STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Case No. 2025-CP-26-08617
	)	
Weldon Boyd,	)	
Plaintiff	)	**PLAINTIFF'S MEMORANDUM**
vs.	)	**IN OPPOSITION TO**
	)	**MOTION TO DISMISS**
Mark B. Tinsley,	)	
Defendant	)	
	)	

Plaintiff Weldon Boyd (hereafter "Boyd") opposes the Defendant's Motion to Dismiss[1] and asserts the Motion should be denied. The gist of arguments made by Defendant can be considered preliminarily, if at all, on a motion for judgment on the pleadings or summary judgment, since content raised by answer (which is the only place a Defendant may raise an affirmative defense) may be considered only at those stages of the action. *See* footnote one.

Standard for Review of Defendant's Motion

The opening paragraph of the motion asserts that it is based upon Rule 12(b)(6) and Rule 12(b)(8). "It is a well-settled principle that in resolving a… motion to dismiss, the court is limited to a consideration of the allegations contained within the four corners of the complaint." *Charleston County School District v. Harrell,* 393 S.C. 552, 559, 713 S.E.2d 604, 608 (2011).

[1] Issue 2 in the motion makes reference to some unidentified "wrongful death suit" which Defendant does not bother to identify. The complaint in this matter cites the filing of a lawsuit by reference to a point in time (see ¶¶ 55, 58) but does not identify the lawsuit nor discuss its substantive content or character. Reference to a "wrongful death suit", even if it was identified by Defendant in his motion to dismiss, requires an answer and affirmative defense, which must be raised by answer, and as to which the Defendant has the burden of proof. *Garrison v. Target Corporation*, 435 S.C. 566, 869 S.E.2d 797 (2022) ("An affirmative defense conditionally admits the allegations of the complaint, but asserts new matter to bar the action[.]" *Garrison* also points out that a defendant has the burden of proof on affirmative defenses.

In ruling on a Rule 12(b)(6) motion, the allegations set forth on the face of the complaint must be assumed to be true. *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct.App.2003). Accordingly, "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Gentry v. Yonce*, 522 S.E.2d 137, 337 S.C. 1, 5 (1999). The motion should be denied if "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case." *Id*. The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

To prevail on a motion to dismiss pursuant to Rule 12(b)(8), "the movant must show that the actions in question are between the same parties in their same capacities." *Cricket Cove Ventures, LLC v. Gilland*, 390 S.C. 312, 322, 701 S.E.2d 39, 45 (Ct.App.2010). As noted, Defendant's motion makes no argument on his Rule 12(b)(8) motion[2] and it is therefore abandoned. *Chris v. Jennifer J.*, 403 S.C. 96, 742 S.E.2d 382 (2013); *Mulherin-Howell v. Cobb*, 362 S.C. 588, 608 S.E.2d 587 (Ct.App. 2005).

ARGUMENT

In Part I of the argument below, the numbered sections contained within Defendant's motion are further addressed and refuted in turn. In Part II below, Boyd articulates the proper scope and role of equity in our courts, and the appropriateness of invocation of that power in this matter.

[2] The only way Defendant and some third party could be the same person/entity is if that person/entity had assigned a cause of action to Defendant to pursue for his own purposes. *See e.g., Sentry Select Ins. Co. v. Maybank Law Firm*, 426 S.C. 154, 162 826 S.E.2d 270 (2019) ("the determination whether *in a specific case* the defendant will be held liable to a third party not in privity is a matter of policy and involves the balancing of several factors"), *citing Lucas v. Hamm*, 56 Cal;.2d 583, 364 P.2d 685 (1961). If some person/entity has assigned a cause of action to Defendant, that, too, would be an affirmative defense which Defendant would have to raise in an answer and on which he would bear the burden of proof.

I. DEFENDANT'S PURPORTED GROUNDS FOR DISMISSAL ARE UNAVAILING, AND WELL BEYOND APPROPRIATE BOUNDS FOR CONSIDERATION IN A MOTION TO DISMISS.

While the motion is filled with attention-grabbing language and insults directed at Boyd's counsel,[3] the facts and cases cited in the substantive, numbered paragraphs relate to legal issues that have no relevance to the facts alleged, nor the equitable claim asserted in the complaint. Defendant's arguments go beyond the corners of the complaint, which is the standard by which this motion has to be considered.

A. There is no other pending case between these parties in their same capacities.

The motion tangentially and vaguely seeks to articulate a Rule 12(b)(8) basis for the motion, which includes the argument set forth in numbered paragraph 1 of Defendant's motion. However, the argument lacks specificity throughout the motion, merely referencing "existing litigation" that remains unidentified, let alone explained with respect to the nature of the litigation or its status. That is predictable and unavoidable, however, as there is objectively and undisputably no separate pending action pending between the "same parties in their same capacities" as South Carolina law would require. *See Cricket Cove Ventures* cited above.

Even if the judicial constraint against going beyond the facial content of the complaint[4] were to be disregarded as Defendant's motion attempts to do, it would nevertheless remain true

[3] Defendant's colorful but substantively empty language in the motion includes the following (repetition in the original): "cursory", "absurdity", "improperly", "poorly drafted", "ill-conceived", "sensationalized", "mischaracterized", "categorically apparent", "defective", "self-serving", "sour grapes", "nebulous claim for relief", "worth asking who is really motivated by their own 'personal purposes of establishing and/or increasing… celebrity status'", "frivolous", "misleading", "improper defendant", "egregiously", "improperly", "circumventing manner", "sensationalized complaint which lacks any substance", "ignores", "self-serving", "cherry-picked", "improper", and "ridiculous."

[4] Paragraph 37 of the complaint makes reference to "a civil action" filed by Defendant Tinsley, but the action is not identified by case number or otherwise, nor is the nature of the action described except in reference to public statements by Defendant in Paragraph 55 and 58. The reference in the complaint for the filing of "the civil action" as stated in Paragraph 37 cites only the date a civil action was filed and intentionally omits any reference to the nature of that civil

that Defendant Tinsley is not a defendant or party *at all* within any other proceeding/case/claim involving Boyd. While Boyd is a party in separately pending litigation, Defendant is involved in the same merely *as opposing counsel* for a party adverse to Boyd. Further, as the complaint repeatedly makes clear, alleged failures of Defendant Tinsley that give rise to the cause of action asserted in this matter relate solely to acts undertaken exclusively for Defendant's personal benefit, in a wholly non-representative capacity and effect.

B. There is no "adequate remedy at law" such that equitable relief should be unavailable.

Numbered Paragraph 2 of Defendant's motion is expressly premised upon Rule 12(b)(6), but again improperly seeks to introduce information and argument premised outside the content of the complaint, substantively relying upon outside litigation between different parties, the status of such litigation, and the substantive relief available in that proceeding. None of that information is appropriate for Rule 12(b)(6) consideration. Instead, additional facts alleged by the Defendant constitute an affirmative defense, the burden on which falls upon the defendant. *Youmans v. Dept. of Transp.*, 670 S.E.2d 1, 380 S.C. 263 (Ct.App.2008)("The burden of proving an affirmative defense is on the defendant.").

Law governing affirmative defenses has long been the law in South Carolina. *McConnell v. Kitchens*, 20 S.C. 430, 433, (1884)("The rule seems to be that when the defendant admits… the plaintiff's cause of action, as stated in the complaint, and relies solely upon an affirmative defense based upon new matter stated in the answer… the defendant would assume the burden of proving his affirmative defense."). An affirmative defense cannot be considered during consideration of a

lawsuit. A cover page on Exhibit D to the complaint recites a civil case number, but the document is not an official court document, it is not stamped by a clerk of court or otherwise authenticated. Nothing in the complaint in this action provides any information about the civil action other than the date it was filed. The reference to the date of the civil action in the complaint is for chronological purposes only, as it relates to Defendant's multiple wrongful acts.

dismissal motion rightly premised upon taking only Boyd's allegations, viewing them "in the light most favorable to the plaintiff, and with every doubt resolved in his behalf."[5]

Defendant's citations all relate to cases in which legal damages were sought, and then equitable relief was *additional* relief sought. *To wit*, Defendant cites *EllisDon Const., Inc. v. Clemson Univ.*, quoting it as holding that "equity is only available when a party is without an adequate remedy at law" However, a cursory review of the opinion reveals it concerns whether statutory interest should apply to unpaid sums due between the parties. Defendant also cites (a) *Carolina Attractions v. Courtney*, which Defendant openly quotes as addressing an "equitable lien," signaling succinctly the wholesale inapplicability of a case involving a contractual dispute for damages; (b) *Milliken v. Morin*, a case wherein appeal was taken because of the court's denial of equitable relief sought only *after* a jury award in favor of the plaintiff for monetary damages, with such award merely being of an amount that was unsatisfactory to the plaintiff.

Those cases and their holdings are irrelevant to the instant action, where no legal remedy (such as payment of a debt) has been sought,[6] unless Defendant is suggesting that he should be held accountable by payment of a sum of money to Boyd. Even when improperly and vaguely referencing other litigation (between *different* parties), never does Defendant assert the nature of any remedy available to Boyd other than that sought in the complaint. As such, there is no non-

[5] Similarly, the closing paragraph of the motion asserts that Defendant's motion is supported by "exhibits" and "certified documents that may be later submitted to this Court" no exhibits are allowed in considering dismissal pursuant to Rule 12(b)(6).

[6] Defendant acknowledges as much in footnote 1 to his motion, which begins by stating "Plaintiff goes to great lengths to 'waive' any claim for legal relief and limit the relief to the equitable side of the court." Exactly, and Boyd did so effectively, even without needing his allegations to be viewed "in the light most favorable… and with every doubt resolved in [Boyd's] behalf" as the law requires.

equitable "adequate remedy" available that can be derived from the face of the complaint that would merit dismissal in favor of Defendant.

C. Declaratory relief and the requested means of achieving it in this matter is appropriate, and unavailable elsewhere.

Numbered Paragraphs 3 and 4 reference "the pending wrongful death action" and "wrongful death suit" respectively, suggest Boyd could seek relief as a component of that separate action, and even suggest how Boyd might go about doing so. As stated above, Defendant is not a party to any separate action involving Boyd, and any dispositive resolution in this matter would not be dispositive as to any claim or defense in the separate matter. Regardless, all such references and suggestions by Defendant are inappropriate for consideration in the context of a Rule 12(b)(6) motion anyway, as none of that is alleged in the complaint. Likewise, the support for the "ripeness" grounds asserted by Defendant expressly relate to the procedural status of unrelated litigation between distinct parties, no aspect of which is relevant. The Court's authority to consider this 12(b)(6) motion is explained and set forth above, and Defendant makes arguments premised upon matters impermissibly outside that scope. Within the scope are clear allegations of damage to Boyd, regardless of whether Defendant publishes another false statement.

Additionally, in this and other portions of the motion to dismiss, this Court's authority more broadly in a declaratory judgment action such as this one is misstated by Defendant. To wit, Defendant's footnote number 1 asserts that "Plaintiff is not entitled to a jury trial on matters in equity. This is another demonstration of how poorly drafted and ill-conceived the Complaint in this matter is." The face of the complaint includes Boyd's request for a jury trial as to factual issues. This is consistent with more than a decade of accepted procedure, where the "resolution of factual issues may be submitted to an advisory jury in a case arising in equity." *Erickson v. Jones*

Street Publishers, LLC, 368 S.C. 444, 480, 629 S.E.2d 653 (2006)(citing Rule 39(c), SCRPC (providing for advisory jury in all actions not triable of right by a jury)); *First State Sav. and Loan Ass'n v. Nodine*, 354 S.E.2d 51, 291 S.C. 445, 447 (Ct.App.1987) ("under provisions of S.C.R.Civ.P. 39(c), a jury may render an advisory verdict in equity matters. It may not, however, render a verdict granting ultimate relief unless consented to by both parties."); *Momeier v. McAlister, Inc.*, 190 S.C. 529, 538-39, 3 S.E.2d 606, 610 (1939) (judge in equity case has the right and power to refer issues to a jury for the enlightenment of his conscience). Poorly drafted, indeed.

D. Defendant must answer individually for his false statements and otherwise improper conduct set forth in the Complaint.

Numbered Paragraph 5 states affirmatively that Defendant's "advocacy statements are not even alleged to be false." A mere sampling from the complaint reveals otherwise, however:

(a) Opening paragraph of complaint states "manufacturing… a false narrative"

(b) Paragraph 37: "notwithstanding the clear evidence that Spivey had caused his own demise as well as significant undisputed evidence of Spivey's aggression and his unilateral creation of the deadly situation that led to his death..."

(c) Paragraph 38: "knowingly false yet sensational narrative..."

(d) Paragraph 41: Defendant's "own view of the facts..."

(e) Paragraph 45: "the story… [Defendant] wants to tell, notwithstanding the truth..."

(f) Paragraph 46: ". . . [Defendant's manipulation of the facts. . ."

(g) Paragraph 55: [Defendant's statement] "was knowingly false."

(h) Paragraph 67: [Defendant] "made this false statement to promote his own celebrity…"

(i) Paragraphs 82, 88(A) and 89(A): "[Defendant] manufactured... a false narrative…"

Numbered Paragraph 5 also states Defendant "was, at all times, acting in his representation [sic] with the knowledge of the Spivey's (*sic*)." As a threshold issue, the quoted portion is another failure by Defendant via submission of alleged additional facts, thereby asserting an affirmative defense when proper consideration of his Rule 12(b)(6) motion precludes him from doing so.

Even without interpretation of those allegations "in the light most favorable to the plaintiff, and with every doubt resolved in his behalf" as would be appropriate, Boyd's complaint definitively makes clear Defendant was acting in his individual capacity, at his own direction, by his own devices, and for his exclusive personal benefit, such that he cannot resort to blaming his client and transferring responsibility as his motion attempts to do.

The individual wrongful acts of the Defendant that do not relate to representation of a client in any matter were made clear by, *inter alia*, the following allegations contained within the complaint:

(a) "[Defendant] has done all acts in his individual capacity and for his own purposes..." (opening paragraph of complaint)

(b) [Defendant] did not engage in the acts for any tactical reason in any client matter or to assist in furtherance of any client matter, but for his own personal purposes." *Id*.

(c) "[Defendant] engaged in the acts… for purposes of self-promotion and self-aggrandizement to establish and/or further celebrity status for himself..." (Second opening paragraph of complaint).

(d) "[Defendant] did so... solely for personal publicity and promotion..." (Paragraph A, page 2).

(e) "[Defendant] is not sued in his representative capacity as a lawyer, but solely as an individual having acted for his own personal benefit and interests, not... in furtherance of the interests of any client." (Paragraph 5).

(f) "[Defendant's] wrongful conduct was not in his capacity as a lawyer doing a job for a client. [Defendant's] status as a lawyer created the vehicle through which [Defendant] engaged in the public disclosures, self-promotion and pursuit of celebrity... [Defendant] is sued as an individual..." (Paragraph 39).

(g) "[Defendant] sought out media attention... for the purpose of... raising his own public profile for personal reasons." (Paragraph 44).

(h) "[Defendant] affirmatively garnered media attention for his own self-aggrandizement, celebrity and self-promotion." (Paragraph 45).

(i) "[Defendant's] own purposes for his wrongful conduct include self-aggrandizement, self-promotion and achieving celebrity and high visibility in the public eye… [Defendant's] efforts have nothing to do with effecting a higher or better result for his clients." (Paragraph 52).

(j) "…for purposes of enhancing [Defendant's] own public profile and feeding his ego, not to advance his client's interest or for any other legitimate reason." (Paragraph 50)

(k) "These examples are representative of [Defendant's] extensive effort and his reach as he engaged in self-aggrandizement and seeking of celebrity status." (Paragraph 54).

(l) "[Defendant] did so to promote his own celebrity and reputation among the public." Repeated in every paragraph from 57-68, and in 75.

Were Defendant a mere lay person, Boyd could unquestionably bring a suit directly against Defendant for his actions. The analysis and result do not change because Defendant may simultaneously be acting as adverse counsel to Boyd in separate litigation precisely because—as noted was stated extensively in the Complaint—Defendant's actionable conduct was outside the scope of that representation.

The grounds set forth in the numbered and unnumbered paragraphs of Defendant's Motion to Dismiss are without merit and the Motion should be denied.

II. INVOCATION OF THE EQUITABLE POWER OF THIS COURT IS WARRANTED AND APPROPRIATE.

The proper scope and role of equity in South Carolina courts, and the long tradition of case law in support thereof, make certain the appropriateness of Boyd's invocation of that power in this matter.

A. Equitable Power of the Court is Properly Invoked.

While not expressly stated in the Motion to Dismiss, Defendant seems to want to argue that the equitable power of the Court is insufficient to permit Boyd's action to be adjudicated. He is wrong.

> [T]he destruction of the old Court of Equity and the combination of equity and common law principles within the jurisdiction of the same court, *to wit*, the Court of Common Pleas, has by no means extended or enlarged the class of cases in which equity principles may be administered. . . On the contrary, these remain as before, and a party seeking the aid of the Court of Common Pleas now, on its equity side, must come in with a case over which the old Court would have had jurisdiction... So that, to text a question of jurisdiction now in a given case, we have only to inquire whether the old court could have heard it.

Solomans v. Shaw, 25 S.C. 112, 114 (1886).

In *Solomans* the South Carolina Supreme Court referenced existing English and American jurisprudence to conclude an equity court "has jurisdiction in case of rights recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the courts of common law." *Id.* The court stated there are two requirements for a Court of Common Pleas to exercise equity jurisdiction: (1) "a recognized right" and (2) "the absence of power in the common law courts to give adequate and complete relief." In elaborating, the Supreme Court stated that equity will not provide a remedy where a right once existed, but was lost by the plaintiff's failure to timely bring an action.

Two years earlier, our Supreme Court noted that equity fashions a remedy where necessary and supported by equitable principles. "No court of justice can... be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country... there can be no civil right where there can be no legal remedy." *McConnell v. Kitchens*, 20 S.C. 430, 439 (1884).

By way of example, in 1910, the Supreme Court concluded that equity jurisdiction would provide a remedy for a shareholder of a corporation where "it can fairly be gathered from all the allegations of a complaint that the officers and directors of a corporation have made use of relations of trust and confidence in order to secure or promote selfish interests, *enough is then averred to set a court of equity in motion*." *Andrews v. Sumter Commercial & Real Estate Co.*, 87 S.C. 301, 307, 69 S.E. 604 (1910)(emphasis added). The Court also stated, "there can be no doubt... a case is stated which, if proved, call for the interference of a court of equity." *Id*.

Both appellate courts of the State have reinforced the equitable powers of a court exist to prevent "one party to suffer a gross wrong at the hands of another." *Ross v. Ross*, 394 S.C. 261, 265, 715 S.E.2d 359 (Ct.App.2011)(citing *Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.* 386 S.C. 108, 687 S.E.2d 19 (2009)). Equity jurisdiction exists "to do fairness and is flexible and adaptable to particular exigencies" to permit relief when circumstances justify it. *Id*.

The Supreme Court in *Hooper* noted equitable remedies can be applied "to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits" and that equity is triggered "because of extraordinary events" occurring beyond the control of the party seeking to invoke equity. *Hooper*, 386 S.C. at 116 (citing *Ocana v. Am. Furniture Co.*, 135 N.M. 539, 91 P.3d at 65 (2004)).

The Supreme Court has noted that "[e]quity does not permit a defendant to defeat justice" by the "ruse" of an "attempt at a technical avoidance". . . because "to do so would be to compound the defendant's wrong." *Chapman v. Citizens and S. Nat'l Bank of S.C.*, 302 S.C. 469, 482, 395 S.E.2d 446 (1990). The Supreme Court noted a circuit court has an "obligation" to provide equitable relief to a party whose rights have been abused. *Id*. at 478.

In one of the oldest cases in South Carolina involving discipline of a licensed attorney, the Supreme Court observed that attempts to suborn perjury were equally offensive as the actual subornation of perjury. "There can be no well-founded reason why the fabrication of evidence not involving perjury... should not be equally so; they are alike calculated to pervert the public justice of the country, and to do individual injustice." *Burns v. Clayton*, 237 S.C. 316, 334, 117 S.E.2d 300 (1960). The Supreme Court quoted a Nevada case for the proposition that "[i]t is clear that subordination of perjury, tampering with witnesses or *otherwise practicing deception upon a court by fraudulent devices* is gross misconduct in the perverting or obstruction of justice." *Id.* (emphasis added)(citing *In re: Wright*, 69 Nev. 259, 248 P.2d 1080, 1083).

The circuit court clearly has authority to hear this matter in equity, with the assistance of an advisory jury to determine factual issues, and to grant equitable relief.

B. Declaratory Judgment Act can furnish a full and adequate remedy.

South Carolina Code §§ 15-53-10 *et seq*. (hereafter "the Act") governs declaratory judgments, which were not known at common law. Once enacted in South Carolina, a circuit court judge noted that the Act was "designed to supply former deficiencies in legal procedures and to furnish a full and adequate remedy where none existed before." Lide, *The Uniform Declaratory Judgment Act*, 9 S.C.L.Q. 58 (1948), *quoting* 16 Am.Jur 281-282. Judge Lide lauded the legislature's adoption of the Act, noting a prior 1922 law allowing limited declaratory relief had been inadequate, and urged that the courts embrace its use "in appropriate cases." He called the adoption of the Declaratory Judgment Act "a step forward," and urged the trial courts to "vindicate the wisdom" of the Act "to the promotion of the common welfare." *Id.* at 63.

In early decisions construing the Act, the Supreme Court of South Carolina built on Judge Lide's expectation that the courts would issue declaratory judgments at appropriate times by applying the act upon "the ripening seeds of a controversy" sufficient to invoke the act. *Waller v. Waller*, 220 S.C. 212, 223, 66 S.E.2d 876 (1951) (quoting 16 Am.Jur. 284).

Terms and phrases now recited by rote were developed incrementally through early decisions which analyzed the wisdom of the terms of the Act.

- "A declaratory judgment should not deal with moot or abstract matters or constitute a merely advisory opinion... and there should be an existing controversy or at least the 'ripening seeds of a controversy.'" *Waller v. Waller*, *supra*. (rejecting the assertion that the suit was "premature" and that adjudication of fee simple title need not await the death of all life tenants).[7] The Supreme Court noted the "justice and fairness of the... declaratory decree appears to us to be quite obvious", citing the Uniform Declaratory Judgment act which "is to be liberally construed and administered." *Id., supra.*, 220 S.C. at 224.
- "Where a concrete issue is present, and there is a definite assertion of legal rights and a positive legal duty… there is a justiciable controversy calling for the invocation of declaratory judgment action." *Dantzler v. Callison*,[8] 227 S.C. 317, 321, 88 S.E.2d 64 (1955) (citing *S.C. Elec. & Gas Co. v. S.C. Pub. Serv. Auth.*, 215 S.C. 193, 54 S.E.2d 777 (1949)).
- The Act "does not require the court to give a purely advisory opinion which the parties might, so to speak, be put on ice to be used when occasion might arise." *City of*

[7] The Supreme Court noted an earlier decision invoking the equitable powers of the court that predated the Act supported the conclusion not to dismiss the suit as "premature." *Id*. at 224 (citing *Des Portes v. Des Portes*, 157 S.C. 407, 154 S.E. 426 (1930)).

[8] In *Dantzler*, the Supreme Court noted that a "demurrer" or motion to dismiss should not be granted if the plaintiff is "entitled to a declaration of rights at all." "[T]he court is not concerned with whether the plaintiff is right... but is only concerned with whether he is entitled to a declaration of rights with respect to the matters alleged. The test of sufficiency of such a complaint is not whether it shows that the plaintiff is entitled to a declaration of rights in accordance with his theory, but **whether he is entitled to a declaration of rights at all.**'" *Id.* 227 S.C. at 321-322 (emphasis added).

Columbia v. Sanders, 231 S.C. 61, 68, 97 S.E.2d 210 (1957)(citing *Town of Tryon v. Duke Power Co.*, 111 N.C. 100, 22 S.E.2d 450, 453) (The Act does "license litigants to fish in judicial ponds for legal advice."). The Supreme Court set aside its "considerable doubt" about whether a justiciable controversy was presented, since "the rule requiring the existence of a justiciable controversy is somewhat relaxed where the public interest in involved" the Court approved issuance of a declaratory judgment. *Id.*

The South Carolina Court of Appeals has analyzed the "case or controversy" analysis by reference to numerous prior Supreme Court decisions in *Crescent Homes SC LLC v. CJN, LLC*, 445 S.C. 164, 912 S.E.2d 389 (Ct.App.2024). That Court concluded that a right of first refusal in a contract was unenforceable despite the absence of any then-pending proposed sale of the real property in question. Following that Court's cataloguing of the requirements the Act, the Court of Appeals upheld a trial court's ruling that right of first refusal was not enforceable, when the holder of the first right of refusal had filed a *lis pendens* on the affected property and prompted the withdrawal of an offer to purchase.

As the trial judge determined in *Crescent Homes, supra*., the issues presented required "further inquiry into the facts of the case to 'clarify application of the law.'" 912 S.E.2d at 395. "The Act should be liberally construed to accomplish its intended purpose of affording a speedy and inexpensive method of deciding legal disputes and of settling legal rights and relationships, without awaiting a [further] violation of... rights." *Id.* at 183 (quoting *Sunset Key LLC v. City of Folly Beach*, 357 S.C. 414, 423, 593 S.E.2d at 466 (2004)).

The Court of Appeals also quoted former Chief Justice Toal's treatise on Appellate Practice: "The principles of justiciability . . . have grown out of the federal court's interpretation of 'the case or controversy' requirement. . . federal courts use a two-factor test: (1) the fitness of the issues for judicial determination; and (2) the hardship to the parties of withholding court consideration.

There can be no doubt that the dispute presented by the Complaint filed in this action is real, not hypothetical or abstract. As clearly alleged and therefore treated as indisputably true for purposes of the present motion, Defendant has made multiple false statements of fact that have damaged Boyd in the public eye. There is likewise no ability in consideration of this motion to treat as true the extensive and repeated allegation that Defendant made these statements purely for his own personal benefit, to the detriment of Boyd.[9]

CONCLUSION

The motion to dismiss should be denied. Plaintiff has brought this case in the right court, for the right reasons, and at the right moment. On the strength of the well pled complaint that set forth an ample, sufficient, and clear basis for relief sought, and through proper application of existing law. Suit cannot wait while Defendant continues to cause harm to Boyd.[10] Dismissal upon Defendant's motion would be improper. Accordingly, Boyd awaits this Court's determination that the matter shall proceed for the reasons set forth herein.

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[9] It will be a question of fact, with an advisory jury able to assist, to determine what Defendant's motivation was for the widespread false statements of fact that have damaged Boyd.

[10] In his motion to dismiss, Defendant does not seriously dispute the allegations of the complaint, but erroneously seeks dismissal of this action under the unproven theory that he should be protected from suit. At common law, Defendant would not be so protected, and that is why equity court exists. Defendant seems to want to continue to make false statements about Boyd to increase Defendant's celebrity, and there is nothing Boyd can do about it. The concept of immunity for a lawyer acting within the scope of his representation of a client is a judicial creation, which abrogates common law, and therefore such abrogation must be strictly construed. *See Gaar v. North Myrtle Beach Realty Co. Inc*., 287 S.C. 525, 339 S.E.2d 887 (Ct.App. 1986) (adoption of immunity standard). *Taylor v. Murphy*, 293 S.C. 316, 320, 360 S.E.2d 314 (1987)(abrogation of the common law "does not erase a vested right. . ."). Should Defendant seek, at a later time, to invoke some form of immunity in this proceeding, the viability of such immunity and the common law from which it arose would necessarily be analyzed in detail.

Respectfully submitted,

s/ Desa Ballard

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