

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge, Third Circuit

Case No.: 2007-CP-43-500

Cole Vision Corporation and Sears Roebuck & Company, Inc.,
Of Whom Cole Vision Corporation is thePetitioner,

v.

Steven C. Hobbs, O.D. and NCMIC Insurance Company,
Of Whom Steven C. Hobbs is the.....Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON CERTIORARI REVIEW

- I. WAS THE COURT OF APPEALS CORRECT IN REVERSING THE TRIAL COURT AND DENYING COLE’S PETITION FOR REHEARING, WHICH CITED AUSTIN v. BEAUFORT COUNTY’S SHERIFF’S OFFICE, 377 S.C. 31, 659 S.E.2d 122 (2008)?
- II. WAS THE COURT OF APPEALS CORRECT IN RULING THAT DR. HOBBS PLED SUFFICIENT FACTS TO CONSTITUTE A NEGLIGENCE CAUSE OF ACTION?
- III. DID DR. HOBBS PRESERVE THE ISSUE OF A NEGLIGENCE CAUSE OF ACTION?
- IV. WHAT IS THE PUBLIC POLICY REGARDING A NEGLIGENCE CAUSE OF ACTION UNDER THE DECLARATORY JUDGMENT ACT AND THE SOUTH CAROLINA CONSTITUTION?

STATEMENT OF THE CASE

Cole Vision Corporation (hereinafter Cole) and Sears & Roebuck Company (hereinafter Sears) filed a declaratory judgment action against Steven C. Hobbs, (hereinafter Dr. Hobbs) and NCMIC Insurance Company (hereinafter NCMIC). The declaratory judgment action involves the litigation and settlement arising out of a professional liability suit. The Plaintiff and patient in the suit was Mary Lewis, plus her husband.

In the declaratory judgment action, Cole and Sears request the Court to declare that Dr. Hobbs has contractually agreed to hold harmless and to indemnify Cole and Sears and that NCMIC is obligated to provide coverage and indemnify Cole and Sears under its professional liability coverage with Dr. Hobbs (First Declaration); that Dr. Hobbs has a contractual obligation to defend and indemnify Cole and Sears (Second Declaration); that the Plaintiffs be awarded monetary damages against Dr. Hobbs for all expenses and attorney's fees that they have incurred (Third Declaration); and that NCMIC is obligated to reimburse Cole and Sears for attorney's fees incurred (Fourth Declaration). [R.pp.3-18.]

Dr. Hobbs filed an Answer and Counterclaim, which included a Counterclaim against Cole for negligence involving Cole's loss of patient records of Mrs. Lewis. (Second Defense and Counterclaim).[R.pp 19a-22.] Plaintiff Cole replied with a general denial (First Defense) and affirmative defenses that the Complaint (Counterclaim) failed to state facts sufficient to constitute a cause of action (Second Defense) and does not arise from the same transaction or occurrence and should be severed (Third

Defense).[R.pp.22a-22b.]

In the Counterclaim , Dr. Hobbs alleges that Cole had a duty to preserve patient records because Cole required patient history profiles to be kept in its custody and control. (Answer and Counterclaim, Paragraph 40 [R.p. 21].) Dr. Hobbs alleges that Cole has lost the history profile of Mary Lewis and has breached its duty to preserve this evidence, which was negligence. (Answer and Counterclaim, Paragraphs 41 and 42 [R.p.22].) As a result of this negligence, Dr. Hobbs alleges that he has been impaired with his ability to defend the claim of Mary Lewis and has incurred attorney's fees and costs and has continued exposure as a result of the claim of Mary Lewis. (Answer and Counterclaim, Paragraph 43 [R.p.22].) Dr. Hobbs requests that the Court declare that Cole is liable for any liability that he may have to the Lewises and to Sears as a result of Cole's spoliation of evidence, that the Dr. Hobbs has no duty to Cole, and that Cole is obligated to reimburse Dr. Hobbs for attorney's fees and costs incurred in defending the professional liability action and this declaratory judgment action. (Answer and Counterclaim, Paragraph 44 [R.p. 22].)

Cole filed a Motion to Dismiss the Counterclaim pursuant to Rule 12(b)(6), South Carolina Rules of Civil Procedure, on the ground that South Carolina law does not recognize a cause of action for spoliation of evidence.[R.pp. 23-24.] This matter came before the Honorable Clifton Newman for a hearing on July12, 2007, at which time he granted the Motion to Dismiss and requested counsel for Cole to prepare an order. (Transcript [R.pp 36-54].) On August 9, 2007, Judge Newman entered a written order granting Cole's Motion to Dismiss the Counterclaim.[R.pp 3-6.]

Dr. Hobbs filed a Notice of Appeal on August 23, 2007. On July 1, 2009, the Court of Appeals held that Dr. Hobbs pled sufficient facts to constitute a negligence cause of action and reversed the trial court's dismissal of the counterclaim pursuant to Rule 12(b)(6), SCRPC. [R.pp. 106-111.] Cole filed a Petition for Rehearing on July 15, 2009, which included the case of *Austin v. Beaufort County Sheriff's Office*, 377 S.C. 31, 659 S.E.2d 122 (2008), rehearing denied. [R.pp. 112-117.] On August 25, 2009, the Court of Appeals denied Cole's Petition for a Rehearing.[R.p.p. 118-119.]

On September 24, 2009, Cole filed a Petition for Writ of Certiorari. Dr. Hobbs filed a Return to Petition for Writ of Certiorari on October 19, 2009. The Supreme Court granted the Petition on September 2, 2010.

ARGUMENT

- I. **THE DECISION OF THE SUPREME COURT IN *AUSTIN V. BEAUFORT COUNTY SHERIFF'S OFFICE* IS NOT CONTROLLING AND DOES NOT ESTABLISH A PRECEDENT, AND THE COURT OF APPEALS CORRECTLY DENIED COLE'S PETITION FOR A REHEARING AFTER THE *AUSTIN* DECISION.**

The Supreme Court of South Carolina in *Austin* made it clear that its decision was limited to the facts of the case and did not rule out the possibility of a spoliation claim under different circumstances. "Under the particular facts of the instant case, it is clear that the appellant's allegations do not rise to the level of stating a claim. . . . Thus, we decline to address whether we would, under other factual circumstances, adopt the tort of a third-party spoliation of evidence." *Austin v. Beaufort County Sheriff's Office*, 377 S.C. 31,35-36, 659 S.E.2d 122, 124 (2008).

In addition, there is no procedural, legal, or factual parallel between the circumstance in *Austin* and the dismissal of the Counterclaim of Dr. Hobbs. The *Austin* case involved an action against the Sheriff's Office (third party) for destruction of evidence, which allegedly impaired Plaintiff's ability to bring a wrongful death action against an unknown defendant for her son's drug overdose; the trial court granted summary judgment. In contrast to *Austin*, this case involves a defense and Counterclaim in a declaratory judgment action, which was dismissed on a Rule 12(b)(6) motion made by Cole, who is not a third party.

Cole relies entirely on *Austin*, which is not pertinent to the Circuit Court's dismissal of the Counterclaim of Dr. Hobbs, especially in a declaratory judgment action. Furthermore, Cole cited the *Austin* decision on its Petition for Rehearing when the Court denied the Petition and held: "After a careful consideration of the Petition for Rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded and hence, there is no basis for granting a rehearing." [R.p.118.]

II. THE COURT OF APPEALS CORRECTLY HELD THAT DR. HOBBS HAS ALLEGED FACTS SUFFICIENT TO SUPPORT HIS CLAIM FOR NEGLIGENCE.

The Court of Appeals found that Dr. Hobbs pled sufficient facts for a negligence cause of action to overcome a Rule 12(b)(6), SCRCP, dismissal. [R.p.110.]

The ruling on a Rule 12(b)(6), SCRCP, motion to dismiss must be based solely upon the allegations set forth in the complaint. A 12(b)(6) motion should not be granted if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. The question to be considered is

whether, when viewed in the light most favorable to the plaintiff, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail.

(Citations omitted.) *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004), rehearing denied. Based on the allegations set forth in the Counterclaim, Dr. Hobbs has provided “fair notice” to the Cole and the Court.

“The purpose of a pleading is fair notice to the opponent and the court.” In this state, Rule 8, SCRPC, mandates that a pleading contain “ultimate facts” rather than “evidentiary facts” to state a cause of action.

Watts v. Metro Security Agency, 346 S.C. 235, 240, 550 S.E.2d 869, 871, (S.C. App. 2001), rehearing denied, quoting James F. Flanagan, South Carolina Civil Procedure 59 (2d ed. 1996).

Dr. Hobbs has pled the necessary elements for a negligence cause of action.

To state a cause of action for negligence, the plaintiff must allege facts which demonstrate the concurrence of three elements: (1) a duty of care owed by the defendant; (2) a breach of that duty by negligent act or omission; and (3) damage approximately caused by the breach.

Doe ex rel. Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001). Dr. Hobbs has alleged a duty of care owed by Cole to him in Paragraph 40 of the Answer and Counterclaim, which provides: “Plaintiff Cole required the Defendant’s patient history profiles be kept in its custody and control and had a duty to preserve this patient’s record.”[R.p. 21.] Paragraph 42 of the Answer and Counterclaim alleges: “Cole breached its duty to Defendant to preserve evidence and Cole’s spoliation of this evidence is

negligence.”[R.p. 22.] In Paragraph 43 of the Answer and Counterclaim, Dr. Hobbs alleges damages as a result of Cole’s negligence. [R.p.22]

The Counterclaim clearly alleges the necessary elements of negligence: duty, breach and causation. Negligence is not a new cause of action; South Carolina has recognized negligence causes of action since 1790. 18 S.C. Juris., Negligence §3. Consequently, the Court of Appeals correctly found that Dr. Hobbs had pled sufficient facts for a negligence cause of action.

III. DR. HOBBS PRESERVED THE ISSUE OF A NEGLIGENCE CAUSE OF ACTION BY RAISING THE ISSUE TO THE TRIAL JUDGE, WHO RULED ON IT AT THE HEARING.

Counsel for Dr. Hobbs specifically raised to the trial judge the issue of pleading the essential elements of a negligence cause of action in the Answer and Counterclaim.

Mr. Stuart: Thank you, your honor. I appreciate your patience today. If I may, I also have a memorandum and some attached cases I’d like to present both to opposing counsel and your honor. May it please the court, it’s the position that I take on Dr. Hobbs that under South Carolina case law the Motion to Dismiss should be denied. The first case I would like to bring to your attention is the case of *Stiles vs. Horatio*, which I have cited in the introduction to my memorandum. And essentially what that case holds is that a 12(b) motion should not be granted if any facts alleged or reasonably inferred, entitle my client to any relief under any theory of the case.

And certainly if your honor has looked at the Counterclaim that we have pled, and the Answer and Counterclaim we have basically pled the essential elements of a negligence cause of action. So we certainly think we have alleged facts that themselves or the reasonable inference can entitle him to some relief under some theory.

In this case we have specifically pled a negligence cause of action, as you can tell from the counterclaim.

* * *

So if your honor, I would propose that based on these cases that we have pled, you know, a negligence cause of action and either as a negligent cause of action or an independent cause of action based upon exfoliation of evidence, they should allowed to proceed with discovery in this case.

* * *

The Court: So if you consider it as a negligence cause of action, what would be negligence?

Mr. Stuart: If you will look at the pleadings, if you will look at the bottom of Page Four, Page Five, where I have pled is that Cole who was operating this particular store, basically kept these patient profiles in their custody. And required Dr. Hobbs to put these in their custody. And if you look Paragraph 41, they basically lost the profile of Mary Lewis, which is a key piece of evidence. And Cole as a result of that negligence, has breached it's duty to Dr. Hobbs. And furthermore, as a result of that negligence, that this has impaired Dr. Hobbs' ability to defend himself. And further required him to incur additional attorney's fees and costs himself.

So basically, you know, what I've got here, your honor, is the basic negligence cause of action of duty, breach of that duty, and proximate damage resulting from that breach.

[R.p. 44, Line 18 - R.p. 45, Line 14; R.p. 46, Line 19 - Line 24; and R.p. 47, Line 1-Line 19.]

At the hearing, Judge Newman ruled as follows:

The Court: I agree with the plaintiff that the State has not recognized a cause of action for exfoliation of evidence and that the claim in this viable

defense here leads to exfoliation of evidence. Though it may have some reference to negligence, I believe it is an evidentiary matter that is dealt with through other means and it does not constitute an independent cause of action. And I grant to Motion to Dismiss.

[R.p. 53, Line 4 - Line 11.] The Transcript of the motions hearing unequivocally establishes that the issue of pleading a negligence cause of action was raised to and ruled on by the trial judge, who considered it an evidentiary matter.

The Second Defense and Counterclaim that was under consideration by Judge Newman provided in part:

38. Defendant had each patient complete, sign and date a history profile, which indicated the reason for visit, type of exam and payment. With regard to type of exam, the patient would indicate whether or not the patient wanted his or her eyes dilated.
39. Mary Lewis did not have her eyes dilated for her examination.
40. Plaintiff Cole required that Defendant's patient history profiles be kept in its custody and control and had a duty to preserve this patient's record.
41. On information and belief, Cole has lost the history profile for Mary Lewis, which is a key piece of evidence with regard to her examination and Defendant's alleges liability.
42. Cole breached its duty to Defendant to preserve this evidence and Cole's spoliation of this evidence is negligence.
43. As a result of Cole's negligence, Defendant is impaired with regard to his ability to defend the claim of Mary Lewis and has incurred attorneys fees and costs and continues to incur attorneys fees and costs in his own defense as a result of

Cole's spoliation of evidence and continued exposure as a result of the claim of Mary Lewis.

[R.pp. 21-22.] In addition, the Memorandum provided by counsel to Judge Newman specifically asserts that Dr. Hobbs has pled the essential elements for a negligence cause of action and that an action for negligence based on spoliation of evidence can be maintained without the necessity of creating an independent tort. [R.pp. 31 and 33-34.]

In order to preserve an issue for appeal, it is not necessary in every case to file a Rule 59(e) SCRPC motion. The South Carolina Supreme Court held:

Third, our rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may* wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

(Italics in original.) *Elam v. S.C. Department of Transportation*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). In a footnote, the Supreme Court explained:

We do not mean to imply by our emphasis on the potential importance of such a motion that one is necessary or desirable in every case. An aggrieved party who is confident his issues and arguments were sufficiently raised to and ruled on by the trial court may wish to simply file and serve a timely notice of appeal.

Id. 25,n.5, 781 n.5. See also Proffitt, David, "Should I Stay or Should I Go? Deciding Whether to Appeal or File a Motion to Reconsider," South Carolina Lawyer, Pages 38-42 (July 2007). The Transcript of the Hearing before Judge Newman on July 12, 2007 records that the specific issue of cause of action for negligence was raised to and ruled

on by the Court.

“Error preservation requirements are intended ‘to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.’ ” *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) quoting *I ‘On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). See also *Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939)(“[A]ll that this Court has ever required is that questions presented for its decision must first have been fairly and properly raised in the lower Court and passed on by that Court.”). “This Court does not require parties to engage in futile actions in order to preserve issues for appellate review.” *Staubes*, 339 S.C. at 415, 529 S.E.2d at 547. The circumstances of this case do not warrant a Rule 59(e) motion.

IV. PUBLIC POLICY SUPPORTS NEGLIGENCE CAUSE OF ACTION.

A. DECLARATORY JUDGEMENT ACT APPLIES TO JUSTICIABLE CONTROVERSY.

The Complaint and the Counterclaim were both brought as declaratory judgment actions pursuant to the Uniform Declaratory Judgment Act. S.C. Code Ann. (2005) §15-53-10 et. seq. The Act provides that the courts “shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed.” S.C. Code Ann. (2005) §15-53-20. Furthermore, the Act provides: “It is to be liberally construed and administered.” S.C. Code Ann. (2005) §15-53-130.

To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy. A justiciable controversy exists when a concrete issue is present, there is a definite assertion of legal rights and a positive legal duty which is denied by the adverse party.

(Citations omitted.) *Graham v. State Farm Mutual Automobile Insurance Co.*, 319 S.C. 69, 71, 459 S.E.2d 844, 845 (1995). See also *Sunset Cay, LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d 462, 466, (2004) rehearing denied.

When a demurrer was recognized in South Carolina, the Supreme Court of South Carolina held: “The complaint is not subject to demurrer for failing to state a cause of action for declaratory judgment if the facts alleged show the existence of a justiciable controversy between the parties.” *Bank of Augusta v. Satcher Motor Co.*, 249 S.C. 53, 57, 152 S.E.2d 676, 678 (1967).

It is contended however that under the facts alleged the plaintiff had available other remedies for the assertion of its rights and therefore an action for declaratory judgment was not proper. While it is true that the plaintiff had available other remedies, this fact alone would not bar an action for declaratory relief. . . . Declaratory relief will however ordinarily be refused ‘where a special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances.’

(Emphasis added and citations omitted.) *Id* at 59 and 679.

The existence of another remedy and the presence of complicated issues of fact may be considered by the court in exercising its discretion as to whether declaratory relief should be granted. However, neither is ground for sustaining a demurrer, which tests the legal sufficient of the pleading.

Guimarin v. Doan, Inc., v. Georgetown Textile and Mfg. Co., 249 S.C. 561, 567, 155 S.E.2d 618, 621 (1967).

That another remedy may exist, and that other relief may be available to the plaintiff, are factors to be considered by the court. However, before declaratory relief may be denied, in the discretion of the court, on the ground of the existence of other remedies, it must clearly appear that the asserted cumulative remedies are not only available to the

plaintiff, but that they are speedy and adequate, or as well suited to the plaintiff's needs as declaratory relief.

Southern Ry. Co. v. Order of Ry. Conductors of America, 210 S.C. 121, 135, 1947, 41 S.E.2d 774, 779 (1947). Motions to dismiss in declaratory judgment actions are generally inappropriate.

The mere dismissal of a complaint asking for declaratory judgment is not an affirmative declaration of the parties' rights and is therefore improper.

22A Am. Jur. 2d, Declaratory Judgments §232.

“When bringing an action under the Declaratory Judgment Act, ‘[a]ll that is required is that the [plaintiff] demonstrate a justiciable controversy.’” *Sloan v. School District of Greenville County*, 342 S.C. 515, 525, 537 S.E.2d 299, 304 (S.C. App. 2000) quoting *Brown v. Wingard*, 285 S.C. 478, 479, 330 S.E.2d 301, 302 (1985). The decision of the Court of Appeals to reverse the dismissal of the Counterclaim was appropriate under the Declaratory Judgment Act since the Counterclaim and Reply alleged facts showing the existence of a justiciable controversy between the parties, and the availability of other remedies does not preclude declaratory judgment.

The Declaratory Judgment Act provides that a declaratory judgment does not preclude a party from obtaining additional relief based upon the same facts.

Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree to show cause why further relief should not be granted forthwith.

S.C. Code Ann. (2005) §15-53-120 The Supreme Court of South Carolina has recognized that further relief based upon a declaratory judgment may result in consequential or incidental relief.

“Under these provisions, a court, in a proceeding for declaratory relief, may grant consequential or incidental relief, that is, it may enter a judgment granting both declaratory and coercive relief, where the proper grounds for such relief appear from the pleadings and proof.”

Bank of Augusta supra S.C. 60, S.E.2d 679 quoting 22 Am. Jur. 2d, Declaratory Judgments §100.

B. SOUTH CAROLINA CONSTITUTION GUARANTEES REMEDY.

Article 1, Section 9 of the South Carolina Constitution provides: “All Courts shall be public and every person shall have speedy remedy therein for wronged sustained.”

“The word ‘wrongs’ is here used in its broadest legal sense, embracing every injury to or impairment legal rights of personal property.” *David v. Whitlock*, 90 S.C. 233, 239, 73

S.E. 171, 173 (1911). Article 1, Section 9 applies to civil remedies only. *State v.*

Lagerquist, 254 S.C. 501, 506, 176 S.E.2d 141, 143 (1970), certiorari denied 91 S.Ct.

912, 401 U.S. 937, 28 L.Ed. 2d 216. The dismissal of the negligence cause of action and defense leaves Dr. Hobbs without a “remedy” within the meaning of Article 1, Section 9, and the suggested evidentiary sanction is totally inadequate for Dr. Hobbs.

“It is the duty of the courts to weed out fraudulent claims.” *Kinard v. Augusta Sash & Door, Co.* 286 S.C. 579, 581, 336 S.E.2d 465, 466 (1985).

It is the task of the law to remedy wrongs which merit redress even at the expense of incurring a torrent of litigation. A meritorious but novel cause of action should

not be denied for the reason that it would be an easy one to fabricate, inasmuch as it is the duty of courts to weed out fraudulent claims.

1 American Jurisprudence 2d, Actions, §37.

CONCLUSION

The Court of Appeals correctly held that Dr. Hobbs had alleged facts sufficient to support his claim for negligence and reversed the dismissal of his claim by the trial court. The negligence issue was properly before the Court of Appeals by raising the issue to the trial judge, who ruled on it at the hearing on Cole's motion to dismiss pursuant to Rule 12(b)(6) SCRPC. Public policy supports the negligence cause of action based on the elements of a negligent cause of action, the Declaratory Judgment Act, and Article 1, Section 9 of the South Carolina Constitution. For these reasons, this Court should affirm the decision of the Court of Appeals in this case and allow discovery in order for Dr. Hobbs to develop the theory of his claim.

Respectfully submitted,

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