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September 7, 2021

RECEIVED

Sep 07 2021

SC Court of Appeals

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

RE: Ex Parte: Donald L. Smith
In Re: Greg Battersby v. J. Kirkman Moorhead, et al.
Appellate Case No. 2020-000070

Dear Mrs. Kitchings:

I write to inquire about a pending and unresolved matter in the referenced case. I am not certain to whom this should be addressed, or what I need to do to properly bring the matter to the Court's attention. On April 23, 2021, I filed a Motion to Dismiss the appeal on the grounds that it was not properly perfected. No Notice of Appeal was served, in accordance with Appellate Court Rule 203(1)(B), on the Anderson County Clerk of Court. The matter does not presently show in the SC E-Filing system that the case is on appeal, and there is no Notice of Appeal filed in the case documents. A copy of my Motion is attached hereto. The Court ruled on parts II and III of the Motion, did not address part I of the motion, and stated that Mr. Smith could proceed only on the last Order issued awarding sanctions. It is this last Order (the Order awarding sanctions) for which no Notice of Appeal was filed with the Clerk of Court. With final briefs due very shortly, I am uncertain as to whether I need to re-file the Motion to Dismiss for failure to properly perfect the appeal, or how to best address this with the Court. Your assistance with this issue would be greatly appreciated.

With kind regards,

THE INJURY LAW FIRM, P.C.

Daniel L. Draisen
Daniel L. Draisen



LIFE MEMBER
MILLION DOLLAR ADVOCATES FORUM
The Top Trial Lawyers In America™



DLD

Enclosures

cc: Donald L. Smith, Esq.

Steven M. Krause, Esq.

J. Kirkman Moorhead, Esq.

RECEIVED

Apr 23 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No.: 2015-CP-02-00667
Appellate Case No. 2020-000070

Ex Parte: Donald L. Smith,.....Appellant,

In Re: Greg Battersby,.....Plaintiff,

v.

J. Kirkman Moorhead, Krause, Moorhead
& Draisen, P.A., Allstate Insurance Company,
and Allstate Northbrook Indemnity Company,.....Defendants

of whom:

J. Kirkman Moorhead and Krause, Moorhead
& Draisen, P.A. are,.....Respondents.

MOTION TO DISMISS APPEAL

Daniel L. Draisen, Esq.
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Steven M. Krause, Esq.
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Attorneys for Respondents

TABLE OF AUTHORITIES

	<u>Page No.</u>
Cases	
<u><i>Kinghorn v. Sakakini</i></u> 426 S.C. 147, 825 S.E.2d 748 (Ct.App. 2019)	02
SC Appellate Court Rules	
SCACR, Rule 203	01, 02
SCACR, Rule 269	03
SC Rules of Civil Procedure	
SCRCP, Rule 52	02

COME NOW the Respondents in the above-captioned matter and respectfully move the Court for an Order Dismissing the appeal in this matter on the following grounds:

I. Appellant failed to properly perfect his Appeal.

Appellant failed to properly perfect his appeal in this matter. Pursuant to South Carolina Appellate Court Rule 203(1)(B), Notice of Appeal:

(1) Appeals from the Circuit Court, Family Court and Probate Court.

(A) Where to File. The notice of appeal shall be filed with the clerk of the lower court and with the Clerk of the Supreme Court in the following cases:
...**In all other cases, the notice of appeal shall be filed with the clerk of the lower court and the Clerk of the Court of Appeals.**

(B) When and What to File. **The notice of appeal shall be filed with the clerk of the lower court and the clerk of the appellate court within ten (10) days after the notice of appeal is served.** (emphasis added)

Appellant did not (and has never) file his Notice of Appeal with the Anderson County Clerk of Court as required by SCACR, Rule 203. Respondents provide the Court with the SC Judicial Department Case History E-Filing Log which shows that the last document filed with the Anderson County Clerk of Court in this matter was the Order of December 16, 2019 (see SC Judicial Department E-Filing Log attached hereto and incorporated by reference thereto as Exhibit A).

As such, Appellant's Notice of Appeal was not properly filed, the filing is procedurally defective, the appeal was not properly perfected, the time within which to properly perfect an appeal has run, and the appeal should be dismissed.

II. The orders granting Summary Judgment and granting an award of Monetary Sanctions were not timely appealed, are the law of the case, and have not been properly been submitted to the Court for consideration.

On June 4, 2015, a hearing was held before the Honorable R. Lawton McIntosh, Circuit Court Judge, who converted Respondents' Motions to Dismiss to Summary Judgment with the

consent of the parties and granted summary judgment as to all causes of action based upon attorney immunity and the other grounds presented by Respondents' attorney, and on July 8, 2015, Judge McIntosh issued a formal Order granting Respondents' Motion for Summary Judgment and Motion to Dismiss (Order dated July 8, 2015 is attached hereto and incorporated by reference thereto as Exhibit B). The trial court's ruling granting Respondents' Motion for Summary Judgment and Motion to Dismiss *was not appealed* by the Plaintiff or the Appellant.

On February 3, 2016, the Honorable R. Lawton McIntosh, Circuit Court Judge, issued a formal Order granting Respondents' Motion for Sanctions pursuant to Rule 11, SCRCF (Order dated February 3, 2016 is attached hereto and incorporated by reference thereto as Exhibit C). Thereafter, on February 18, 2016, Appellant filed his Motion to Reconsider. On April 21, 2016, the trial court denied Appellant's Motion to Reconsider (Form 4 Order dated April 21, 2016 is attached hereto and incorporated by reference thereto as Exhibit D). In Kinghorn v. Sakakini, 426 S.C. 147, 825 S.E.2d 748 (Ct.App. 2019), the Court of Appeals held that the circuit court is not required to state its findings of fact and conclusions of law on motions to dismiss, summary judgment motions, or any other motion except those dealing with involuntary dismissal pursuant to SCRCF, Rule 52(a). While the Form 4 Order mentions the submission of a formal order, no formal order was ever entered by the trial court, and the Form 4 Order was the final order of the court on the matter. The trial court's ruling granting Respondents' Motion for Sanctions *was not appealed* by the Appellant.

Pursuant to SCACR, Rule 203(b)(1):

(a) Notice. A party intending to appeal must serve and file a notice of appeal and otherwise comply with these Rules. Service and filing are defined by Rule 262.

(b) Time for Service.

(1) Appeals From the Court of Common Pleas. A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment. When a timely motion for judgment n.o.v. (Rule 50, SCRCP), motion to alter or amend the judgment (Rules 52 and 59, SCRCP), or a motion for a new trial (Rule 59, SCRCP) has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion. When a form or other short order or judgment indicates that a more full and complete order or judgment is to follow, a party need not appeal until receipt of written notice of entry of the more complete order or judgment.

With regard to the Order granting Respondents' Motion for Summary Judgment, any Notice of Appeal would have had to be filed on or before August 7, 2015; and with regard to the Order imposing monetary sanctions on the Appellant, any Notice of Appeal would have had to be filed on or before May 21, 2016. The time within which to appeal these Orders has long since passed and it is improper to submit same to the Court by "piggy-backing" them onto the December 16, 2019 Order for consideration on appeal in this matter.

Accordingly, any appeal of the trial court's Orders of July 8, 2015 and February 3, 2016, to the extent it is deemed that Appellant has submitted same for review by the Court, should be dismissed as untimely filed.

III. The order appealed is merely an administrative order.

The order appealed in this matter is the trial court's administrative order directing that the monetary sanctions awarded against Appellant, which Appellant has not paid in over three (3) years since being ordered to do so, be entered upon the Judgment Rolls (Order dated December 16, 2019 is attached hereto and incorporated by reference thereto as Exhibit E).

Respondents assert that because the monetary sanctions in this matter were awarded against the Appellant attorney personally, who was not a party to the underlying case, there was confusion

in the Clerk of Court's office with regard to how to enter the judgment against an individual in a case where he was not a party. The trial court's issuance of the December 16, 2019 order in this matter was merely administrative in that it directs the Clerk of Court to enter the monetary sanctions as a judgment against the Appellant in the Judgment Rolls.

The purpose and nature of the order was readily apparent to the Appellant, he is well-versed and studied in the law as a licensed member of the South Carolina Bar. The appeal filed by Appellant in this matter is frivolous or taken solely for the purpose of delaying the entry of judgment against him. As such, Respondents request that the Court impose sanctions pursuant to SCACR, Rule 269, against Appellant.

Respectfully submitted,

s/Daniel L. Draisen

DANIEL L. DRAISEN (SC Bar# 13536)

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and

s/Steven M. Krause (w/permission)

STEVEN M. KRAUSE (SC Bar# 3571)

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ATTORNEYS FOR THE RESPONDENTS

April 23, 2021
Anderson, South Carolina

EXHIBIT A



2015CP0400667 : Gregg Battersby VS J Kirkman Moorhead , defendant, et al

Common Pleas

Case Number 2015CP0400667
Case Subtype Use 370 or 380
Filed Date 03-20-2015
Status Dismissed

Plaintiff Gregg Battersby
Defendant J Kirkman Moorhead et al
Assigned Judge Clerk Of Court C P, G S, And Family Court
File Type Jury

Show/Hide Participants

Name	Description	Type	File Date
Donald Loren Smith	Judgment/Judgment	Judgment	12-16-2019 04:16:38 PM
Timothy Alan Nowacki	Judgment/Judgment	Judgment	12-16-2019 04:16:38 PM
Donald Loren Smith	Judgment/Judgment	Judgment	12-16-2019 04:16:06 PM
Steven M. Krause	Judgment/Judgment	Judgment	12-16-2019 04:16:06 PM
J Kirkman Moorhead	NEF(12-16-2019 04:15:42 PM) Order/Other	Filing	12-16-2019 04:15:49 PM
J Kirkman Moorhead	Order/Other	Order	12-16-2019 04:15:42 PM
J Kirkman Moorhead	NEF(12-10-2019 11:28:11 AM) Order/Order Cover Sheet \$25....	Filing	12-10-2019 11:40:20 AM
J Kirkman Moorhead	Order/Order Cover Sheet \$25.00	Filing	12-10-2019 11:28:11 AM
J Kirkman Moorhead	NEF(12-06-2019 01:06:21 PM) Order/Form 4	Filing	12-06-2019 01:06:31 PM
J Kirkman Moorhead	Order/Form 4	Order	12-06-2019 01:06:21 PM
J Kirkman Moorhead	NEF(12-04-2019 02:04:29 PM) Affidavit/Affidavit of	Filing	12-04-2019 02:21:31 PM
J Kirkman Moorhead	Affidavit/Affidavit of	Filing	12-04-2019 02:04:29 PM
Gregg Battersby	Notice/Notice of Hearing	Filing	11-01-2019 03:58:59 PM
Donald Loren Smith	12/5/2019_MOTION_Roster/Notice of Motions Roster Publication	Action	11-01-2019 03:42:11 PM
Alfred Johnston Cox	12/5/2019_MOTION_Roster/Notice of Motions Roster Publication	Action	11-01-2019 03:42:11 PM
Steven M. Krause	12/5/2019_MOTION_Roster/Notice of Motions Roster Publication	Action	11-01-2019 03:42:11 PM
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Gregg Battersby	12/5/2019_MOTION_Roster/Notice of Motions Roster Publication	Action	11-01-2019 03:42:11 PM
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J Kirkman Moorhead	Motion/Other	Motion	10-15-2019 04:19:31 PM
Gregg Battersby	Order/Form 4 Decision by Court	Order	04-22-2016 11:16:53 AM
J Kirkman Moorhead	Service/Certificate Of Service by Mailing	Filing	02-22-2016 11:21:42 AM
Gregg Battersby	Service/Certificate Of Service by Mailing	Filing	02-22-2016 11:20:41 AM
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J Kirkman Moorhead	Order/Order	Order	02-04-2016 11:36:05 AM
Krause Moorhead & Draisen PA	Order/Order	Order	02-04-2016 11:36:05 AM
Krause Moorhead & Draisen PA	Verification/Verified	Filing	01-29-2016 10:28:02 AM
J Kirkman Moorhead	Memo/Memo in Support of Court's Proper Exercise of	Filing	01-29-2016 10:26:06 AM
Krause Moorhead & Draisen PA	Memo/Memo in Support of Court's Proper Exercise of	Filing	01-29-2016 10:26:06 AM
Gregg Battersby	Notice/Lack of Jurisdiction over Defs' Motion for Sanctions	Filing	01-27-2016 09:41:12 AM
Gregg Battersby	ADR/Alternative Dispute Resolution (Workflow)	Action	10-16-2015 11:10:03 AM
Gregg Battersby	Order/Form 4	Order	10-08-2015 03:02:55 PM
J Kirkman Moorhead	Memo/Memorandum in Support	Filing	10-08-2015 03:01:52 PM
Krause Moorhead & Draisen PA	Memo/Memorandum in Support	Filing	10-08-2015 03:01:52 PM
Gregg Battersby	Memo/Memorandum in Opposition	Filing	10-08-2015 02:13:00 PM
Gregg Battersby	Memo/Memorandum in Opposition	Filing	10-08-2015 02:13:00 PM
Gregg Battersby	Letter/Letter	Filing	10-07-2015 02:12:04 PM
Gregg Battersby	Memo/Memorandum in Opposition To Request For Sanctions	Filing	09-23-2015 04:36:00 PM
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Steven M. Krause	Roster/Notice of Motions Roster Publication Sent	Action	09-04-2015 10:44:15 AM
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J Kirkman Moorhead	Order for Substitution Of Counsel	Order	08-27-2015	04:20:13 PM
J Kirkman Moorhead	Filing of Motion Coversheet	Filing	08-25-2015	04:24:00 PM
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Allstate Northbrook Indemnity Company	Order/Order	Order	08-20-2015	09:13:09 AM
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Krause Moorhead & Draisen PA	Order/Order	Order	07-10-2015	02:19:18 PM
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Allstate Northbrook Indemnity Company	Service/Certificate Of Service by Mailing	Filing	07-02-2015	01:57:18 PM
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Gregg Battersby	Motion/Motion For Motion to Withdraw Pleading	Motion	06-30-2015	02:45:07 PM
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Gregg Battersby	Service/Certificate Of Service by Mailing	Filing	06-29-2015	09:18:53 AM
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Gregg Battersby	Service/Certificate Of Service by Mailing	Filing	06-22-2015	03:24:07 PM
J Kirkman Moorhead	Order/Order	Order	06-12-2015	03:55:12 PM
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Gregg Battersby	Memo in Opposition to Moorhead and ⁷ KMD's Motion to Dismiss	Filing	06-04-2015	01:32:07 PM
Gregg Battersby	Service/Certificate Of Service by Mailing	Filing	06-04-2015	01:30:45 PM
J Kirkman Moorhead	Memo/Memo in Support of Motion to Dismiss	Filing	06-04-2015	01:30:08 PM

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Gregg Battersby	Memo/Memo in Opposition to Def. Allstate Ins. Co.'s Motion	Filing	06-04-2015	01:24:17 PM
J Kirkman Moorhead	Letter/Letter with attachments re: hearing 6-4-15	Filing	06-02-2015	10:07:47 AM
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Gregg Battersby	Service/Certificate Of Hand Delivery	Filing	06-02-2015	10:05:28 AM
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Case Party Inactive	Roster/Notice of Motions Roster Publication Sent	Action	05-01-2015	12:45:49 PM
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Allstate Insurance Company	Motion/Dismiss	Motion	04-30-2015	01:12:00 PM
Allstate Northbrook Indemnity Company	Filing Motion To Dismiss	Filing	04-30-2015	01:12:00 PM
Gregg Battersby	Service/Certificate Of Service	Filing	04-30-2015	01:11:00 PM
J Kirkman Moorhead	Notice/Notice of Presentation	Filing	04-23-2015	03:54:06 PM
Gregg Battersby	Letter Re: Motion to Dismiss for Second Amended Complaint	Filing	04-06-2015	04:15:10 PM
Gregg Battersby	Second Amended Complaint	Filing	03-31-2015	01:23:43 PM
Gregg Battersby	Second Amended Summons	Filing	03-31-2015	01:19:55 PM
Gregg Battersby	Service/Certificate Of Service	Filing	03-31-2015	09:49:04 AM
J Kirkman Moorhead	Motion/Dismiss	Motion	03-31-2015	09:34:01 AM
Gregg Battersby	Amended/Amended Summons And Complaint	Filing	03-31-2015	09:32:02 AM
Gregg Battersby	Summons & Complaint	Filing	03-20-2015	10:58:00 AM

EXHIBIT B

FILED-CLERK'S OFFICE
ANDERSON SC

LOB

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

2015 JUN 10 AM 9:47
IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Gregg Battersby,

COMMON PLEAS AND
GENERAL SESSIONS

CIVIL ACTION NO.: 2015-CP-04-00667

Plaintiff,

v.

**ORDER GRANTING J. KIRKMAN
MOORHEAD AND KRAUSE,
MOORHEAD, & DRAISEN, P.A.'S
MOTION FOR SUMMARY JUDGMENT
AND MOTION TO DISMISS**

J. Kirkman Moorhead, Krause, Moorhead &
Draisen, P.A., Allstate Insurance Company,
and Allstate Northbrook Indemnity
Company,

Defendants.

THIS MATTER comes before the Court on a Motion to Dismiss Plaintiff's Second Amended Complaint ("Complaint") against Defendants J. Kirkman Moorhead and Krause, Moorhead and Draisen, P.A., (hereinafter referred to collectively as "Attorneys"), pursuant to South Carolina Rule of Civil Procedure 12(b)(6). After due notice, a hearing was held in this matter on June 4, 2015. Plaintiff was represented by Donald L. Smith, Esq., and Attorneys were represented by Eric K. Englehardt, Esq., of Turner Padgett Graham and Laney, P.A. At the hearing the Motion was converted to a Motion for Summary Judgment at the request of Plaintiff and consent of Attorneys. (Hr'g. Tr. p. 3 ll. 17-23). Having carefully considered the allegations in the Plaintiff's Complaint and arguments and evidence submitted by counsel, the Court grants Attorneys' Motion for Summary Judgment and holds that Attorneys are not liable to Plaintiff under any of the causes of action brought in the Complaint.

BACKGROUND AND FINDINGS OF FACT

Plaintiff brings his Complaint alleging Attorneys are liable to Plaintiff for damages arising out Attorneys' performance of professional activities as attorneys for a client, namely Jan Morton (hereinafter referred to as "Client"). Plaintiff's Complaint also names Allstate Insurance

Company and Allstate Northbrook Insurance Company as Defendants based upon acts arising out of wholly separate transactions from those complained of against Attorneys.¹

The Complaint alleges Attorneys have an attorney-client relationship with Client. (Complaint ¶ 11). In particular, Attorneys are providing legal representation to Client in a separate civil action brought by the Plaintiff against Client. (Ex. 3 to Plaintiff's Memorandum). The Complaint alleges Attorneys and Client conspired to concoct a story that Plaintiff indecently exposed himself to Client, and that Attorneys advised Client to report the incident to the Anderson County Sheriff's Office. (Complaint ¶¶ 12-13). Client did report the incident, and Plaintiff was arrested by the Sheriff on August 2, 2013 and subsequently charged by the Solicitor. (Complaint ¶¶ 14, 17, 27). The Complaint alleges Attorneys knew Client's statements were false, and that Attorneys conspired with Client to use the criminal charges to strengthen a civil case against Plaintiff. (Complaint ¶¶ 16, 28). Additionally, the Complaint alleges Attorneys assisted Client by filing an administrative complaint with South Carolina Department of Labor, Licensing and Regulation ("LLR") regarding the incident. (Complaint ¶ 25).

Plaintiff's Complaint asserts seven causes of action against Attorneys for acts arising out of Attorneys' representation of Client: (1) false imprisonment; (2) defamation; (3) intentional infliction of emotional distress ("IIED"); (4) malicious prosecution; (5) conspiracy; (6) fraud; and (7) abuse of process. At the hearing, Plaintiff stipulated Attorneys were entitled to summary judgment on all causes of action except civil conspiracy. (Hr'g. Tr. p. 16 ll. 9-19). Even if Plaintiff had not stipulated to summary judgment of the other six causes of action in Attorneys' favor, this Court finds that the grounds outlined below for granting summary judgment of the

¹ The causes of action against Allstate and Northbrook were dismissed pursuant to a separate order of this Court under the same Civil Action Number.

conspiracy claim in Attorneys' favor, namely attorney immunity, also warrant summary judgment of those causes of action in Attorneys' favor.

LEGAL STANDARD

At the hearing, Plaintiff submitted a portion of Morton's deposition transcript in support of his arguments, and presented arguments based upon the exhibits attached to his Memorandum in Opposition to Defendant's Motion to Dismiss. When a court is considering a motion to dismiss and matters outside the pleadings 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." Rule 12(b), SCRPC; *Martin v. Companion Healthcare Corp.*, 357 S.C. 570, 574, 593 S.E.2d 624, 627 (Ct. App. 2004).

Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law. *Knight v. Austin*, 396 S.C. 518, 521-22, 722 S.E.2d 802, 804 (2012); Rule 56(c), SCRPC. "The evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party." *Fleming v. Rose*, 350 S.C. 488, 493-94, 567 S.E.2d 857, 860 (2002) (internal citations omitted).

DISCUSSION AND ORDER

Considering the facts in the light most favorable to Plaintiff, Attorneys were at all times acting within the within the scope of their representation of Client and owed no duty to the third-party, non-client Plaintiff. "Generally, an attorney is immune from liability to third persons arising from the performance of his professional activities as an attorney on behalf of and with the knowledge of his client." *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509

(2006) (quoting *Gaar v. N. Myrtle Beach Realty Co., Inc.*, 287 S.C. 525, 528, 339 S.E.2d 887, 889 (Ct. App. 1986)). Because an attorney normally conducts litigation solely in his professional capacity, the attorney “has no personal interest in the suit” and cannot be held liable to third-party non-clients “for injury allegedly arising out of the performance of his professional activities.” *Id.* at 529, 339 S.E.2d at 889. 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 v. Three Rivers Behavioral Ctr. & Psychiatric Solutions*, 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010). (quoting *Stiles v. Onorato*, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995)).

Plaintiff failed to allege and the evidence does not show Attorneys ever stepped outside the scope of their representation of Client. Plaintiff argues Attorneys stepped outside of the scope of their representation of Client when they advised Client to report her allegations to the police and further advised Client to recommend to another alleged victim that she also report her own, similar encounters with the Plaintiff. In addition, Plaintiff argues Attorneys stepped outside their role as attorney when they assisted Client with an online complaint form filed with LLR because Client did not need an attorney to file an LLR complaint and nor were Attorneys representing Client when they completed the complaint form. (Hr’g. Tr. pp. 19-20, ll. 10-2). This Court finds this argument unpersuasive. At all times alleged in the Complaint, Attorneys were acting on behalf of and as attorneys for the Client in all the acts complained of by Plaintiff. There is simply no cognizable basis in either law or fact to conclude these acts fall outside the scope of Attorneys’ representation of Client. See *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 23, 567 S.E.2d 881, 893 (Ct. App. 2002). (“The absolute privilege covers anything that may be

said in relation to the matter at issue, whether it be in the pleadings, in affidavits, or in open court.”)

Plaintiff also argues Attorneys acted outside of the scope of their representation and in their own personal interest when they allegedly created, embellished or made up better facts to strengthen Client’s claims. (Hr’g. Tr. pp. 21-24, ll. 15-2). Plaintiff argued at the hearing and in his memorandum that Attorneys conspired with Client because Attorneys would share in any judgment obtained as a result of the suit. (Hr’g. Tr. pp. 21-22, ll. 15-19). Despite Plaintiff’s claims, an attorney has an ethical obligation to zealously to pursue any lawful claim of his client and properly represent and support his client. *Gaar*, 287 S.C. at 529-30 (citing former Rule 32, Canon 7, Rules of Practice in the Supreme Court of South Carolina). And, no different than any other profession, an attorney obtains a fee as compensation for professional services rendered. The fee, which may be paid out of proceeds from a judgment, is directly tied to the representation of the client, and therefore falls squarely within the scope of representation. See *Gaar*, 287 S.C. at 529 (holding that an attorney normally conducts the litigation solely in his professional capacity and he has no personal interest in the suit). This Court finds there is no evidence Attorneys had any personal interest in their representation of Client.

Regarding Plaintiff’s allegations that Attorneys conspired with Client to make up or embellish certain facts to strengthen Client’s claims, Plaintiff points to Client’s deposition testimony that the number of times the LLR complaint states she visited the Plaintiff for treatment was wrong. (Hr’g. Tr. pp. 22-23, ll. 11-20). The relevant portion of Client’s Deposition, as cited at the hearing by Plaintiff, is as follows:

Q: “Dr. Battersby had been treating me for several issues once a week for 20 weeks.” Is that true?

A: "No. The 20 weeks is wrong."

Q: "And can you estimate -- I believe you said earlier that you thought you may have started with Dr. Battersby back in April."

A: "I thought I did, but I went back and looked. It was May 2nd":

Q: "What did you look at?"

A: "The cancelled check from my first visit."

(Dep. of Jan Morton, June 18, 2014, p. 76, ll. 6-17). Contrary to Plaintiff's assertions, this deposition testimony clearly shows Client was mistaken in her original estimation stated in the LLR complaint, and the number was not an embellishment or number otherwise made up by Attorneys. This Court therefore finds there is no evidence Attorneys conspired with Client to makeup or embellish facts to strengthen Client's case.

Turning to the other exception to the general rule of attorney immunity, Plaintiff's Complaint does not allege, and this Court finds that Attorneys owed no duty to the Plaintiff. The Plaintiff is not a client of Attorneys. At the hearing and in his memorandum, Plaintiff argues that Rule 3.3 Candor Toward the Tribunal of the South Carolina Rules of Professional Conduct imposes a duty on Attorneys to Plaintiff. In particular, Plaintiff argued that Attorneys owed Plaintiff a duty of advising their Client not to report her allegations to law enforcement. Rule 3.3 mandates that a lawyer not knowingly make false statements or present evidence the lawyer knows to be false to a tribunal, fail to correct the past representations later discovered to be false, or knowingly permit a client to engage in fraudulent conduct without taking remedial measures or disclosing to the tribunal. By its plain language, this Court finds that Rule 3.3 does not impose upon Attorneys a duty to Plaintiff. Therefore, this Court finds Attorneys are entitled to summary judgment in their favor on all of Plaintiff's claims.

LCB

Assuming arguendo Attorneys owed a duty to Plaintiff, this Court finds Attorneys breached no such duty. Plaintiff alleges Attorneys should have recognized Client was lying when she informed them Plaintiff was wearing a robe during the alleged incident, but then reported later to law enforcement that Plaintiff was wearing a towel. First, the Court finds these are subtle differences of no material distinction, both figuratively and literally, so as to put Attorneys on notice that Client may be lying. Second, the police report which contains the allegedly different descriptors of Plaintiff's attire was not created until *after* Attorneys advised Client to report to the police – the very act Plaintiff claims Attorneys should have advised their Client against doing. The Attorneys therefore would not have had the benefit of the very report Plaintiff claims should have put them on notice.

CONCLUSION

For the foregoing reasons, it is hereby ordered that Attorneys' Motion for Summary Judgment is GRANTED. There being no just reason for delay, FINAL JUDGMENT is hereby entered against the Plaintiff and in favor of the Defendants J. Kirkman Moorhead and Krause, Moorhead and Draisen, P.A.

AND IT IS SO ORDERED.



R. LAWTON MCINTOSH, JUDGE

Anderson, South Carolina

7-8, 2015

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GENERAL SESSIONS

EXHIBIT C

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STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

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ANDERSON IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

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Gregg Battersby,

COMMON PLEAS AND
CENTRAL DISTRICT

CIVIL ACTION NO.: 2015-CP-04-00667

Plaintiff,

v.

**ORDER GRANTING J. KIRKMAN
MOORHEAD AND KRAUSE,
MOORHEAD, & DRAISEN, P.A.'S
MOTION FOR SANCTIONS**

J. Kirkman Moorhead, Krause, Moorhead &
Draisen, P.A., Allstate Insurance Company,
and Allstate Northbrook Indemnity
Company,

Defendants.

THIS MATTER comes before the Court on Defendants J. Kirkman Moorhead and Krause, Moorhead and Draisen, P.A., (hereinafter referred to collectively as "Attorneys") motion for sanctions pursuant to Rule 11, SCRPC, and The South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 (the "Frivolous Proceedings Act"). Attorneys bring this Motion subsequent to a July 10, 2015 order (hereinafter "Order") of this Court granting summary judgment in Attorneys favor as to all of Plaintiff's claims. After due notice, a hearing was held in this matter on October 2, 2015. Plaintiff was represented by Donald L. Smith, Esq., and Attorneys were represented by Steven M. Krause, Esq., of Krause, Moorhead, and Draisen, P.A. Having carefully considered the Order, arguments and evidence submitted by counsel, the Court grants Attorneys' Motion and sanctions the attorney for the Plaintiff under Rule 11, SCRPC. The Court does not sanction the Plaintiff as a party or find any violation of the Frivolous Proceedings Act.

As an initial matter, Plaintiff objected to the Court's jurisdiction over the sanctions motion. Plaintiff's objection came only after this Court rendered its initial decision on January 8, 2016 communicated via email to all parties, and instructed Attorneys to prepare an order

granting the motion for sanctions. In a memorandum filed on January 27, 2016, Plaintiff argued that the Attorney's post-trial motion for sanctions was filed more than ten days after the filing of the Order and therefore this Court is divested of jurisdiction. Plaintiff misunderstands the law governing the timely filing of post-trial motions. In accordance with Rule 59(e), SCRCPP, "[a] motion to alter or amend the judgment shall be served not later than 10 days *after receipt of written notice of the entry of the order.*" *In re Beard*, 359 S.C. 351, 357, 597 S.E.2d 835, 838 (Ct. App. 2004). A motion for sanctions must be filed within ten days of the *notice* of entry of judgment. *Russell v. Wachovia Bank, N.A.*, 370 S.C. 5, 20, 633 S.E.2d 722, 730 (2006), *Pitman v. Republic Leasing Co., Inc.*, 351 S.C. 429, 432, 570 S.E.2d 187, 189 (Ct. App. 2002).

On January 29, 2016, Attorneys filed with the court a verified memorandum attesting that they received the Order on July 23, 2015. A true copy of the Order filed July 10, 2015 from the clerk of court stamped July 23, 2015 was included with the verified memorandum. The Motion for Sanctions was filed with the clerk of court the next day, July 24, 2015. Based upon the Attorney's representations, this Court finds that the Motion was timely filed and therefore this Court has retained jurisdiction. *See USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 651, 661 S.E.2d 791, 795 (2008)(upholding trial court's finding that a motion to reconsider was timely filed after counsel, an officer of the court bound by the ethical and professional rules of this state, informed the court that she did not receive written notice of the order until more than a month after final judgment was entered).

Turning to the merits of the Motion, under Rule 11(a), SCRCPP, a party and/or the party's attorney may be sanctioned for filing a frivolous pleading, motion, or other paper, or for making frivolous arguments. *Runyon v. Ex parte Gregory*, 378 S.C. 430, 437-38, 663 S.E.2d 46, 50-51 (2008) citing *Wright*, 322 S.C. 15, 471 S.E.2d 160 (1996). The party and/or attorney may also be

sanctioned for filing a pleading, motion, or other paper in bad faith whether or not there is good ground to support it. *Id.* It is irrefutable that a lawyer owes their client zealous advocacy, but that zeal must be constrained within the bounds placed upon them as an officer of the court and under the court's rules. Specifically, Rule 11, SCRPC, expressly sets forth the outer boundaries of acceptable attorney conduct by requiring that there be good ground to support any pleading filed before the court. Thus, that rule prohibits a lawyer from asserting claims or legal positions that are not supported by fact, well-founded under existing law, or through the modification, extension, or expansion of existing law.

Plaintiff brought a complaint alleging that Attorneys are liable to Plaintiff for damages arising out of Attorneys' performance of professional activities as attorneys for a client. Plaintiff asserted seven causes of action against Attorneys. The seven causes of action are: (1) false imprisonment; (2) defamation; (3) intentional infliction of emotional distress ("IIED"); (4) malicious prosecution; (5) conspiracy; (6) fraud; and (7) abuse of process.

At the outset of the hearing on the summary judgment motion, Plaintiff stipulated that Attorneys were entitled to summary judgment on all causes of action except civil conspiracy. (Order p. 2; Hr'g Tr. p. 16 ll. 9-19). 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, 564, 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.

Regarding Plaintiff's conspiracy cause of action, this Court finds that Plaintiff's claim was based upon mere suspicion without any supporting evidence. Moreover, after reviewing Plaintiff's counsel arguments in support of the conspiracy cause of action, this Court finds that counsel alleged conspiracy to "throw it against the wall and see if it sticks". The Plaintiff made several arguments in an attempt to give some cognizable basis for his conspiracy claim, none of which this court finds are supported by law or fact.

First, the Plaintiff argued to the Court at the summary judgment hearing that the Attorneys stepped out of the scope of the representation of their client when they advised their client to report possible criminal acts to the police and further advised their client to recommend to another alleged victim that she also report her own, similar encounters with the Plaintiff. More troubling, is that plaintiff's counsel also argued that an attorney is not acting in his capacity as an attorney when assisting a client filing a complaint before a state administrative agency. The Plaintiff argued that Attorneys stepped outside their role as attorneys when they assisted their client with an online complaint against Plaintiff filed with the South Carolina Department of Labor, Licensing, and Regulation because the client did not need an attorney to file the complaint nor were the Attorneys representing the client when they completed the complaint form. (Order p. 2; Summ. J. Hr'g Tr. pp. 19-20, ll. 10-2). The Court found that "there is simply no cognizable basis in law or fact to conclude these acts fall outside the scope of Attorneys' representation of Client." (Order p. 2).

Second, the Court rejected the Plaintiff's argument that Attorneys created, embellished or made up better facts to strengthen their client's claims, and therefore conspired with their client

because Attorney's would share in any judgment obtained as a result of the suit because such an allegation is contrary to well-established law. (Order p. 5). The Court found that Plaintiff presented no evidence to support its bald assertions that Attorneys made up or embellished facts to strengthen their client's case. (Order p. 6). The Court also found, that in accordance with case law, an attorney does not act outside of the scope their representation simply by collecting a fee. (Order p. 5 citing *Gaar v. Myrtle Beach Realty Co., Inc.*, 287 S.C 525, 529, 339 S.E. 2d 888 (holding that an attorney normally conducts the litigation solely in his professional capacity and he has no personal interest in the suit)). The Court then found that there is no evidence here that Attorneys had any personal interest in their representation of their client. (Order p. 5).

Third, Plaintiff argued that Attorneys violated Rule 3.3 Candor Toward the Tribunal of the South Carolina Rules of Professional Conduct and that the rule also imposed a duty on Attorney to Plaintiff. The Court dismissed Plaintiffs argument that Rule 3.3 imposed Attorneys a duty to the Plaintiff, finding that the plain language of the rule creates no such duty. (Order p. 6). The Court also found that even if a duty was owed, the Plaintiffs breached no such duty. Plaintiff alleged that Attorneys should have recognized their client was lying when she informed them that Plaintiff was wearing a robe during the incident, but then later reported to law enforcement that Plaintiff was wearing a towel. The Court found that "these are subtle difference of no material distinction, both figuratively and literally, to put Attorneys on notice that Client may be lying." *Id.* Second, the Court found that the police report which contained the allegedly different descriptions of Plaintiff's attire was not created until after Attorney's advised their client to report to the police. Therefore, the Court found that Attorneys "would not have had the benefit of the very report Plaintiff claims should have put them on notice."

Plaintiff's argument is not reasonably supported by the facts. Plaintiff counsel's theory is on its face factually implausible.

Based upon the foregoing, this Court finds that sanctions are warranted against Plaintiff's counsel under Rule 11, SCRPC. A sanction under Rule 11, SCRPC, may include an order to pay the reasonable costs and attorney's fees incurred by the party or parties defending against the frivolous action or action brought in bad faith, a reasonable fine to be paid to the court, or a directive of a nonmonetary nature designed to deter the party or the party's attorney from bringing any future frivolous action or action in bad faith. *Runyon v. Wright*, 322 S.C. 15, 19, 471 S.E.2d 160, 162 (1996). Further, if appropriate under the facts of the case, the court may order a party and/or the party's attorney to pay a reasonable monetary penalty to the party or parties defending against the frivolous action or action brought in bad faith. Rule 11(a), SCRPC.

Given the facts and circumstances of this case, I am imposing as a monetary sanction which I calculate based upon the Attorneys' fees and costs for defending the underlying lawsuit and bringing this sanctions motion. Attorneys were forced to notify their malpractice carrier and retain outside counsel. Attorneys also contributed considerably to the defense of the professional association.¹ I find that counsel is responsible for the reasonable expenses, including attorney's fees. Based upon the Affidavits of Attorneys' counsel, I find that the total costs of defending this action of \$11,206.20 are reasonable. Plaintiff's counsel is required to pay to Attorneys \$11,206.20 as a monetary sanction.

¹ Attorneys did not submit and this Court did not consider any time expended by Mr. Moorhead as he is a party to this action. However, this Court notes that it could have ordered Plaintiff's counsel reimburse Attorneys for Mr. Moorhead's time because I decided to impose a monetary sanction.

LeB

Plaintiff's counsel is ordered to pay to Attorneys \$11,206.20 for violating Rule 11, SCRPC. This amount shall be paid within thirty days of the filing date of this order.

AND IT IS SO ORDERED.


~~THE HONORABLE~~ JUDGE LAWTON R. MCINTOSH

Anderson, South Carolina

2-3, 2016

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GENERAL SESSIONS

EXHIBIT D

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 ANDERSON SC

CASE NO. 2015-CP-04-667



Gregg Battersby

J Kirkman Moorhead, et al

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PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	COMMON PLEAS AND GENERAL SESSIONS	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant or <input type="checkbox"/> Self-Represented Litigant
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DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

RW **PLAINTIFF'S MOTION TO RECONSIDER DENIED.** *MR Krause to prepare formal order.*

This order ends does not end the case.

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Signature]
 Circuit Court Judge

2155
 Judge Code

4-21-16
 Date

EXHIBIT E

STATE OF SOUTH CAROLINA
COUNTY OF ANDERSON

Gregg Battersby,

Plaintiff,

v.

J. Kirkman Moorhead, Krause, Moorhead &
Draisen, P.A., Allstate Insurance Company,
and Allstate Northbrook Indemnity
Company,

Defendants.

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2015-CP-04-00667

**ORDER GRANTING DEFENDANTS
MOTION TO ENTER MONETARY
SANCTIONS IN THE JUDGMENT ROLLS**

THIS MATTER comes before me pursuant to a Motion to Enter Monetary Sanctions in the Judgment Roll against the attorney for the Plaintiff, Donald Loren Smith, Esquire.

The Defendants J. Kirkman Moorhead and the Law Firm of Krause, Moorhead & Draisen, PA were present and represented by Steven M. Krause of the Law Firm of Krause, Moorhead & Draisen, PA.

Donald Loren Smith, Esquire was present.

At the call of the case, the Court inquired if the Motion was merely ministerial and what arguments, evidence or law would be pertinent.

The Defendants, J. Kirkman Moorhead and Krause, Moorhead & Draisen, PA concurred with the Court's rationale. Further, the only reason the Motion was filed was that Mr. Smith was not a named defendant and therefore the previous Order of the Court filed on February 4, 2016 awarding monetary sanctions against Mr. Smith is not listed or recorded in the Judgment Roll.

The Court listened to argument from Mr. Smith which centered upon the fact that the Form Order which was filed on April 22, 2016 denying his Motion for Reconsideration did not contain a formal order denying such reconsideration. Accordingly, he maintains that this Motion is not proper.

The Court does not concur with Mr. Smith's logic but will utilize this Order to again deny his Motion for Reconsideration, even though the Court feels it to be redundant.

In addition, the Court finds that the Motion for Monetary Sanctions previously granted by this Court should be entered as a judgment in the Judgment Roll of Anderson County against Donald Loren Smith, Esquire in the amount of \$11,206.20.

Further, the Clerk of Court is directed to do so.

IT IS SO ORDERED.

R. LAWTON MCINTOSH, JUDGE
TENTH JUDICIAL CIRCUIT

Anderson, South Carolina

_____, 2019



Anderson Common Pleas

Case Caption: Gregg Battersby VS J Kirkman Moorhead , defendant, et al
Case Number: 2015CP0400667
Type: Order/Other

S/R. LAWTON McINTOSH

S/R.LAWTON McINTOSH

Electronically signed on 2019-12-16 14:11:39 page 3 of 3

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Apr 23 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No.: 2015-CP-02-00667
Appellate Case No. 2020-000070

Ex Parte: Donald L. Smith,.....Appellant,

In Re: Greg Battersby,.....Plaintiff,

v.

J. Kirkman Moorhead, Krause, Moorhead
& Draisen, P.A., Allstate Insurance Company,
and Allstate Northbrook Indemnity Company,.....Defendants

of whom:

J. Kirkman Moorhead and Krause, Moorhead
& Draisen, P.A. are,.....Respondents.

PROOF OF SERVICE

I hereby certify that I have served Respondents' Motion to Dismiss Appeal on Donald L. Smith, Esq., Appellant (and attorney for the Appellant), by depositing a copy of same in the United States Mail, postage prepaid, on April 23, 2021 addressed to Donald L. Smith, Esq., 122 North Main Street, Anderson, South Carolina, 29621.

s/Daniel L. Draisen

DANIEL L. DRAISEN (SC Bar# 13536)

2006 North Main Street

Anderson, South Carolina 29621

(864) 888-8887

daniel@injuredSC.com

ATTORNEY FOR THE RESPONDENTS