initial Summons and Complaint in this matter against April Blair, Tracy Dunn, HUB Enterprises, Inc., Shawn Conway, Gallivan, White & Boyd, Sam Nikopoulos, and John Doe. The Complaint alleged a single cause of action for tortious interference with contract against all defendants. On November 13, 2017, Appellant filed his Amended Summons and Complaint, wherein Donald Smith was removed as a named plaintiff, but the allegations generally remained the same. In response to the Amended Complaint, GWB Respondents filed their Motion to Dismiss on November 22, 2017.[1]

On February 5, 2019, after considering written submissions and the Amended Complaint, and after hearing oral argument on February 8, 2018, the circuit court granted GWB Respondents' Motion to Dismiss ("Dismissal Order"). On February 13, 2019, GWB Respondents filed a Motion for Sanctions against Appellant's attorney. After a hearing on July 11, 2019, the circuit court granted GWB Respondents' Motion for Sanctions on October 09, 2019 ("Sanctions Order") and ordered Appellant's Attorney Donald Smith ("Attorney Smith") to pay GWB $13,081.74 as reimbursement for the attorneys' fees and costs incurred. On February 15, 2019, Appellant filed a Motion to Reconsider regarding the circuit court Dismissal Order. The circuit court denied Appellant's Motion to Reconsider on October 2, 2019. Appellant filed a Motion to Reconsider the circuit court's Sanctions Order on October 21, 2019. The circuit court denied Appellant's Motion to Reconsider its Sanctions Order on February 3, 2020. Appellant filed a Notice of Appeal on March 6, 2020.

[1] GWB Respondents previously filed a Motion to Dismiss the original Complaint on November 8, 2017.

STATEMENT OF THE FACTS

The allegations of Appellant's Amended Complaint in the current matter arise from a prior lawsuit, wherein Appellant sued Respondent April Blair and Respondent Tracy Dunn and alleged that Respondent Dunn shot Appellant in the leg while at Respondent Blair's home. (R. p. 56). During the course of the prior litigation, GWB represented Respondent Blair via her homeowner's policy issued by State Farm Insurance Company ("State Farm"). (R. p. 1). Respondent Sam Nikopoulos served as an operations assistant at GWB and his job duties included providing courier services at GWB during the time of the prior litigation. (R. p. 1). Prior to trial in the prior litigation, GWB relayed a settlement offer for $100,000.00 on behalf of Respondent Blair and State Farm to Appellant and Appellant's counsel Attorney Smith. (R. p. 62). The offer was rejected. (R. p. 64). After deliberately rejecting the offer of judgment and electing to go forward with a jury trial, the jury returned a defense verdict in favor of Respondent Blair. (R. p. 60).

Appellant then filed a motion to vacate and submitted an affidavit of William Clarence Tillman, which Appellant's counsel argued constituted newly discovered evidence to support his motion to vacate the prior judgment. (Memorandum in Support of Motion to Vacate, R. pp. 396-404). In his supporting memorandum, Appellant argued, inter alia, that the prior defendants (Blair and Dunn) conspired to deny Appellant's claims, thereby interfering in Appellant's attorney-client relationship and/or contract. (R. pp. 398-99). The prior trial court dismissed Appellant's motion to vacate, finding the affidavit was not credible, Appellant had not satisfied the requirements to vacate a judgment, and the motion was wholly without merit. (March 30, 2018 Order Denying Motion to Vacate, R. pp. 406-26). The prior trial court denied Appellant's motion to reconsider its order denying his motion to vacate. (April 12, 2018 Order Denying Reconsideration of Order, R. pp. 446-47). No appeals were taken from these prior orders.

Appellant filed the Amended Complaint in the current lawsuit on November 13, 2017, alleging Respondents tortuously interfered with his contractual relationship with his attorney, Mr. Smith. (R. pp. 62-63). In his Amended Complaint, Appellant contends that an alleged conversation took place between Respondent Nikopolous and Respondent Dunn that allegedly impacted Respondent Dunn's testimony in the prior lawsuit. (R. p. 63). These exact same claims and issues alleged in the current matter were previously raised and ruled upon in the prior litigation. (*See Generally* Am. Compl.; Motion to Vacate).

ARGUMENT

I. The Circuit Court Correctly Granted GWB Respondents' Motion to Dismiss.

This Court should affirm the circuit court's Order dismissing the Amended Complaint against GWB Respondents, as Appellant has abandoned the issue on appeal. Further, even if not abandoned, the circuit court properly held that GWB Respondents could not be liable to a third-party for actions taken in representation of its client. Finally, this Court should affirm the Dismissal Order based on the alternative findings that GWB Respondents cannot be vicariously liable for the actions of an independent contractor and Appellant has failed to allege any breach of the contract between Appellant and his attorney.

A. Standard of Review

"'On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court.'" *Grimsley v. S.C. Law Enf't Div.*, 396 S.C. 276, 281, 721 S.E.2d 423, 426 (2012) (quoting *Rydde v. Morris,* 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009)). "That 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. Inversely, the court may dismiss a claim when

the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support a theory of law. *Tatum v. Medical Univ. of S.C.*, 346 S.C. 194, 552 S.E.2d 18 (2001).

B. Appellant Has Abandoned Any Argument Regarding the Dismissal Order.

Appellant has abandoned his argument with respect to the Circuit Court's Dismissal Order.

"An issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory." *Bluffton Towne Ctr., LLC v. Gilleland-Prince*, 412 S.C. 554, 573, 772 S.E.2d 882, 892 (Ct. App. 2015) (citing *Potter v. Spartanburg Sch. Dist. 7,* 395 S.C. 17, 24, 716 S.E.2d 123, 127 (Ct. App. 2011)); *see also S.C. Dep't of Soc. Servs. v. Mother,* 375 S.C. 276, 283, 651 S.E.2d 622, 626 (Ct. App. 2007) (finding an issue abandoned because the appellant made "a conclusory argument without citation of any authority to support her claim"); *Hunt v. S.C. Forestry Comm'n,* 358 S.C. 564, 573, 595 S.E.2d 846, 851 (Ct. App. 2004) ("Issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal.").

While Appellant offers one citation regarding the elements of a tortious interference with contract cause of action, Appellant offers no citation to any authority to support his claim that the circuit court's order granting GWB Respondents' Motion to Dismiss, and the reasoning therein, was in error. Thus, Appellant has abandoned his appeal with respect to the Motion to Dismiss and this Court should affirm on this ground alone.

C. The Circuit Court Properly Held that Appellant Cannot Establish a Cause of Action Against GWB Respondents.

Even construing the allegations of the Amended Complaint in a light most favorable to Appellant, the circuit court properly found that Appellant failed to state facts sufficient to constitute a legal cause of action against GWB Respondents.

The circuit court properly relied on the well-established legal principal that a lawyer has no liability to a non-client third party for actions taken in the representation of a client. *See Gaar v. North Myrtle Beach Realty Co., Inc*., 287 S.C. 525, 399 S.E.2d 887 (Ct. App. 1986); *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995); *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 697 S.E.2d 551 (2010). Further, an attorney owes no duty to a non-client unless 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." *Argoe*, 388 S.C. at 400, 697 S.E.2d at 554 (quoting *Stiles,* 318 S.C. at 300, 457 S.E.2d at 602 (1995)).

Appellant has not and cannot plead allegations suggesting that GWB[2] and GWB Respondents acted outside the scope of its representation of Respondent Blair or that it breached any independent duty it owed to Appellant. GWB Respondents were only named in this action by virtue of its representation of Respondent Blair in the prior lawsuit.

In *Gaar*, this Court stated that "[in his professional capacity the attorney is not liable, except to his client and those in privity with his client, for injury allegedly arising out of the performance of his professional activities." *Gaar v. N. Myrtle Beach Realty Co.*, 287 S.C. 525, 529, 339 S.E.2d 887, 889 (Ct. App. 1986). In *Stiles v. Onorato*, the defendant filed a third-party complaint against the plaintiff's attorney, alleging civil conspiracy and initiation of a frivolous

[2] GWB is not even included as to the actual tortious interference with contract cause of action in the Amended Complaint.

lawsuit. 318 S.C. 297, 300, 457 S.E.2d 601 (1995). The Supreme Court, relying on *Gaar*, affirmed the circuit court's dismissal of the action, stating:

> Nowhere in the complaint does Onorato allege in what manner Bowen acted outside his role as Stiles' attorney nor does he allege that Bowen breached some independent duty owed to Onorato. Therefore, on the face of his complaint, the only reasonable inference is that Bowen was acting at all times in his capacity as Stiles' attorney. Under Gaar, Bowen is immune for any activities taken in his professional capacity. Accordingly, under *Gaar,* Onorato's complaint was fatally deficient and Bowen's Rule 12(b)(6) motion was properly granted.

Id. at 300, 457 S.E.2d at 603.

It is astounding that Appellant and his counsel simply choose to make up facts far beyond what is even plead in the actual Summons and Complaint and seek relief before this Court on pure fabrications and conspiracies. However, the only reasonable inference to be drawn from the actual allegations of the Amended Complaint is that GWB Respondents were, at all times, acting as counsel for Respondent Blair. Indeed, even in his appellate brief, Appellant concedes that GWB's attorney was "acting as a messenger for his client." (App. Br. p. 7). Thus, dismissal was proper. *See Stiles*, *Gaar*, *Argoe*, *supra*.

GWB Respondents additionally submit that to permit lawsuits of this kind to go forward would not only condone, but encourage, unsuccessful litigants to re-litigate the issues under the guise of a different lawsuit. Moreover, it would lead to pervasive and frivolous lawsuits against attorneys for simply representing and advocating for their clients. Indeed, the tidal wave of unfounded litigation would have a chilling effect on the practice of law.

D. The Dismissal Order Should Be Affirmed Pursuant to Rule 220(c), SCACR.

Appellant has not addressed, in any meaningful way, that the Circuit Court's alternative but equally important ruling that GWB Respondents cannot be liable pursuant to *respondeat superior* for the acts of a private investigation firm, an independent contractor and thus may

affirm the Dismissal Order on this ground alone. The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR. An appellate court need not address remaining issues when disposition of a prior issue is dispositive. *Allegro, Inc. v. Scully*, 408 S.C. 200, 201, 758 S.E.2d 716, 716 (2014); *Earthscapes Unlimited, Inc. v. Ulbrich,* 390 S.C. 609, 617, 703 S.E.2d 221, 225 (2010); *see also Futch v. McAllister Towing of Georgetown, Inc.* 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999).

The circuit court found that the Amended Complaint's only specific allegation against GWB is that Respondent HUB Enterprises, Inc. was retained by the law firm to provide surveillance of Appellant, and therefore, it is liable for the conduct of the investigator pursuant to *respondeat superior*. The circuit court properly held that this sole allegation was conclusory and unsupported by any other allegations. *See Jones v. Gilstrap*, 288 S.C. 525, 528, 343 S.E.2d 646, 648 (Ct. App. 1986) (holding that conclusory allegations in a complaint are insufficient to survive a judgment on the pleadings).

Moreover, the circuit court properly noted that as a general rule, an employer is not vicariously liable for the torts of an independent contractor committed in the performance of the contracted work. *Rock Hill Tel. Co., Inc. v. Globe Commc'ns, Inc.*, 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005); Duane v. Presley Constr. Co., Inc., 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978). Appellant's Amended Complaint contains no allegations that even remotely call into question this general rule with respect to his sole cause of action of tortious interference with contract and the circuit court's Dismissal Order should be affirmed.

E. Appellant's Amended Complaint Fails to Establish the Elements for an Action for Wrongful Interference with An Attorney-Client Relationship.

The circuit court granted GWB Respondents' Motion to Dismiss on the two grounds discussed above, *supra*. However, there is another ground which warrants affirmance of the circuit court's Dismissal Order, as the appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal." Rule 220(c), SCACR.

An essential element to the cause of action for tortious interference requires the intentional procurement of the contract's breach. *Kinard v. Crosby*, 315 S.C. 237, 240, 433 S.E.2d 835, 837 (1993). Of course, where there is no breach of contract, there can be no recovery. *First Union Mortg. Corp. v. Thomas*, 317 S.C. 63, 73, 451 S.E.2d 97, 913 (Ct. App. 1994). Furthermore, if a party fails to allege facts sufficient to support an essential element of a cause of action, it reasons that the party has failed to state facts sufficient to constitute a cause of action.

Appellant's Complaint fails to plead any facts or circumstances evidencing a breach of contract between Appellant and his attorney. While Appellant's extensive and colorful Amended Complaint may touch on other elements of tortious interference with contract, it glaringly omits any allegation that the contract between him and his attorney was breached or even interfered with in any meaningful way. As such, the circuit court's Dismissal Order should be affirmed pursuant to Rule 220(c), SCACR.

F. Appellant is Barred and Estopped From Bringing this Action Pursuant to the Doctrines of Res Judicata and Collateral Estoppel.

Appellant's current action is nothing more than an attempt to relitigate issues determined and tried in the prior lawsuit. As such, it is barred by the doctrines of collateral estoppel and res judicata.

The doctrine of res judicata provides that final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised

in that action. *Venture Engineering, Inc. v. Tishman Const. Corp. of South Carolina*, 360 S.C. 156, 600 S.E.2d 547 (Ct. App. 2004), Res judicata bars not only the claims that were actually raised in a prior action, but also those issues which might have been raised in the former suit. *RIM Assocs. v. Blackwell*, 359 S.C. 170, 597 S.E.2d 152 (Ct. App. 2004). Doctrine of collateral estoppel, or issue preclusion, serves to prevent a party from relitigating in a subsequent action an issue actually and necessarily litigated and determined in a prior action. *McClain v. Pactiv Corp*., 360 S.C. 480, 602 S.E.2d 87 (Ct. App. 2004), "'While the traditional use of collateral estoppel required mutuality of parties to bar relitigation, modern courts recognize the mutuality requirement is not necessary for the application of collateral estoppel where the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issues.'" *Kunst v. Loree*, 404 S.C. 649, 653–54, 746 S.E.2d 360, 362 (Ct. App. 2013) (quoting *Snavely v. AMISUB of S.C., Inc.,* 379 S.C. 386, 398, 665 S.E.2d 222, 228 (Ct. App. 2008)).

GWB Respondents represented Respondent Blair in the prior lawsuit and was therefore in privity with her. Appellant's Motion to Vacate and the Memorandum in Support of his Motion to Vacate included the affidavits of Willie Clarence Tillman and Michael Moske. In his arguments, Appellant asserted the exact same allegations and theories against the same exact parties as he does in the current lawsuit, including that the contents of the affidavit constituted "newly discovered evidence" and that Respondents conspired against Appellant and interfered with Appellant's attorney-client relationship. The trial court found no reason to disturb the jury's findings or verdict upon review of the post-trial motions. In fact, the trial court noted "the contentions made by [Appellant] in the current motion are not supported by credible facts or evidence. Rather they appear to be nothing more than unfounded conspiracy theories based upon

speculation, misrepresentation of the known facts, and the untrustworthy hearsay statements made through the affidavit executed by Tillman." The trial court further stated "the record leaves this Court firmly convinced there was no such 'collusion' or 'conspiracy' amongst the defendants prior to the trial of this case. . . ."

As such, the issue of whether Appellant's attorney-client relationship was impaired, whether Appellant was denied due process, and whether there was a tortious interference with the contract between Appellant and Attorney Smith were all previously raised to and ruled upon by the prior trial court. No appeal was taken from his post-trial orders. The parties, facts, arguments, claims and demands made in Appellant's Motion to Vacate in the prior lawsuit are identical to those in the current lawsuit, as if Attorney smith merely copied and pasted them into the Amended Complaint. While Appellant is unsatisfied with his result in the prior action, there can be no doubt that he had the opportunity to fully and fairly litigate these very issues in the prior action. Thus, Appellant's current action is barred by the doctrines of res judicata and collateral estoppel and dismissal should be affirmed pursuant to Rule 220(c), SCACR.

G. Appellant Cannot Rely Upon Arguments That Were Not Properly Preserved.

Prior to delving into the substance of this appeal, GWB Respondents note that Appellant's arguments regarding "extrinsic fraud" were not raised in his Memorandum in Opposition to GWB Respondents' Motion to Dismiss, nor in his Motion for Reconsideration. Further, Appellant only tangentially referenced "fraud" in his Motion for Reconsideration regarding the Sanctions Order. Thus, Appellant's "extrinsic fraud" argument against GWB Respondents was presented for the first time in his appellate brief.

The law is clear that only issues "fairly and properly raised to the lower court and passed upon by that court" can be appealed. *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52

(2011) (internal quotations omitted); *see also Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006). For this Court to have "a platform for meaningful appellate review," *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011), the circuit court must have had the opportunity to hear every argument advanced by Appellant "to rule properly after it has considered all relevant facts, law, and arguments," *I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Appellant cannot keep "ace card[s] up [its] sleeve - intentionally or by chance - in the hope that an appellate court will accept th[ose] ace card[s] and, via a reversal, give [it] another opportunity to prove [its] case." *I'On,* 338 S.C. at 422, 526 S.E.2d at 724. These arguments were never presented to, nor considered by, the circuit court and are therefore not properly preserved to be considered by this Court.

Even if the Court were to consider this argument, it is wholly without merit and must fail. Appellant alludes that all Respondents used "extrinsic fraud to accomplish their objective." (App. Br. p. 12). However, absolutely no fraud, of any kind, was ever alleged in the Amended Complaint. Yet again, even grasping, assuming and torturing Appellant's Amended Complaint to find allegations of fraud, Appellant has failed to plead it with the required particularity. *See* Rule 9(b), SCRCP (requiring that in all averments of fraud or mistake, the circumstances constituting such fraud shall be stated with particularity. Moreover, it can be reasonably assumed that the alleged fraudulent acts he now speaks of are the same as those he alleged in the prior litigation in his post-trial motions, which were denied and dismissed without appeal.

II. The Circuit Court Properly Awarded Sanctions Against Appellant.

This Court should affirm the circuit court's Order granting GWB Respondents' Motion for Sanctions, as the circuit court did not abuse its discretion in awarding sanctions against Attorney Smith. The circuit court properly determined, in light of the identical nature of the current lawsuit and the prior lawsuit, as well as the case law contradicting Appellant's cause of

action against GWB Respondents, that a reasonable attorney would not have filed the current lawsuit.

A. Standard of Review

When reviewing judge's order of sanctions, the appellate court takes its own view of the facts. *Father v. S.C. Dep't of Soc. Servs.,* 353 S.C. 254, 260–61, 578 S.E.2d 11, 14 (2003). "[W]here the appellate court agrees with the trial court's findings of fact, it reviews the decision to award sanctions, as well as the terms of those sanctions, under an abuse of discretion standard." *Id.* at 261, 578 S.E.2d at 14. An abuse of discretion may be found if the trial court's conclusions lack reasonable factual support. *Ex parte Bon Secours-St. Francis Xavier Hosp., Inc.*, 393 S.C. 590, 597, 713 S.E.2d 624, 628 (2011) (citing *Runyon v. Wright,* 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996)).

B. The Circuit Court Correctly Awarded Sanctions Against Appellant.

The South Carolina Frivolous Civil Proceedings Sanction Act ("FCPSA") provides for liability for attorney fees and costs of frivolous suits. South Carolina Code Ann. § 15–36–10 (2005) provides, in pertinent part, that an attorney or pro se litigant participating in a civil or administrative action or defense may be sanctioned for:

a) filing a frivolous pleading, motion, or document if:

i. the person has not read the frivolous pleading, motion, or document;
ii. 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;
iii. a reasonable attorney presented with the same circumstances would believe that the procurement, initiation, continuation, or defense of a civil cause was intended merely to harass or injure the other party; or
iv. a reasonable attorney presented with the same circumstances would believe the pleading, motion, or document is frivolous,

> interposed for merely delay, or merely brought for any purpose other than securing proper discovery, joinder of parties, or adjudication of the claim or defense upon which the proceedings are based;
>
> b) making frivolous arguments a reasonable attorney would believe were not reasonably supported by the facts; or
>
> c) making frivolous arguments that a reasonable attorney would believe were not warranted under the existing law or if there is no good faith argument that exists for the extension, modification, or reversal of existing law.

S.C. Code Ann. § 15-36-10(A)(4). Further, sanctions may include . . . an order for the party represented by an attorney or pro se litigant to pay the reasonable costs and attorney's fees of the prevailing party . . . [which] shall include, but not be 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[.]" S.C. Code Ann. § 15-36-10(G)(1). The Court may also issue "an order for the attorney to pay a reasonable fine to the court[,]" S.C. Code Ann. § 15-36-10(G)(2).

While this Court has the freedom to take its own view of the facts in addressing the Order for Sanctions, there can be but what conclusion reached: a reasonable attorney would not have filed the present lawsuit. As such, the circuit court did not abuse its discretion.

Appellant had a previous dispute with Respondents Blair and Dunn resulting in Appellant being shot by Respondent Dunn while at Respondent Blair's house. In the prior lawsuit brought by Appellant against Respondents Blair and Dunn, GWB Respondents represented Respondent Blair. Prior to trial, GWB Respondents made a settlement offer on behalf of its client, which Appellant declined. The case went to trial and the jury returned a defense verdict for Respondent

Blair. Appellant filed post-trial motions, which were denied. Appellant then filed the current lawsuit in an attempt to re-litigate the same issues that were raised in the prior litigation.

Appellant filed the current lawsuit on October 9, 2017. The allegations in the Amended Complaint are nearly identical to those in the prior lawsuit.

1. Dunn and Blair were involved in a romantic relationship and resided together in a home owned by Blair. (Prior Complaint at ¶ 9; Complaint at ¶ 8.)

2. Blair offered to allow Harbin to stay at her house in exchange for his performing work on the house. (Prior Complaint at ¶ 8; Complaint at ¶ 10.)

3. Harbin and Blair were romantically involved and spent the night together. (Prior Complaint at ¶ 7; Complaint at ¶ 13.)

4. Blair called or messaged Dunn to tell him that Harbin had spent the night. (Prior Complaint at ¶ 16; Complaint at ¶ 16 (additionally alleges that Blair told Dunn that Harbin had raped her).)

5. Dunn showed up with a gun at Blair's house, and proceeded to confront Harbin. (Prior Complaint at ¶ 17; Complaint at ¶¶ 17-18.)

6. Dunn shot Harbin in the calf. (Prior Complaint at ¶ 19; Complaint at ¶ 20.)

7. Blair told law enforcement that Harbin had raped her. (Prior Complaint at ¶ 25; Complaint at ¶ 24.)

8. Law enforcement did not pursue Blair's sexual assault allegations. (Prior Complaint at ¶ 26; Complaint at ¶ 25.)

9. Blair was responsible for Dunn shooting Harbin. (Prior Complaint at ¶¶ 20-24; Complaint at ¶ 68.)

(R. pp. 121-22). All of these factual issues were submitted to the jury in the prior lawsuit.

As noted above in section I.F., *supra*, in his post-trial motions and supporting memoranda and documents, including the affidavits of Willie Clarence Tillman and Michael Moske, Appellant asserted the exact same allegations and theories against the same exact parties as he does in the current lawsuit, including that Respondents conspired against Appellant and

interfered with Appellant's attorney-client relationship. The trial court found no reason to disturb the jury's findings or verdict upon review of the post-trial motions. In fact, the trial court noted "the contentions made by [Appellant] in the current motion are not supported by credible facts or evidence. Rather they appear to be nothing more than unfounded conspiracy theories based upon speculation, misrepresentation of the known facts, and the untrustworthy hearsay statements made through the affidavit executed by Tillman." The trial court further stated "the record leaves this Court firmly convinced there was no such 'collusion' or 'conspiracy' amongst the defendants prior to the trial of this case. . . ."

Appellant is simply dissatisfied with the outcome of the trial and obviously regrets rejection of the settlement offer in light of Respondent Blair's defense verdict. However, dissatisfaction cannot be the basis for retrial of these issues. Legal doctrines such as res judicata and collateral estoppel exist to prevent this type of unfounded relitigation and to promise judicial efficiency and finality. *See e.g., Liberty Mut. Ins. Co. v. Emplyers Ins. of Wausau*, 284 S.C. 234, 325 S.E.2d 566 (Ct. App. 1985) ("'res judicata' bars relegation of the same cause of action while 'collateral estoppel' bars relitigation of the same facts or issues necessarily determined in the former proceeding."). Appellant's filing of this current lawsuit is an improper attempt to have a second bite at the apple and circumvent proper judicial restraints.

GWB Respondents were named as defendants in the current lawsuit solely by virtue of their representation of Respondent Blair in the prior lawsuit. However, as discussed above, *supra*, Appellant blatantly disregarded well-established South Carolina precedent squarely addresses the question of whether a lawyer can be held liable to a non-client third party for actions taken in the representation of a client. *See Gaar v. North Myrtle Beach Realty Co., Inc*., 287 S.C. 525, 399 S.E.2d 887 (Ct. App. 1986); *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601

(1995); *Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 697 S.E.2d 551 (2010). After his Amended Complaint was dismissed, Appellant began to concoct yet another theory that GWB Respondents were acting outside of the scope of their representation by interviewing a witness. While patently unfounded, such an allegation was never pled. Furthermore, there is well-established precedent holding that an employer is not vicariously liable for the torts of an independent contractor committed in the performance of contracted work. *See Rock Hill Tel. Co., Inc. v. Globe Commc'ns, Inc*., 363 S.C. 385, 390, 611 S.E.2d 235, 238 (2005); *Duane v. Presley Constr. Co*., Inc., 270 S.C. 682, 683, 244 S.E.2d 509, 510 (1978).

Through the exercise of minimal diligence, Appellant's counsel could have located these cases. It appears that at a minimum, Appellant's counsel failed to assess whether case law supported his theories of liability against GWB Respondents. However, it is also very possible that Appellant's counsel willfully disregarded the established law and was determined to file his frivolous lawsuit hell or high water.

The circuit court was particularly concerned with the filing of this current lawsuit given that Attorney Smith was previously sanctioned by the court in 2016 for similar conduct. *See* Feb. 6, 2016 Order, *Gregg Battersby v. J. Kirkman Moorhead, Krause, Moorhead & Draisen, P.A., Allstate Insurance Company, and Allstate Northbrook Indemnity Company*, C.A. No. 2015-CP-04-00667. In that case, Attorney Smith brought a complaint alleging that attorneys were liable to the plaintiff for damages arising out of the attorneys' representation of their client. The court found that no reasonable attorney would have brought the plaintiff's claims against the attorneys:

> The Plaintiff conceded that the law in this state is that an attorney is generally immune from liability to third person arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client. *See Pye v. Estate of Fox*, 369 S.C. 55, 56, 633 S.E.2d 505, 509 (2006). It

> is apparent to this Court that Plaintiff's counsel filed the claims without researching the law on attorney immunity to determine whether the claims were viable and supported by law. Plaintiff's counsel made no argument to the contrary. This Court finds that no reasonable attorney would have brought the Plaintiff's claims against Attorneys given the well-established case law on attorney immunity and the facts of the case.

Here, the circuit court held that in light of Attorney Smith's previous sanctions, and the clear rulings from South Carolina appellate courts, a reasonable attorney would not have filed and pursued this action against GWB Respondents because it was clearly not warranted under existing law. Thus, the circuit court properly found that Attorney Smith violated the limitations established by the FCPSA, and he was rightfully sanctioned as a result. The circuit court did not abuse its discretion in so finding and should be affirmed.

C. Appellant's Additional Arguments are Not Preserved and are Wholly Without Merit

For the first time on appeal, Appellant contends that GWB Respondents' Motion for Sanctions was filed too early and that GWB Respondents' unclean hands bar them from prevailing on the Motion for Sanctions. These arguments were not only never presented to, nor considered by, the circuit court, but they are wholly without merit.

The law is clear that only issues "fairly and properly raised to the lower court and passed upon by that court" can be appealed. *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (2011) (internal quotations omitted); *see also Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006). For this Court to have "a platform for meaningful appellate review," *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011), the circuit court must have had the opportunity to hear every argument advanced by Appellant "to rule properly after it has considered all relevant facts, law, and arguments," *I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Appellant cannot keep "ace card[s] up [its] sleeve -

intentionally or by chance - in the hope that an appellate court will accept th[ose] ace card[s] and, via a reversal, give [it] another opportunity to prove [its] case." *I'On,* 338 S.C. at 422, 526 S.E.2d at 724. But that is exactly what Appellant attempts to do in this appeal by arguing that the Motion was untimely and that GWB Respondents somehow have unclean hands. As these theories are outside the scope of arguments presented to and considered by the circuit court, they are not on appeal.

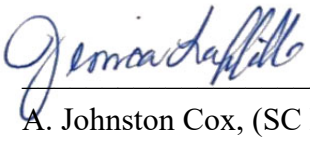
Against that backdrop, GWB Respondents briefly address the unpreserved arguments. First, with respect to the timing issue, Appellant's argument is fatally flawed, as it presupposes that GWB Respondents would have the clairvoyance to know that Appellant intended to file a motion for reconsideration with respect to the Dismissal Order. Moreover, the Dismissal Order was filed on February 5, 2019. GWB Respondents, much like Appellant, had ten days to file their Motion for Sanctions. While it is an inventive argument to suggest that a Motion for Sanctions was filed too *early*, Appellant's argument is nevertheless without merit.

Appellant's argument with respect to unclean hands once again relies on his unfounded conspiracy theories, previously rejected by the trial court. It is difficult to address an argument that is based so heavily on a manufactured fallacy and conspiracy. In any event, Appellant made the same suggestions with respect to GWB Respondents manufacturing and altering of evidence to the circuit court and the circuit court nevertheless awarded sanctions. This was not an abuse of discretion and the circuit court should be affirmed.

CONCLUSION

The circuit court properly granted GWB Respondents' Motion to Dismiss and Motion for Sanctions. This action is a woefully transparent attempt to relitigate the issues previously tried in the prior lawsuit. Moreover, Appellant's theory and allegations against GWB Respondents are

unsupported by well-established precedent. For the foregoing reasons, GWB Respondents respectfully requests the circuit court's orders be affirmed.



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January 19, 2021

THE STATE OF SOUTH CAROLINA IN THE COURT OF APPEALS

APPEAL FROM ANDERSON COUNTY COURT OF COMMON PLEAS
THE HONORABLE J. CORDELL MADDOX CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2020-000421 CIVIL ACTION NO. 2017-CP-04-02099

John Harbin,

APPELLANT,

v

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

RESPONDENTS.

CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies that Respondents Gallivan, White & Boyd, PA's and Sam Nikopoulos Final Brief complies with South Carolina Appellate Court Rule 211(b).

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