IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2018-001134

Glenda R. Couram ..... Appellant

v.

Nationwide Mutual Insurance Company, Titan Indemnity Company, Eugene Matthews, in his individual capacity, Sherwood's Plumbing Services, LLC dba and Beatrice Tyree Tidwell, Rick Skurko in his official and individual capacity and Tracey Peer, in her official and individual capacity .....Respondents

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FINAL BRIEF OF RESPONDENTS

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III. Whether the Circuit Court correctly denied Appellant's Motion to Amend the Complaint to add new claims and new defendants because it determined the Proposed Amended Complaint would be futile.

STATEMENT OF THE CASE

On April 12, 2016, Appellant filed a Complaint against Sherwood Tidwell and "Titian [sic] Indemnity Company Subsidiary of Nationwide Insurance" in the Richland County Court of Common Pleas, styled as: *Glenda Couram v. Sherwood Tidwell, et al.*, civil action no. 2016-CP-40-2350. (Plaintiff's Original Complaint, 2016-CP-40-2350; 2nd Am. R. pp. 309, 311-312) (hereinafter the "Previous Action"). In that lawsuit, Appellant sought damages for the September 18, 2015 automobile accident (hereinafter the "Accident") caused by Mr. Tidwell. (Plaintiff's Original Complaint, 2016-CP-40-2350; 2nd Am. R. pp. 309, 311-312). Titan issued an automobile liability insurance policy to Tidwell and provided him with a defense in the Previous Action. By consent order dated September 2, 2016, "Titan Indemnity Company, Subsidiary of Nationwide Mutual Insurance Company" was removed as a party to the action. (2nd Am. R. pp. 326-327). On February 16, 2017, Mr. Tidwell filed a $20,000.00 Offer of Judgment, which Appellant declined. (2nd Am. R. p. 177). The case was heard by a jury, and on June 16, 2017 the jury rendered a verdict in the amount of $1,000.00. (2nd Am. R. p. 178).

On July 3, 2017, Appellant filed the original Complaint in this action before the Richland County Court of Common Pleas, again suing Mr. Tidwell and Titan Indemnity Company ("Titan"),

as well as Nationwide Mutual Insurance Company ("Nationwide"). (2nd Am. R. pp. 42–54). On July 19, 2017, Appellant filed an Amended Complaint adding Beatrice Tyree Tidwell as a Defendant. In this case, Appellant seeks damages for conduct arising out of the September 18, 2015 accident with Mr. Tidwell that has already been litigated to finality. (*See* 2nd Am. R. pp. 27–28, ¶¶ 12–14, 18). Appellant's Amended Complaint alleges: 1) intentional infliction of emotional distress and/or negligent infliction of emotional distress, and 2) civil conspiracy. (2nd Am. R. pp. 31–35). The factual allegations of Appellant's original Complaint and Amended Complaint make it clear that she is suing Nationwide and Titan for exercising Titan's right to provide a defense for Mr. Tidwell in the previous case and for failing to offer her more than $20,000.00 for the damages she sustained in the Accident. (2nd Am. R. pp. 28–29, ¶¶ 20–26).

On December 4, 2017, Appellant filed a motion seeking leave to amend her Complaint to add Rick Skurko and Tracy Peer, two Nationwide insurance adjusters who were involved in the settlement negotiations. (2nd Am. R. pp. 80–81). Appellant also moved to add claims for tortious interference with contractual relationship and tortious interference with a business relationship.[1] (2nd Am. R. p. 80) The trial court found the Proposed Amended Complaint would be futile because Appellant failed to state facts sufficient to allege (1) a tortious interference with contract cause of action, and (2) any cause of action against Adjusters Skurko and Peer. (2nd Am. R. pp. 17, 20). So, the trial court denied Appellant's Motion to Amend on April 20, 2018. (Order Denying Plaintiff's Motion for Leave to Amend Complaint, 2nd Am. R. p. 20). Additionally, the trial court granted Respondents' Motion to Dismiss on April 20, 2018, concluding (1) Appellant's emotional distress claims are barred by *res judicata* and collateral estoppel because Appellant could have

[1] The trial court interpreted this as request to add a tortious interference with contract claim, which is the cause of action recognized in employment contracts. (2nd Am. R. p. 14). Accordingly, Respondents address these claims as one claim of tortious interference with contract.

litigated them in the Previous Action, and (2) Appellant failed to allege facts sufficient to constitute a cause of action for civil conspiracy. (2nd Am. R. pp. 5, 9). On June 17, 2018, Appellant filed and served a Notice of Appeal in this case. (2nd Am. R. p. 329).

SUMMARY OF THE ARGUMENT

Appellant has already received a jury verdict awarding her recovery for the damages she sustained in the Accident. However, Appellant is displeased with the $1,000.00 jury verdict she received in that case, compared to the settlements she attempted to procure from Respondents. The current case is Appellant's attempt to relitigate the issue of damages from the Accident with newly-phrased claims and new defendants. But *res judicata* and collateral estoppel bar plaintiffs from continuing to use the courts to obtain the verdict they want—Appellant cannot have a second bite at the apple.

Furthermore, even if her claims were not barred by the full and final judgment in the Previous Action, Appellant has failed to allege facts sufficient to constitute each of her causes of action. Her multiple complaints in this case are filled with conclusory statements that she suffered emotional distress, but do not allege any conduct by Respondents that rises to the level of extreme or outrageous conduct that might induce such distress. Her civil conspiracy claim falls short as a matter of law without allegations of acts in furtherance of a conspiracy that are separate and distinct from her other causes of action. Her tortious interference with contract claim merely highlights that Appellant's own allegations of lost wages in the Previous Action justified Respondents' actions to obtain her employment records and talk to her employer. Additionally, Appellant failed to allege how Respondents' due diligence in defending their insured in the Previous Action proximately caused her termination from employment when she explicitly stated she was terminated for cause. Appellant cannot point to a single act of Respondents that amounts to

anything more than defending their insured in the Previous Action. Thus, she has failed to allege facts sufficient to constitute any of her causes of action.

Appellant attempted to obtain a new and greater recovery award from the courts by cloaking the issues litigated in the Previous Action as new claims against new defendants. However, the trial court correctly granted Respondents' Motions to Dismiss because Appellant's claims are barred by *res judicata* and collateral estoppel and none of the allegations in any version of her Complaint, nor the reasonable inferences drawn from her allegations, entitle Appellant to relief on any theory.

STANDARD OF REVIEW

In reviewing the trial court's grant of Respondents' Motion to Dismiss pursuant to South Carolina Rules of Civil Procedure 12(b)(6), this court applies the same standard of review as the trial court. *Hotel and Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 650, 780 S.E.2d 263, 271 (Ct. App. 2015). The court should not dismiss a complaint merely because it doubts the Plaintiff will ultimately prevail. *Benedict College v. National Credit Sys., Inc.*, 400 S.C. 638, 644, 735 S.E.2d 518, 521 (Ct. App. 2012). However, a dismissal is proper when none of the allegations in the Complaint and none of the reasonable inferences drawn from the allegations in the Complaint would entitle the Plaintiff to relief on any theory. *Hotel and Motel Holdings, LLC*, 414 S.C. at 650, 780 S.E.2d at 271.

ARGUMENT

I. The Circuit Court correctly dismissed Appellant's emotional distress claims as barred by *res judicata* and collateral estoppel because Appellant could have litigated these claims and did litigate the issues necessary to support these claims in the Previous Action.

Appellant's intentional infliction of emotional distress (IIED) and negligent infliction of emotional distress (NIED) claims are barred by *res judicata* and collateral estoppel. Yet, even if

her claims were not barred, Appellant failed to allege facts sufficient to constitute IIED and NIED causes of action. Thus, the trial court did not err in granting Respondents' Motion to Dismiss as it pertains to these claims.

A. Appellant's emotional distress claims arose out of the Accident and its settlement process, which were litigated to finality in the Previous Action, and are therefore barred under *res judicata* and collateral estoppel.

Under *res judicata*, a final judgment on the merits in the Previous Action concludes the parties and their privies in a second action based on the same claim and any claims that arise out of the same transaction or occurrence previously litigated. *See Sub-Zero Freezer Co. v. R.J. Clarkson Co.*, 308 S.C. 188, 190–91, 417 S.E.2d 569, 571 (1992); *H.G. Hall Constr. Co., Inc. v. J.E.P. Enters.*, 283 S.C. 196, 203, 321 S.E.2d 267, 271 (Ct. App. 1984). "The term 'privy,' when applied to a judgment or decree, means one so identified in interest with another that he represents the same legal right. One in privity is one whose legal interests were litigated in the former proceeding." *H.G. Hall Constr. Co., Inc.*, 283 S.C. at 204, 321 S.E.2d at 271 (citations omitted).

In the Previous Action, Appellant brought a negligence claim for the Accident against Sherwood Tidwell, which was litigated to finality and resulted in a jury determination that Appellant was owed $1,000.00 in damages. Respondents, as parties with the same legal interest in the payment due Appellant as Mr. Tidwell, qualify as Mr. Tidwell's privies and cannot, therefore, be subject to any claims that were or could have been litigated in the previous action. *H.G. Hall Constr. Co., Inc.*, 283 S.C. at 204, 321 S.E.2d at 271; *Sub-Zero Freezer Co.*, 308 S.C. at 192, 417 S.E.2d at 571. Appellant's current claims of emotional distress stemming from the settlement process arise out of the same transaction or occurrence as the Previous Action—that is to say, Appellant's current claims again raise the issue of how much recovery Appellant was entitled to receive after the Accident. Because the issue of damages owed to Appellant after the Accident was fully litigated in the Previous Action, Appellant cannot bring these claims against

Respondents as Mr. Tidwell's privies. *See Plum Creek Dev. Corp. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999) (any claim that arises out of the same "transaction or occurrence" as the previous lawsuit is barred by *res judicata*); *Sub-Zero Freezer Co.*, 308 S.C. at 190–91, 417 S.E.2d at 571.

Furthermore, "[u]nder the doctrine of collateral estoppel,...the second action is based upon a different claim and the judgment in the first action precludes relitigation of only those issues actually and necessarily litigated and determined in the first suit." *Beall v. Doe*, 281 S.C. 363, 369 n.1, 315 S.E.2d 186, 189 n.1 (Ct. App. 1986) (internal quotations omitted). Those issues actually and necessarily litigated and decided in the Previous Action are barred under collateral estoppel "regardless of whether the ***claims*** in the first and subsequent lawsuits are the same." *Carolina Renewal, Inc. v. S.C. Dep't. of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (emphasis added). Like *res judicata*, collateral estoppel bars relitigation of the issues against the same parties as well as their privies. *Roberts v. Recovery Bureau, Inc.*, 316 S.C. 492, 496, 450 S.E.2d 616, 619 (Ct. App. 1994). The Previous Action involved the amount of damages to which Appellant was entitled because of the Accident. Appellant's allegations that Respondents refused to settle her claims from the Accident necessarily depend upon the amount of damages to which Appellant was entitled. Because the Previous Action fully litigated the issue of Appellant's recovery from the Accident, Appellant is collaterally estopped from raising these issues in this lawsuit.

Finally, Appellant argues that the trial court should not have dismissed her IIED and NEID claims because they raised "a novel question as to direct victim." (App. Br. 29–32). If the courts denied Motions to Dismiss simply for novel factual questions as to the "direct victims" in each case, the courts would very rarely dismiss claims, even frivolous claims, because every original

case presents a novel factual question as to the "direct victim." Rather, the court should refrain, upon motions to dismiss, from answering on motions to dismiss only those novel issues with "far reaching effects." *Springfield v. Williams Plumbing Supply Co.*, 249 S.C. 130, 138, 153 S.E.2d 184, 187 (1967). By Appellant's own argument, the issues in this case apply only to the "direct victim." (App. Br. 29–32). Thus, whatever novel issue may be present in this case would not have "far reaching effects," but would only affect Appellant.

Regardless, despite Appellant's arguments to the contrary, her claims are not novel—the issues at the heart of her claims were fully and finally litigated in the Previous Action. Appellant is barred from relitigating the same claims or issues necessarily decided in the Previous Action, and the trial court did not err in dismissing Appellant's IIED and NIED claims under *res judicata* and collateral estoppel. This is especially true considering, as discussed below, that Appellant also has failed to allege facts sufficient to constitute causes of action for IIED and NIED. *Springfield*, 249 S.C. at 138–39, 153 S.E.2d at 188 ("If a plaintiff has clearly not alleged facts sufficient to constitute a cause of action, a [movant] is, of course, entitled to have his [motion to dismiss granted] and be saved the expense and trouble of a trial.").

B. Even if her emotional distress claims were not barred by *res judicata* and collateral estoppel, Appellant failed to allege facts sufficient to constitute causes of action.

A claim for IIED requires Appellant to allege that: "'(1) the defendant intentionally or recklessly inflicted severe emotional distress, or was certain, or substantially certain, that such distress would result from his conduct; (2) the conduct was so extreme and outrageous so as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized community; (3) the actions of the defendant caused plaintiff's emotional distress; and (4) the emotional distress suffered by the plaintiff was severe such that no reasonable man could be expected to endure it.'" *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 356, 650 S.E.2d 68,

71 (2007) (quoting *Ford v. Hutson*, 276 S.C. 157, 162, 276 S.E.2d 776, 778 (1981)) (internal quotations and citation omitted).

Appellant alleges Respondents' conduct that was "so extreme and outrageous as to exceed all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized society" was the insurers' provision of an effective defense of their insured in the Previous Action and their refusal to offer more than $20,000.00 in settlement for a case that resulted in a $1,000.00 jury verdict. (*See* 2nd Am. R. p. 31, ¶ 41). However, even if Appellant's factual allegations "demonstrate unprofessional, inappropriate behavior, they fall short of conduct that exceeds all possible bounds of decency and is atrocious and utterly intolerable in a civilized society" necessary for an IIED claim. *Gattison v. S.C. State Coll.*, 318 S.C. 148, 157, 456 S.E.2d 414, 419 (Ct. App. 1995).

Furthermore, Appellant has failed to allege more than mere bald assertions of emotional distress she suffered. Appellant's conclusory statements that she sustained "severe emotional distress" and "humiliation, embarrassment, mental anguish, emotional distress..." are insufficient to allege the occurrence of emotional distress, even if "the emotional distress suffered...was and continues to [be] serious and severe." (2nd Am. R. pp. 31–32, ¶¶ 42–43, 48). The manifestation of a "fever blister that remained four days after the trial" (2nd Am. R. p. 33, ¶ 50), likewise is not enough to support Appellant's claims of intentional infliction of emotional distress. Indeed, a reasonable man could be expected to endure a fever blister. *See Hansson*, 374 S.C. at 356, 650 S.E.2d at 71 (stating that the emotional distress required for an IIED claim is distress so severe "no reasonable man could be expected to endure it").

Relatedly, Appellant fails to allege facts sufficient to constitute a cause of action for NIED. In South Carolina, only bystanders may recover for NIED. *See Kinard v. Augusta Sash & Door*

Co., 286 S.C. 579, 582 n.2, 336 S.E.2d 465, 467 n.2 (1985) ("Our adoption of the [NIED] cause of action is limited to 'by-stander recovery.'"); *Doe v. Greenville Cty. Sch. Dist.*, 375 S.C. 63, 68, 651 S.E.2d 305, 307 (2007) (holding that where plaintiffs alleged an NIED claim outside the context of bystander recovery, they had "not stated a claim which is cognizable under South Carolina law"). Appellant argues she was the direct victim of Respondents' actions and does not claim to be a bystander. Thus, she cannot recover for NIED, and the trial court did not err in dismissing this claim.

Finally, imbedded within her arguments about her IIED and NEID claims, Appellant argues that the court abdicated its role and put "the duties of a judge" in Respondents' hands, presumably by allowing Respondents to draft the proposed order granting Respondents' Motions to Dismiss. (App. Br. 17, 26). Appellant argues that this was "unjust, prejudicial and against the constitution and the express goals of the judiciary...." (App. Br. 26). However, "it is common practice for judges to ask a party to draft a proposed order for the sake of efficiency." *Hall v. Catoe*, 360 S.C. 353, 365, 601 S.E.2d 335, 341 (2004). Thus, there is no merit to Appellant's argument that the court abdicated its role and it was unjust and prejudicial for Respondents to draft the proposed order later adopted by the trial court in dismissing this case.

II. The Circuit Court correctly dismissed Appellant's civil conspiracy claim because Appellant failed to allege facts in furtherance of a civil conspiracy separate and independent from the facts alleged in her other causes of action.

"In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim." *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 115–16, 682 S.E.2d 871, 875 (Ct. App. 2009). The trial court properly dismisses a civil conspiracy claim where the civil conspiracy action "does no more than

incorporate the prior allegations and then allege the existence of a civil conspiracy" and pray for damages resulting from the conspiracy with no allegations of additional acts in furtherance of the conspiracy. *See Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981).

Appellant's Amended Complaint merely states that the Respondents "jointly operated to perpetrate the wrongful acts complained of herein" and "agreed and conspired with each other to engage in the alleged wrongful conduct, including Defendants' interference with plaintiff [sic] employment relationships by coming to an agreement between them to do an unlawful act or to do a lawful act in an unlawful way ... ." (2nd Am. R. pp. 33–34, ¶¶ 52, 59). Nowhere in the civil conspiracy section of her Amended Complaint did Appellant set forth what constituted the "wrongful acts" or "unlawful acts" committed by the Respondents. Thus, the alleged "wrongful acts complained of herein" must refer to those acts previously alleged in her Amended Complaint in the "Facts Common to All Causes of Action" section of her Amended Complaint. Because Appellant merely incorporated into her civil conspiracy claim her allegations previously alleged in the Amended Complaint and failed to set forth additional acts in furtherance of the conspiracy, Appellant's civil conspiracy claim fails as a matter of law. *See Hackworth*, 385 S.C. at 116, 682 S.E.2d at 875. The trial court did not err in dismissing this claim. *Id.* at 116, 682 S.E.2d at 875 (dismissing a civil conspiracy claim where the plaintiff "reiterated verbatim" the allegations contained in its other causes of action).

Nevertheless, relying on the dissent in *Allegro, Inc. v. Scully, et al.*, 418 S.C. 24, 791 S.E.2d 140 (2016), Appellant argues that the lower court applied the wrong standard in dismissing her civil conspiracy claim. In *Allegro*, the Court found the plaintiff failed to plead special damages "emanating solely from the conspiracy," and dismissed the civil conspiracy claim. 418 S.C. at 34,

791 S.E.2d at 145. Chief Justice Pleicones, however, disagreed with the majority because he believed the "special damages" requirement for a civil conspiracy claim is to prevent double recovery rather than to prescribe a method of pleading for a civil conspiracy claim. *Id.* at 36–37, 791 S.E.2d at 146–47.

Although Appellant failed to plead special damages resulting from the alleged civil conspiracy, Appellant's failure to plead special damages is not the only issue here. As discussed above, under South Carolina law, a plaintiff also must plead allegations of acts in furtherance of a civil conspiracy separate from any other allegations of improper conduct within the Amended Complaint. *See, e.g.*, *Todd*, 276 S.C. at 293, 278 S.E.2d at 611 (concluding plaintiff failed to state a claim for civil conspiracy because "[n]o additional acts in furtherance of the conspiracy [were] plead" beyond those plead for other tortious causes of action); *Kuznik v. Bees Fairy Assoc.*, 342 S.C. 579, 611, 538 S.E.2d 15, 31 (Ct. App. 2000) ("Because [the third party plaintiff] ... merely realleged the prior acts complained of in his other causes of action as a conspiracy action but failed to plead additional acts in furtherance of the conspiracy, he was not entitled to maintain his conspiracy cause of action."). Even if Appellant were not required to plead special damages resulting solely from the civil conspiracy and no other cause of action, her civil conspiracy claim fails because she did not include allegations of "acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint." *Hackworth*, 385 S.C. at 115–16, 682 S.E.2d at 875. Appellant merely incorporated the allegations previously asserted for other causes of action in her Amended Complaint, alleged the existence of a civil conspiracy, and prayed for damages based upon the incorporated allegations. Thus, the trial court did not err in dismissing her civil conspiracy claim. *See id.* at 115–16, 682 S.E.2d at 875 ("A claim for civil conspiracy

must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint."); *Todd*, 276 S.C. at 293, 278 S.E.2d at 611.

III. The Circuit Court correctly denied Appellant's Motion to Amend the Complaint because Appellant's desired addition of two causes of action and two new defendants would have been futile.

Under Rule 15(a) of the South Carolina Rules of Civil Procedure, when more than thirty (30) days have passed after service of a party's pleading, "a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." Rule 15(a), S.C.R.C.P. "[A] motion to amend a pleading is addressed to the sound discretion of the trial judge." *Porter Bros., Inc. v. Specialty Welding Co.*, 286 S.C. 39, 41, 331 S.E.2d 783, 784 (Ct. App. 1985); *Pruett v. Bowers*, 330 S.C. 483, 489, 499 S.E.2d 250, 253 (Ct. App. 1998). Although leave to amend a complaint should be freely given generally, "it may be denied where the proposed amendment would be futile." *Jennings v. Jennings*, 389 S.C. 190, 209, 697 S.E.2d 671, 681 (Ct. App. 2010) *reversed on other grounds*, 401 S.C. 1, 736 S.E.2d 242 (2012); *see also Higgins v. Med. Univ. of S.C.*, 326 S.C. 592, 604, 486 S.E.2d 269, 275 (Ct. App. 1997). In determining whether Appellant should be permitted to amend her Complaint so late in the litigation, the trial court properly considered whether Appellant's proposed claim for tortious interference with contract or the addition of Adjusters Skurko and Peer would have been futile.

A. Appellant's proposed claim for tortious interference with contract would have been futile because Appellant failed to allege facts sufficient to constitute a tortious interference with contract cause of action.

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Camp v. Springs Mortg. Corp.*,

310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). In the Previous Action, Appellant alleged she had lost wages. (2nd Am. R. p. 166, ¶12). In her Proposed Amended Complaint Appellant alleges Respondents took the following actions to investigate her lost wages claims in the Previous Action: (1) subpoenaed her employment records; (2) contacted her employer; and (3) emailed either Appellant or her employer. (2nd Am. R. pp. 77–78, ¶¶ 79, 89).

However, Appellant has not alleged how these actions were unjustified. On the contrary, these were lawful acts undertaken by the insurers while exercising their legal right and obligation to provide a defense for their insured. By alleging in the Previous Action that she lost wages as a result of the Accident, Appellant herself justified Respondents' investigation into these claims, including their subpoena for her employment records and contact with her employer. Appellant's proposed claim is futile because Appellant cannot demonstrate that Respondents acted without justification, which is a necessary element of the tortious interference with contract cause of action. *See Moore v. Williamsburg Reg'l Hosp.*, 560 F.3d 166 (4th Cir. 2009) (applying South Carolina law to grant defendants' motion for summary judgment on tortious interference with contract claim for lack of sufficient allegations of absence of justification for defendants' actions); *Camp*, 310 S.C. at 517, 426 S.E.2d at 305.

Furthermore, "in order to constitute actionable interference with a contract, it must appear that the act complained of was the proximate cause of the injury or damage." *Smith v. Citizens & S. Nat'l Bank of S.C.*, 241 S.C. 285, 288, 128 S.E.2d 112, 114 (1962); *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 283 S.C. 155, 164, 321 S.E.2d 602, 608 (Ct. App. 1984), *writ granted in part*, 285 S.C. 84, 328 S.E.2d 479 (1985) and *portion of decision quashed on other grounds*, 287 S.C. 190, 336 S.E.2d 472 (concluding that for tortious interference with contract claims "[t]he Plaintiff must show that but for the interference, the contractual relationship would have continued."). Appellant

never alleged in her Proposed Amended Complaint how Respondents' lawful, justified defense of their insured caused her termination from employment.

Rather, throughout her Proposed Amended Complaint, Appellant alleged that she could be terminated "for cause" from her employment, and that she "was dismissed on the grounds of intentional misconduct." (2nd Am. R. pp. 77–79, ¶¶ 79, 91, 100). Because Appellant's employer could terminate her for cause and then found cause to do so, Appellant has failed to show how Respondents' actions were the proximate cause of her termination. *Smith*, 241 S.C. at 289 128 S.E.2d at 114; *see also Dutch Fork Dev. Group II, LLC v. SEL Props, LLC*, 406 S.C. 596, 604, 753 S.E.2d 840, 844 (2012) ("'[A]n action for tortious interference [with contract] protects the property rights of the parties to a contract against unlawful interference by third parties. Therefore, it does not protect a party to a contract from actions from the other party.'") (quoting *Threlkeld v. Christoph*, 280 S.C. 225, 227, 312 S.E.2d 14, 15 (Ct. App. 1984)) (citation omitted).

By failing to allege that Respondents' actions were unjustified and the proximate cause of her termination, Appellant's tortious interference claim would fail as a matter of law if Appellant had been permitted to add this claim. Thus, the trial court did not err in denying Appellant's Motion to Amend her Complaint to add her tortious interference with contract claim. *Jennings*, 389 S.C. at 209, 607 S.E.2d at 681.

B. Appellant's proposed claims against Adjusters Skurko and Peer would have been futile because Appellant is collaterally estopped from asserting these proposed claims due to the full and final litigation of the underlying issues in the Previous Action and Appellant has failed to allege facts sufficient to constitute causes of action against them.

Appellant's Proposed Amended Complaint alleges Adjusters Skurko and Peer failed to settle her claims against Mr. Tidwell for the Accident for more than $20,000.00. (2nd Am. R. p. 68, ¶¶ 25–28). Appellant's allegations against Adjusters Skurko and Peer address the damages she was owed because of the Accident, which was litigated to finality in the Previous Action.

Although Appellant seeks to bring different claims against Adjusters Skurko and Peer than she litigated against Mr. Tidwell in the Previous Action, as discussed above, the issue underlying the claims is the same: the damages owed Appellant for the Accident. Appellant is collaterally estopped from relitigating the value of her recovery from the Accident. *See Carolina Renewal, Inc.*, 385 S.C. at 554, 684 S.E.2d at 782 ("Collateral estoppel, also known as issue preclusion, prevents a party from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same.").

Furthermore, even if Appellant could bring claims against Adjusters Skurko and Peer, Appellant's Proposed Amended Complaint does not allege facts sufficient to constitute claims against them. Her Proposed Amended Complaint does not amend her procedurally deficient emotional distress or civil conspiracy causes of action brought in her previous complaint—it merely adds Adjusters Skurko and Peer and attempts to allege a tortious interference with contract cause of action. As discussed above, Appellant has not alleged facts sufficient to constitute any of these causes of action. Therefore, the addition of Adjusters Skurko and Peer would be futile because Appellant would not be entitled to relief against them on any theory. *See Hotel and Motel Holdings, LLC*, 414 S.C. at 650, 780 S.E.2d at 271 (allowing grant of motion to dismiss only when, based on the allegations in the complaint and the reasonable inferences drawn therefrom which viewed in the light most favorable to the plaintiff, plaintiff is not entitled to relief based on any theory). Accordingly, the trial court did not err in denying Appellant's motion to amend her complaint and add these defendants. *Jennings*, 389 S.C. at 209, 607 S.E.2d at 681.

CONCLUSION

The trial court did not err in granting Respondents' Motion to Dismiss. Appellant has already fully litigated the question of damages arising from the Accident. The plaintiff is the

master of her complaint, and Appellant chose not to bring these claims in the Previous Action when litigating the question of damages. Therefore, her emotional distress claims stemming from the settlement process for the Accident are barred by *res judicata* and collateral estoppel. Appellant had the opportunity to litigate these claims in the Previous Action, but she failed to do so—she has missed her chance.

Furthermore, Appellant has failed to state facts sufficient to constitute a cause of action for civil conspiracy and tortious interference with contract. As to the civil conspiracy claim, Appellant failed to allege facts in furtherance of the conspiracy that were separate and distinct from the facts allegedly supporting her other claims. Her bare-bones allegations that the facts supporting her other causes of action constitute a conspiracy are insufficient to constitute a civil conspiracy cause of action, and the trial court did not err in granting a dismissal of this claim. Additionally, by failing to state how Respondents' actions in the Previous Action were the proximate cause of her termination from employment and how Respondents acted without justification, Appellant has failed to state a claim for tortious interference with contract that would not be futile. Thus, the court did not err in denying her Motion to Amend the Complaint to add this claim.

Appellant's claims in the present case are an attempt to have a second bite at the recovery apple for the injuries she sustained in the Accident. She attempted to recast her damages from the Accident as stemming from the subsequent actions of Respondents, including Adjusters Skurko and Peer, in defending their insured in the Previous Action. However, Appellant had her chance to litigate all of these claims in the Previous Action, and she failed to do so. *Res judicata* and collateral estoppel bar Appellant from bringing each of these claims now. Every claim Appellant alleged in this case in her original Complaint, Amended Complaint, and Proposed Amended Complaint could have been litigated in the Previous Action, assuming, of course, she had stated

enough facts to constitute causes of action, which she has not done. All of the claims dismissed or denied by the trial court simply seek to reopen the Previous Action. Thus, the trial court did not err in granting Respondents' Motions to Dismiss Appellant's claims nor in denying Appellant's Motion to Amend her Complaint to add more claims that would be futile.

Respectfully submitted,

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Columbia, South Carolina
July 24, 2019

IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2018-001134

Glenda R. Couram ..... Appellant

v.

Nationwide Mutual Insurance Company, Titan Indemnity Company, Eugene Matthews, in his individual capacity, Sherwood's Plumbing Services, LLC dba and Beatrice Tyree Tidwell, Rick Skurko in his official and individual capacity and Tracey Peer, in her official and individual capacity .....Respondents

CERTIFICATE

I, J.R. Murphy, Esquire, attorney for Respondents, certify that the Brief of Respondents complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

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July 24, 2019