THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Alex Kinlaw, Jr., Circuit Court Judge

Appellate Case No. 2020-001075
Civil Action No. 2019-CP-23-06576

Jefferson Davis, Jr. ..... Appellant,

v.

Nate Leupp, Automatic, Inc., Facebook, Inc.,
and John Does 1-40 ..... Respondents.

FINAL BRIEF OF RESPONDENT NATE LEUPP

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1. Whether the Trial Court erred in dismissing Appellant's Greenville County claims against Respondent Nate Leupp pursuant to 12(b)(8) where Appellant pled the same claims, facts, and circumstances in a Richland County Action and the Court Ordered Appellant to identify and serve Respondent Nate Leupp in the Richland County action and whether dismissal with prejudice is appropriate when Appellant willfully failed to comply with a Court Order to name and serve Respondent Leupp and other defendants in Richland County civil action 2018-cp-40-02425.

2. Whether dismissal of Appellant's claims against Nate Leupp under SCRCP 12(b)(8) is further supported by naming defendants Facebook and Automatic, never asserting facts or a cause of action against other named defendants, pleading a substantially identical description of John Does 1-40 as those defendants described in the other prior action, pleading window dressing facts that do not give rise to causes of action and pleading the same causes of action against the same defendant with the same background facts as the prior action. And whether Appellant's request to amend makes the case more substantially identical to the prior Richland County case between the same Appellant and Respondent by causing the surviving causes of action in both cases to be identical.

STATEMENT OF THE CASE

Respondent Nate Leupp is a former chair of the Greenville Republican Party and resident of Greenville County. Appellant is an officer in the Tea Party and a founder of the group My SCGOP (whose mission is to educate people to take over the Greenville Republican Party at ReOrg and promote political candidacies of Appellant, Lin Wood, and other like-minded individuals). Appellant is a public figure as a school choice advocate, Tea Party officer, and multiple time unsuccessful candidate for election to officer positions within the Greenville Republican Party. Appellant is also a Georgia licensed attorney who has been practicing for three decades.

Appellant originally filed a Richland County action on May 3, 2018, against Ellen Weaver, Palmetto Promise Institute, and twenty unnamed parties referred to as John Doe 1-20. In the original complaint, Appellant asserted causes of action for (1) defamation, (2) false light publicity, (3) invasion of privacy, (4) negligence, (5) intentional infliction of emotional distress, (6) tortious interference with prospective contractual relations, (7) unfair trade practices, (8) pierce the corporate veil, and (9) conspiracy. *See* Complaint in Case Number 2018-CP-40—2425, Jefferson Davis v. Ellen Weaver, et al. (R 147-157) On October 30, 2018, the Honorable DeAndrea Benjamin dismissed the causes of action for false light publicity, tortious interference with prospective contractual relations, and unfair trade practices, and allowed Appellant fifteen days to amend the original complaint to include additional facts to support the causes of action for invasion of privacy and civil conspiracy and to name and serve each unnamed party. *See* Order Dated October 29, 2018 in Case Number 2018-CP-40—2425, Jefferson Davis v. Ellen Weaver, et al. (R 164-165)

On November 19, 2019, Appellant filed the First Amended Complaint ("Amended Complaint") in Richland County, which includes Nate Leupp as a named defendant. The

Amended Complaint similarly includes causes of action for (1) defamation, (2) defamation by innuendo, (3) invasion of privacy, (4) negligence, (5) intentional infliction of emotional distress, (6) tortious interference with prospective contractual relations, (7) unfair trade practices, (8) pierce the corporate veil, and (9) conspiracy.[1] *See* First Amended Complaint in Case Number 2018-CP-40—2425, Jefferson Davis v. Ellen Weaver, et al. (R 169, 207-211) The Richland County Amended Complaint mentions Nate Leupp to identify him as a party, (*Id* at ¶ 34.) (R 176), alleges Respondent Leupp's creation of an allegedly defamatory website called "Crooked Jeff" (*Id* at ¶ 158-160.) (R 198), alleges Respondent Leupp is a pawn of Ellen Weaver and Jim DeMint (*Id* at ¶ 161.) (R 198), alleges Respondent Leupp invaded Appellant's Privacy with a Background Check (*Id* at ¶ 230.) (R 208) and defendants individually and collectively (presumably including Nate Leupp) made or caused to be published false statements that Appellant has been disbarred from the practice of law. *Id* at ¶ 222 (R 207)

On February 12, 2019, the Honorable Doyet A. Early heard oral arguments on Motions to Dismiss. After considering the arguments of counsel and Judge Benjamin's October 30, 2018 Amended Order, Judge Early concluded that Appellant's failure to file and serve the Amended Complaint upon Nate Leupp in accordance with the October 30, 2018 Order required dismissal of the claims against Nate Leupp. As a result, Judge Early filed an Order dismissing with prejudice, Appellant's claims against Nate Leupp on February 19, 2019. After denial of Appellant's Motion for Reconsideration on March 27, 2019, Appellant filed a Notice of Appeal on April 13, 2019 to keep Nate Leupp in the Richland County case.

[1] Judge Benjamin's October 30th Amended Order dismissed several causes of action and ordered all John Doe defendants be identified and served. Respondent's Amended Complaint pursuant to this Order included the dismissed causes of action as well as doubled the number of John Doe defendants from 20 to 40.

Six months after dismissal with prejudice, Appellant filed the present action in Greenville County on November 12, 2019 naming Nate Leupp, Automatic, Inc. Facebook, Inc. and the same number of 40 John Doe defendants named in the Richland County Amended Complaint. The Appellant's Greenville County action plows the same ground of alleging a large conspiracy against the Appellant related to his actions and beliefs in school choice and special needs scholarships. It also alleges Respondent Leupp created the allegedly defamatory website and charges Defendants with falsely stating that Appellant has lost his license to practice law. The causes of action in this case are identical to the nine causes of action in Richland County Case number 2018-cp-40-2425. Other facts alleged in the Complaint do not give rise to causes of action due to lack of standing or failure to allege or plead facts sufficient to establish the elements of the included causes of action. When these non-viable additional pled facts are stripped away, this Greenville Complaint is left with a defamation cause of action for the alleged website, invasion of privacy for a background check, and defamation per se for alleging Appellant lost his law license. These are the same causes of action that can be attributed to Respondent Leupp in the Richland County Amended Complaint.

The Trial Court dismissed Appellant's Complaint in this action by Order dated June 29, 2020 under rule 12(b)(8). The Trial Court denied Appellant's Motion to Reconsider on July 27, 2020 noting the Trial Court's observation that Judge Deandra Benjamin ordered these causes of action be brought against Respondent Leupp in the Richland County action Appellant kept viable through appeal. This appeal followed.

STANDARDS OF REVIEW

The Greenville County Trial Court dismissed Appellant's claims against Nate Leupp under SCRCP Rule 12(b)(8) finding the cases were substantially similar and for failing to comply with Judge Benjamin's October 30, 2018 Amended Order and Judge Early's February 19, 2019 Order in Richland County. The interpretation of an order is a question of law that is reviewed *de novo*. *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 498 (2014); *Ex parte TLC Laser Eye Centers, LLC*, 404 S.C. 385, 392, 745 S.E.2d 105, 109 (2013); *Town of Summerville v. City of North Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

Pursuant to Rule 12(b)(8), SCRCP, the movant seeks dismissal of a case because another action is pending between the same parties for the same claim. The Appellate Court uses the same standard of review as the circuit court in scrutinizing the application of Rule 12(b)(8), each of the components of the rule are determined as a matter of law and thus the Appellate Court applies a de novo standard of review to the grant or denial of this motion. See *Miami Sand & Gravel, LLC v. Nance*, 849 N.E.2d 671, 676 (Ind.Ct.App.2006). In other words, the Appellate Court may determine whether there is another action involving the same parties, claims (or subject matter), and remedies as a matter of law. *Capital City Ins. Co. v. Bp Staff, Inc.*, 674 S.E.2d 524, 382 S.C. 92 (S.C. App. 2009)

Avoidance of "duplicative litigation" is the underlying principle of Rule 12(b)(8). *State ex rel. Wilson v. Condon*, 410 S.C. 331, 333, 764 S.E.2d 247, 248 (2014); An appellate court applies a de novo standard of review to the circuit court's grant or denial of a motion for dismissal of a case pursuant to Rule 12(b)(8). *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009); "In South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim." id. at

105, 674 S.E.2d at 531; Rule 12(b)(8) is interpreted "narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate" id. at 106, 674 S.E.2d at 532.

The dismissal of Appellant's claims is also supported by the additional sustaining grounds that (1) the Amended Complaint fails to assert claims against Nate Leupp upon which relief can be granted because the Amended Complaint fails to make any factual allegations in support of any such claims. In reviewing a trial court's dismissal for failure to state a claim pursuant to Rule 12(b)(6), SCRCP, an appellate court applies the same standard as the trial court—the pleadings must be construed liberally and all well-pled facts must be presumed true. *See Doe*, 407 S.C. at 134, 754 S.E.2d at 498-99. A claim should be dismissed when the facts alleged in the complaint do not support relief. *Brouwer v. Sisters of Charity Providence Hospital*, 409 S.C. 514, 519, 763 S.E.2d 200, 202 (2014). The prejudicial effect of a dismissal is determined by the trial court's exercise of its discretion, which will be reversed only for an abuse of discretion. *See Berry v. McLeod*, 328 S.C. 435, 449-50, 492 S.E.2d 794, 802 (Ct. App. 1997); *Newman v. Old West, Inc.*, 286 S.C. 394, 334 S.E.2d 275 (1985).

ARGUMENT

I. The trial court properly dismissed Appellant's claims against Nate Leupp because Appellant was required by Court Order to bring the viable causes of action in Richland County.

A trial court may impose conditions, limitations, and deadlines upon a party seeking leave to amend a pleading. *See, e.g., Stokes v. Murray*, 99 S.C. 221, 221, 83 S.E. 33, 34 (1914); *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 399 S.E.2d 16 (Ct. App. 1990); *King v. King*, No. 2007–UP–132, 2007 WL 8327374 (S.C. Ct. App. March 28, 2007). Amendment of a pleading to include a new party requires naming and serving the pleading. *See Bowman v. Richland Memorial Hospital*, 335 S.C. 88, 92-93, 515 S.E.2d 259, 261 (Ct. App. 1999) ("[A]ppellants had ten days

from the effective date to amend their complaint. Therefore, appellants properly filed and served their amended complaint within ten days of the order."); *see also* Rules 3, 15, SCRCP. A party's failure to amend a pleading in accordance with a trial court's order constitutes a final dismissal of the claims. *Harvin v. Commercial Credit Corporation*, 275 S.C. 14, 15-16, 266 S.E.2d 789, 789-90 (1980).

"As a general rule, judgments are to be construed like other written instruments . . . it should be examined and considered in its entirety." *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 498 (2014) (quoting *Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct. App. 1989). "If the language employed is plain and unambiguous, there is no room for construction or interpretation, and the effect thereof must be declared in the light of the literal meaning of the language used." *Id.* (quoting *Weil v. Weil*, 299 S.C. 84, 90, 382 S.E.2d 471, 474 (Ct. App. 1989). A willful and blatant violation of a Judge's Order is grounds for dismissal with prejudice that cannot be overturned absent abuse of discretion. *Georganne Apparel, Inc. v. Todd*, 399 S.E.2d 16, 303 S.C. 87 (S.C. App. 1990)

Dismissal Under Rule 12(b)(8) SCRCP is Supported by Court Order and Appellant's Defiance of Those Same Court Orders

The Amended Order provides in pertinent part as follows:

> **IT IS THEREFORE ORDERED** each John Doe referenced in the complaint shall be specifically named and served. This court allows the plaintiff 15 day to appropriately amend the pleadings.

Order Dated October 29, 2018 in Case Number 2018-CP-40—2425, Jefferson Davis v. Ellen Weaver, et al. (R 165.)

The language of the Amended Order is plain and unambiguous: Appellant had 15 days to appropriately amend the pleadings, which included specifically naming and serving each John Doe referenced in the original Complaint. *Id.* (R 165). This plain and unambiguous meaning is further crystalized by its context within the Amended Order. *Id.* This meaning is also bolstered by the transcript of the hearing during which Judge Benjamin discussed the intent of the Amended Order. Hearing Tr. at 26-27 ("[T]he only things that I am granting you leave to amend the complaint on is the invasion of privacy, conspiracy, and the John Does, I think you need to name them and serve them . . . [i]t will be 15 days to amend."). The language of the Amended Order is clear and unambiguous and there exists no other reasonable interpretation of the meaning of the Amended Order to name all John Does.

Appellant's first willful and blatant disregard of the Court Order was to double the number of John Does from 20 to 40 in response to Judge Benjamin's Order explicitly stating Appellant had to name all John Does.

Appellant's second willful and blatant disregard for both Judge Benjamin's and Judge Early's Richland County Court Orders was the Appellant's waiting six months after an order dismissing his causes of action with prejudice to bring the same causes of action and same background facts against Richland County dismissed Respondent Nate Leupp for allegedly creating the same website and allegedly defaming Appellant by stating Appellant lost his law license (TR Richland County Complaint Greenville County Complaint). Appellant admits to not serving any of the identified John Doe defendants in the Richland County action pursuant to the terms of Judge Benjamin's Amended Order. Transcript of June 16, 2020 p 41 line 9 (R 121) The present Greenville County case against Nate Leupp for the same causes of action tests Appellant's ability to bring additional litigation against Richland County defendants who were dismissed with

prejudice for Appellant's failure to serve as ordered by Judge Benjamin. Because the Appellant also appealed dismissal of his Richland County Case against the John Doe defendants, duplicative litigation is created for Nate Leupp and the other John Doe defendants who were dismissed because Appellant failed to serve.

Respondent Leupp brought these issues of disregard of a Court Order before the Court in oral argument and in Respondent's memorandum supporting dismissal pursuant to SCRCP 12(b)(8). Id p 40 line 12. (R 120),Order dated February 19, 2020 in Case No. 2018-cp-40-02425. (R 215). . Because of defiance of Court Orders, the Trial Court was well within its discretion to find Appellant was ordered to bring these actions in Richland County and dismiss pursuant to SCRCP 12(b)(8). In a July 2020 Order denying reconsideration the Trial Court made explicit note of Judge Benjamin's October 29, 2018 Order requiring Plaintiff bring the substantially identical causes of action in Richland County in support of its logic for dismissal pursuant to SCRCP 12(b)(8). Order Dated July 27, 2020 in Case No. 2019-cp-23-06576) (R 8, 10) The Trial Court did not err in its finding that these causes of action were ordered brought against Respondent Leupp in Richland County and dismissal under SCRCP 12(b)(8) was proper.

The Trial Court Also Correctly Found this was Duplicative Litigation

Avoidance of "duplicative litigation" is the underlying principle of Rule 12(b)(8) *State ex rel. Wilson v. Condon*, 410 S.C. 331, 333, 764 S.E.2d 247, 248 (2014) "In South Carolina, dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 105, 674 S.E.2d 524, 531.

Mr. Davis has already named Respondent Leupp in a Richland County Lawsuit that plows the same ground. In Richland County Civil Action Number 2018-CP-40-02425 Appellant Davis alleges Mr. Leupp created a website to defame him (First Amended Complaint in Case Number 2018-CP-40—2425 at ¶159) (R 198), alleges Respondent Leupp has created similar defamatory websites (*Id.* at ¶160) (R198), alleges Respondent Leupp is a pawn of Ellen Weaver and Jim Demint (*Id.* at ¶161) (R 198), alleges defendants defamed him by stating he lost his law license and in other ways (*Id.* at ¶¶ 221 and 222) (R 207), alleges he was defamed by innuendo (*Id.* at ¶¶ 226) (R 207), alleges Respondent Leupp invaded his privacy through obtaining his background (*Id.* at ¶ 230 (R 208)), alleges negligence in not checking truthfulness of statements (*Id.* at ¶ 234) (R 209), alleges infliction of emotional distress (*Id.* at ¶ 236) (R 209), alleges Respondent Leupp instructed others not to do business with Appellant (*Id.* at ¶ 238) (R 210), alleges unfair trade practices (*Id.* at ¶¶ 241-244) (R 210), alleges veil piercing (*Id.* at ¶ 246) (R 211) and alleges Respondent Leupp was a part of a larger statewide conspiracy against Appellant Davis related to Appellant Davis' school choice political positions (*Id.* at ¶¶ 250-256) (R 212).

In the present civil action Appellant Davis alleges Respondent Leupp created a defamatory website (Complaint in Case No. 2019-cp-23-06576, ¶¶ 38-46) (R 20-21). Appellant Davis alleges Respondent Leupp created other defamatory websites. (*Id.* at ¶¶ 29-37) (R 18-19)

Appellant Davis realleges the seemingly meaningless detail that there is some significant relationship regarding Respondent Leupp and Richland County co-defendant Jim Demint. *Id.* at ¶ 49. (R 18-19) (R Complaint ¶ 49) Appellant Davis also ties in other Richland County Civil Action co-defendants of Respondent Leupp. (TR Complaint ¶48)

In paragraph 21 of the Greenville County complaint, Appellant Davis admits that he pled identical Richland and Greenville County civil action defamation claims regarding not being from

South Carolina, losing his law license, Appellants issues with the Georgia special needs scholarship program, and Appellants issues with the South Carolina special needs scholarship program.

> Plaintiff Davis has been particularly aware of this fact and exercised extreme care to ensure he interacts with others online in an honest, professional and thoughtful manner. **This practice has been particularly important given other false light and defamatory statements *(some subject to other ongoing litigation)* about Plaintiff by political parties associated with Defendant Leupp, including but not limited to false claims that Plaintiff has been disbarred from the practice of law, is not from South Carolina and that he bankrupted the Georgia school choice program before fleeing to South Carolina to destroy the SC program.**
>
> *Id.* ¶ 21 (R 17)

In paragraphs 92, 124 and 125, (Id. ¶¶ 92, 124-125) (R 27, 34), Appellant Davis claims the defendants defamed him just as he did in Richland County in paragraphs 221 and 222., Complaint, Case No. 2018-cp-40-02524, ¶¶ 221-222, (R 207).

In paragraph 132 the present complaint (Complaint Case No. 2019-cp-23-06576, ¶¶131-134. (R 35)) goes into the same claim of defamation by innuendo or false light as pled in Richland County. Complaint, Case No. 2018-cp-40-02524, ¶¶ 225-227. (R 207-208)

In Paragraph 135 Appellant Davis launches into the invasion of privacy claim (Complaint Case No. 2019-cp-23-06576, ¶¶135-139. (R 36-37)) just as he did in Richland County action. Complaint, Case No. 2018-cp-40-02524, ¶¶ 228-232. (R 208)

In paragraph 141 (Complaint Case No. 2019-cp-23-06576, ¶141. (R 37)) there is an identical negligence claim to the one filed in Richland County. Both allege a duty to investigate

not recognized under South Carolina law.[2] Complaint, Case No. 2018-cp-40-02524, ¶¶ 233-234. (R 209).

Paragraph 143 (Complaint Case No. 2019-cp-23-06576, ¶143. (R 37)) is the beginning of an Intentional Infliction of Emotional Distress claim just like paragraph 236 of the Richland County complaint. Complaint, Case No. 2018-cp-40-02524, ¶ 236. (R 209).

Paragraph 145 (Complaint Case No. 2019-cp-23-06576, ¶¶144-147. (R 38-39)) is a tortious interference with contractual relations claim like the one pled in Richland County.[3]

Complaint, Case No. 2018-cp-40-02524, ¶¶ 237-239. (R 209-210).

In paragraph 149 (Complaint Case No. 2019-cp-23-06576, ¶¶149-154. (R 39-40)) the Appellant re-pleads his unfair trade practices act from the Richland County case against Respondent Leupp.[4] Complaint, Case No. 2018-cp-40-02524, ¶¶ 240-244. (R 210).

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[2] Appellant fails to show any duty owed to him to investigate the truth of an allegation under South Carolina Law. The existence of a duty to investigate is not established. Metts v. Mims, 370 S.C. 529, 635 S.E.2d 640 (S.C. App. 2006) (Failure to investigate in and of itself is insufficient to establish that a defendant recklessly disregarded the falsity of a published article.) Without the existence of a duty, this cause of action can by dismissed under SCRCP 12(b)(6).

[3] This cause of action was dismissed in Richland County because no contract currently existed. (TR Richland County Amended Order) Future contracts that do not exist are speculative. "Whatever actual damages were the natural, direct and immediate result may be recovered upon proof of the claim. Remote or speculative damages are not recoverable. *Llewellyn v. Atl. Greyhound Corp.*, 204 S.C. 156, 28 S.E.2d 673 (S.C. 1944).Without the existence of a contract this cause of action can be similarly dismissed under SCRCP 12(b)(6).

[4] This cause of action has been dismissed in Richland County because the nature of the allegations are not ones that would fall under trade practices as defined in the Unfair Trade Practices Act. (TR Richland County Amended Order) Furthermore the Appellant fails to plead and show that the Attorney General was presented with the exact specifics of this complaint and declined to bring an action. (citation Unfair Trade Practices Act SC Code Section…) As such, this cause of action as pled can be dismissed under SCRCP 12(b)(6).

The veil piercing is plead in both paragraph 156 of this complaint (Complaint Case No. 2019-cp-23-06576, ¶¶155-159. (R 40)) and paragraph 246 of the Richland County complaint.[5] Complaint, Case No. 2018-cp-40-02524, ¶¶ 245-248. (R 211).

The conspiracy cause of action is plead in the same way in both complaints. It is located at paragraph 161 of this complaint. Complaint Case No. 2019-cp-23-06576, ¶¶160-168. (R 41-42). *See also* Complaint, Case No. 2018-cp-40-02524, ¶¶ 249-256. (R 211-212).

Like the Richland County case, Appellant alleges a wide-ranging political conspiracy to harm the Appellant because of Appellants actions and positions regarding special needs scholarships for children. It involves the same set of facts, Respondent Leupp is a defendant in both actions and the complaint mentions Oran Smith, Palmetto Promise Institute, and Jim Demint who are parties to the Richland County action. Complaint Case No. 2019-cp-23-06576, ¶¶48-49. (R 21). South Carolina is a small and closely linked state. There is not room for multiple statewide conspiracies over the same motivation, set of facts, and circumstances. Our Courts have always held that a person cannot bring simultaneous actions for the same set of facts and circumstances in multiple counties against the same Defendant. The Trial Court was correct in dismissing this matter pursuant to Rule 12(b)8 SCRCP. Appellant chose to sue Respondent Leupp in Richland County first, was ordered to name and serve Respondent Leupp in Richland County and his action was dismissed with prejudice and is under appeal. This was properly brought in Richland County and this matter should remain there. The fact that Respondent Leupp was dismissed with prejudice and Appellant has continued the action against Respondent Leupp by appeal shows Res Judicata and 12(b)8 apply. Continuing to fight the appeal along with bringing a second action naming the

[5] Respondent Leupp is an individual and corporate veil piercing is not applicable. No allegations of acts or omissions are made against Defendants Facebook or Automatic. (TR Complaint) As such this cause of action can be dismissed under SCRCP 12(b)(6).

same party, facts, and causes of action and doubling down on John Doe Defendants after being ordered to identify all John Does shows the Respondent's additional disregard for our Courts. Blatant defiance of an order alone or in conjunction with 12(b)(8) SCRCP is enough to dismiss this cause of action with prejudice. Also 12(b)(8) SCRCP alone is sufficient to dismiss the present action with prejudice. The lower court had discretion to dismiss this case on multiple grounds and acted properly on the facts presented.

II. Dismissal of Appellant's claims against Nate Leupp under Rule 12(b)(8) is proper despite Appellant naming the window dressing parties Facebook and Automatic in the caption and claiming unknown parties are involved and is also proper because once causes of action are eliminated as non-viable, the remaining viable causes of action are identical parties, causes of action, and sets of facts and circumstances.

"A defendant may seek dismissal of an action pursuant to Rule 12(b)(8) when another action is pending between the same parties for the same claim." *Cricket Cove Ventures, LLC v. Gilland* (S.C. App. 2010). Corbett v. City of Myrtle Beach, 336 S.C. 601, 610, 521 S.E.2d 276, 281 (Ct. App. 1999) (holding dismissal pursuant to Rule 12(b)(8), SCRCP, appropriate where claims involved the same parties and were based upon the same facts and circumstances); Cox v. Woodmen of World Ins. Co., 347 S.C. 460, 469-70, 556 S.E.2d 397, 402 (Ct. App. 2001) (explaining the trial court properly denied a motion to dismiss pursuant to Rule 12(b)(8) where a class action in an Alabama court involving the same parties and the same or substantially the same issues was decertified).

Slander is actionable per se only if it charges the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." Id. at 511, 506 S.E.2d at 502. "In all other cases-namely, when slander does not fall into the above-named categories-special damages must be established. *Parrish v. Allison*, 656 S.E.2d 382, 376 S.C. 308 (S.C. App. 2007). "If a defamation is actionable per se, then under common law principles the law presumes the defendant acted with common law malice and that the plaintiff suffered general damages. If a defamation is not actionable per se, then at common law the plaintiff must plead and prove common law actual malice and special damages. Lily v. Belk's Dep't Store, 178 S.C. 278,

182 S.E. 889 (1935), *Holtzscheiter v. Thomson Newspapers, Inc.*, 506 S.E.2d 497, 332 S.C. 502 (S.C. 1998).

"Rule 12(b)(6) requires the plaintiff to allege facts." *Paradis v. Charleston County School District*, 424 S.C. 603, 615, 819 S.E.2d 147, 153 (Ct. App. 2018). To bring a defamation action, the Plaintiff must allege who made defamatory statements, what they said and to the exact person or people to whom those statements were said or published. Merely claiming there are false accusations on a potentially disparaging subject is not sufficient under Rule 12(b)(6) requirement to plead facts. *Id.* Rule 8(a)(2) further requires that the facts show that "the pleader is entitled to relief." Rule 8(a)(2), SCRCP. "When a plaintiff states nothing more than legal conclusions, a claim should fail." *Id.* (citing *Talbott v. Padgett*, 30 S.C. 167, 171, 8 S.E. 845, 847 (1889)).

Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 324, 701 S.E.2d 39, 46 (Ct. App. 2010) (stating civil conspiracy consists of three elements: (1) a combination of two or more persons, (2) joining for the purpose of injuring the plaintiff, (3) which causes him special damage); *Pye v. Estate of Fox*, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006) (holding that to establish a conspiracy, the plaintiff must produce evidence, direct or circumstantial, from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the enterprise).

"Generally, a party must be a real party in interest to the litigation to have standing." *Hill v. S.C. Dep't of Health & Envtl. Control,* 389 S.C. 1, 22, 698 S.E.2d 612, 623 (2010) (internal quotation marks omitted). "A real party in interest for purposes of standing is a party with a real, material, or substantial interest in the outcome of the litigation." Id. (internal quotation marks omitted). SCRCP 17(a) requires that every action be prosecuted "in the name of the real party in interest *Bank of Am., N.A. v. Todd Draper, Mortg. Elec. Registration Sys., Inc.*, 405 S.C. 214, 746

S.E.2d 478 (S.C. App. 2013)." The South Carolina rule with respect to the real party in interest requirement is patterned after the comparable federal rule, which has been regarded as embodying the concept that an action shall be prosecuted "in the name of the party who, by the substantive law, has the right sought to be enforced." *Id.*. "The requirement of standing is not an inflexible one." *Sloan v. Sch. Dist. of Greenville Cnty.*, 342 S.C. 515, 524, 537 S.E.2d 299, 304 (Ct.App.2000) (internal quotation marks omitted).

The Parties Material to the Causes of Action are the Same Appellant and Same Respondent as Appellant named in Richland County.

SCRCP Rule 6 requires a plain statement of the facts supporting causes of action.

The Complaint fails to provide any facts to support any viable causes of action against Facebook or Automatic. No acts or omissions are alleged for these two corporate parties. Complaint Case No. 2019-cp-23-06576. (R 13-43). As such they are not real parties to this action.

John Does are described as unknowns who directed Respondent Leupp. Complaint Case No. 2019-cp-23-06576, ¶120. (R 33) (TR Complaint 120). John Does are specifically identified as Jim DeMint and Ellen Weaver. Complaint Case No. 2018-cp-40-02425, ¶161. (R 198). Respondent further describes the John Does as follows: "individuals, entities, members of or leadership in the Greenville County or South Carolina Republican Party, government agencies or taxpayer supported organizations, political advocacy non-profits, public relations firms, lobbyists or even elected politicians or candidates for office." Complaint Case No. 2019-cp-23-06576, ¶122. (R 33)

The Richland County action specifies the following Defendants: Ellen Weaver, Chad Connelly, Oran P. Smith, Neil J. Mellen, Howard S. Rich, Rick Reames, Stephen D. Kirkland, Palmetto Promise

Institute, Palmetto Family Council, Palmetto Family Action, South Carolinians for Responsible Government, SCRG Foundation, Access Opportunity South Carolina, Friedman Foundation for Educational Choice, Inc., Cato Institute, South Carolina Educational Credit for Exceptional Needs Children Fund, South Carolina Education Oversight Committee, South Carolina Department of Revenue, South Carolina Department of Labor, Licensing and Regulation, First Impressions, Inc. d/b/a/ Richard Quinn & Associates, First Tuesday Strategies, LLC, Bill Wilson, Jason Bedrick, Jim DeMint, Randy Page, Tony Denny, Phillip Cease, Melanie Barton, Doris Cubitt, Susan Thomas, John McCormick, Nate Leupp, Institute of Management Consultants USA & John Doe(s) 1-40. Amended Complaint Case No. 2018-cp-40-02425, ¶¶2-35. (R 169-176). These defendants are described in the Richland County Complaint as members of leadership in the Republican Party, government agencies or taxpayer supported organizations, political advocacy non-profits, public relations firms, lobbyists, elected politicians or candidates for office." *Id.* (R 170-176)

Appellant's argument that the parties are different or could be different does not negate the complaint is between the same Appellant and the same Respondent Nate Leupp described in Richland County Civil Action Number 2018-cp-40-002425. The real parties to this litigation are also named in Richland County. The other defendants do not matter. See *Cox v. Woodmen of World Ins. Co.,* 347 S.C. 460, 469-70, 556 S.E.2d 397, 402 (Ct. App. 2001) (The Court placed weight on decertification of a class action rather than presence of additional plaintiffs. A class action with many additional plaintiffs would have barred another case with the same claim between a single plaintiff and the same defendant had it not been decertified.) This Action is between Jefferson Davis and Nate Leupp. They are the same parties named for the same defamation per se, website, and invasion of privacy causes of action stemming from the same alleged statewide school choice conspiracy that is allegedly being conducted against Appellant.

The Subject Matter is the Same

Both the Richland Complaint and this Complaint describe the same alleged statewide conspiracy against the Appellant over his views and actions in school choice. Complaint Case No. 2019-cp-23-06576, ¶¶17, 48-50, 119 . (R 16, 21-22, 32), Transcript of June 16, 2020, p 57, lines 1-14. (R 137). Transcript of June 16, 2020, pp 8-9, lines 1-14. (R 87-88). *See also* Amended Complaint Case No. 2018-CP-40-02425, ¶¶163-102, (R 198-202). *See also* Amended Complaint Case No. 2018-CP-40-02425, ¶¶163-102, (R 198-202).

There Are No New Viable Causes of Action

A review of Appellant's Greenville County allegations against Nate Leupp are summarized below with the deficiencies noted and showing the remaining core underlying facts and causes of action between the two parties are identical or substantially identical.

This complaint alleges Defamation *per se* due to slander and Defamation *Per Quod.* To prove defamation, the plaintiff must show (1) a false and defamatory statement was made; (2) the unprivileged publication was made to a third party; (3) the publisher was at fault; and (4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Fleming v. Rose*, 350 S.C. 488, 494, 567 S.E.2d 857, 860 (2002). When the statement is defamatory *per quod*, "the plaintiff must introduce extrinsic facts to prove the defamatory meaning." Erickson, 368 S.C. at 465, 629 S.E.2d at 664. Special damages must be shown when a plaintiff alleges defamation *per quod. McBride v. Sch. Dist. of Greenville Cnty.*, supra, 389 S.C. 546, 698 S.E.2d 845, (S.C. App. 2010). Special damages are tangible losses or injuries to the plaintiff's property, business, occupation, or profession in which it is possible to identify a specific amount of money as damages. *Erickson*, 368 S.C. at 465, 629 S.E.2d at 664.

South Carolina only recognizes Slander *per se* in limited circumstances. "Slander is actionable per se when the defendant's alleged defamatory statements charge the plaintiff with one of five types of acts or characteristics: (1) commission of a crime of moral turpitude; (2) contraction of a loathsome disease; (3) adultery; (4) unchastity; or (5) unfitness in one's business or profession." *Goodwin v. Kennedy*, 347 S.C. 30, 36, 552 S.E.2d 319, 322-23 (Ct.App.2001). *McBride v. Sch. Dist. of Greenville Cnty.*, 389 S.C. 546, 698 S.E.2d 845, 259 Ed. Law Rep. 918 (S.C. App. 2010)

Appellant fails to plead that Respondent Leupp stated he committed a crime, has a disease, cheated on his wife, or is a sexually promiscuous man. Respondent Leupp is alleged to have said Appellant lost his law license, but this is clearly alleged in the Richland County action and should be dismissed under SCRCP 12(b)(8).

Appellant alleges numerous alleged acts attributed to Nate Leupp in this Greenville County action. These acts or sets of facts from the Complaint are listed in the next several sets of paragraphs along with the reason each alleged fact patter fails to set forth a recognized cause of action. It was presented by Respondent Nate Leupp that none of the plethora of facts supplied by Appellant give rise to a justiciable claim. Respondents Memo in Support of Motion to Dismiss (R 52-55). Transcript of June 16, 2020 Hearing (R 108-112) It was also presented that many causes of action and identical sets of facts were already pled in Richland County. *Id.* (R 102-105).

Appellant alleges Nate Leupp created an allegedly defamatory website called "Crooked Jeff." This is the same website and same defamation claim brought in the Richland County Action between Appellant and Nate Leupp. Amended Complaint Case No. 2018-cp-40-02425 (R 198). As such it was correctly dismissed by the Trial Court pursuant to SCRCP 12(b)(8).

Appellant alleges Respondent Leupp said Appellant is disbarred from practice of law. This claim was made in Richland County against Nate Leupp by the Appellant. Appellant further fails to

state specifics such as to whom the statement was made. SCRCP 12(b)8 applies as it is the same claim between the same parties over the same facts. SCRCP 12(b)(6) applies because sufficient facts are not pled per *Paradis*.

Appellant alleges Nate Leupp said Appellant is not from South Carolina. Appellant made this same claim in Richland County. *Id.* (R 196). There is also no pleading of the special circumstances or link to economic harm required in defamation *per quod.*

Appellant alleges Nate Leupp said Appellant wrecked the Georgia special needs scholarship program. This allegation was also made in the Richland County Case. *(Id.* 197) There is also no pleading of damages. Appellant stated in the transcript that he is retired (R 89) and in the Complaint that he is a volunteer (R 15). Being a retired volunteer contradicts any possibility of required economic harm.

Appellant alleges Nate Leupp invaded Appellant's privacy by having a professional background check performed. SCRCP 12(b)(8) applies because this was explicitly pled in Richland County. (TR Richland County Complaint) Appellant is public figure running for office. A background check is a compilation of publicly available information. These allegations are reasonable, expected, and do not give rise to the mental damage contemplated in invasion of privacy. Snakenberg v. Hartford Cas. Ins. Co., Inc., 383 S.E.2d 2, 299 S.C. 164 (S.C. App. 1989) citing: *Kelley v. Post Publishing Company*, 327 Mass. 275, 278, 98 N.E.2d 286, 287 (1951). ("The law does not provide a remedy for every annoyance that occurs in everyday life,") and citing: *Meetze v. Associated Press*, 230 S.C. 330, 95 S.E.2d 606 (1956). (In order to constitute an invasion of privacy, the defendant's conduct must be of a nature that would cause mental injury to a person of ordinary feelings and intelligence in the same circumstances. The law protects normal sensibilities, not heightened sensitivity, however genuine,) and citing: *Rycroft v. Gaddy, supra* [299 S.C. 172] (plaintiff must show a blatant and shocking disregard of his rights and serious mental injury or humiliation to himself as a result thereof). Whether the

conduct in question meets this test is, in the first instance, a question of law for the court. *Meetze v. Associated Press, supra.* In addition to being pled in Richland County, this set of facts does not give rise to any cause of action pled in the case.

Appellant alleges Nate Leupp called attention to Appellant for filing a lawsuit in Richland County. This is true and Appellant's Richland County Complaint is in this record. Therefore, it is not actionable.

Appellant alleges Nate Leupp said the Tea Party was trying to remove delegates. The Tea Party would be the party with a genuine interest. Appellant fails to plead a specific economic harm from this statement and the Tea Party is not a plaintiff. As such Appellant does not have an interest and therefore standing to bring an action on behalf of the Tea Party under his own name. This is not a justiciable claim.

Appellant alleges Nate Leupp said Appellant tried to remove Linda Gardner from her seat as an executive committee member[6] and pled that Linda Gardner did not believe Nate Leupp's statement. Appellant fails to plead a specific economic harm or damages. Because Appellant pled Linda Gardener did not believe the statement the necessary damages are undercut by the facts pled.

Appellant alleges Nate Leupp falsely reported the amount of money Appellant made being a "volunteer." Appellant's volunteer status contradicts any alleged economic harm and Appellant fails to plead specifics of the audience necessary pursuant to *Paradis*.

Appellant alleges Nate Leupp kicked Appellant's wife out of a Greenville GOP meeting. Appellant's wife not a plaintiff and the true party of interest. Appellant lacks standing to bring the claim of another.

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[6] Public record indicates Appellant ran for the executive committee seat held by Linda Gardner. See *Parrish*, 376 S.C. at 326, 656 S.E.2d at 392 ("**Truth** is an affirmative defense...")

Appellant alleges Nate Leupp stated Appellant Davis is homophobic or racist person. Appellant fails to plead exactly what was said, who was the audience, or any specific link to economic harm to the Appellant. As such, the claim is insufficiently pled pursuant to *Paradis*.

Appellant alleges Nate Leupp said that Appellant is Catholic. In the next sentence Appellant pleads that he attends the Catholic Church with his Wife. Appellant does not plead an actionable untrue statement.

Appellant alleges Nate Leupp accessed police records for Pressley Stutts. Pressly Stutts is not a Plaintiff and Appellant lacks standing to bring Pressley Stutt's claims. Appellant is not a real party of interest.

Appellant alleges Nate Leupp asked candidates in his own party to not attend political functions of a different political party. The Tea Party is the real party of interest. Appellant lacks standing to bring a claim where the Tea Party is the party of interest. Furthermore, this does not appear actionable through the causes of action pled in this case.

Appellant alleges Nate Leupp slashed Pressley Stutts' tires. Pressley Stutts is the real party of interest and not a plaintiff. Appellant lacks standing to bring the claim of Pressley Stutts.

Appellant alleges Nate Leupp told a government official Appellant was a political terrorist and should be ignored. Appellant failed to plead any specific economic harm directly linked to this statement. Special damages must be shown when a plaintiff alleges defamation *per quod. McBride v. Sch. Dist. of Greenville Cnty., supra*, 389 S.C. 546, 698 S.E.2d 845, (S.C. App. 2010). Special damages are tangible losses or injuries to the plaintiff's property, business, occupation, or profession in which it is possible to identify a specific amount of money as damages. *Erickson*, 368 S.C. at 465, 629 S.E.2d at 664. Appellant indicated to the Court that he is retired (R 89) and pled in the complaint that he is a volunteer. (R 15) Therefore no economic damages are asserted or can be inferred.

Appellant pled that Nate Leupp blocked Plaintiff from Facebook pages controlled by Nate Leupp. Appellant failed to plead any cause of action recognized in South Carolina that would apply to blocking a person's access to Nate Leupp's Facebook page. Furthermore, no damages are proximately linked to this alleged action. These facts are non-justiciable.

Appellant alleges Nate Leupp said that Appellant intended to sue the Greenville Election Commission and have an employee removed from her job. Appellant failed to plead any specific link to economic harm caused by this statement. Special damages must be shown when a plaintiff alleges defamation *per quod. McBride v. Sch. Dist. of Greenville Cnty., supra*, 389 S.C. 546, 698 S.E.2d 845, (S.C. App. 2010). Special damages are tangible losses or injuries to the plaintiff's property, business, occupation, or profession in which it is possible to identify a specific amount of money as damages. *Erickson*, 368 S.C. at 465, 629 S.E.2d at 664. Appellant indicated to the Court that he is retired (R 89) and pled in the complaint that he is a volunteer. (R 15) Therefore no economic damages are asserted or can be inferred.

Appellant alleges in his Brief the Court erred by denying his request to delete three causes of action not recognized in South Carolina or that do not apply to Nate Leupp. Appellant further alleges that this would further differentiate this case from Appellant's Richland County case against Nate Leupp. Appellant's argument makes no sense because the Richland County Court dismissed those three causes of action as inapplicable or not recognized in South Carolina. (R 164-165) Deleting those causes of action would make these two cases more similar through the recognition the causes of action are inapplicable in the Greenville Complaint, too.

When the non-actionable window dressing facts are stripped away, this case is left with the same underlying Richland County alleged school choice conspiracy theory plus the same causes of action pled against Respondent Leupp in Richland and re-alleged in Greenville County. Addition of

non-actionable window dressing on a prior dismissed complaint under appeal creates duplicative litigation as envisioned by Rule 12(b)(8) SCRCP. Appellant was ordered to identify Nate Leupp and serve him in the Richland County action. Appellant failed to serve Nate Leupp and many other John Doe defendants. Despite failure to serve, Appellant was still bound by the Richland County Case's Amended Order to take action against these Defendants in Richland County. As such, the Trial Court was correct in its dismissal of this complaint under SCRCP 12(B)(8).

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's Order dismissing Appellant's claims against Respondent Nate Leupp.

(signature on next page)

Respectfully submitted,

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Attorney for Respondent Nate Leupp

January 5, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Alex Kinlaw, Jr., Circuit Court Judge

RECEIVED
JAN 11 2022
SC Court of Appeals

Appellate Case No. 2020-001075
Civil Action No. 2019-CP-23-06576

Jefferson Davis, Jr. ..... Appellant,

v.

Nate Leupp, Automatic, Inc., Facebook, Inc.,
and John Does 1-40 ..... Respondents.

CERTIFICATE OF COMPLIANCE WITH RULE 211

I, Geoffrey Chambers, certify that this final brief complies with the requirements of Rule 211(b).

Geoffrey K. Chambers

January 5, 2022