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NO. COA09-889

NORTH CAROLINA COURT OF APPEALS

Filed: 21 December 2010

EMILY M. MCMANAWAY,

Plaintiff,

v.

Orange County  
No. 08 CVS 1771

LDS FAMILY SERVICES, INC.,  
CECIL L. BOHANNAN (sic),  
MARVILYN B. BOHANNAN (sic),  
KRISTIN BRADLEY BRANCH,  
JOHNNY LEE BRANCH,  
COLEMAN, GLEDHILL  
HARGRAVE & PEEK, P.C.,  
LEIGH A. PEEK, Individually,  
DONNA AMBLER DAVIS, P.C.,  
DONNA AMBLER DAVIS, Individually,

Defendants.

Appeal by plaintiff from order entered 20 March 2009 by Judge Kenneth C. Titus in Orange County Superior Court. Heard in the Court of Appeals 27 January 2010.

*Betsy J. Wolfenden for plaintiff.*

*K&L Gates LLP, by Raymond E. Owens, Jr., Christopher C. Lam, and Dedria L. Harper, for defendant-appellee LDS Family Services, Inc.*

*Bell, Davis & Pitt, P.A., by Stephen M. Russell, Sr., for defendant-appellees Leigh A. Peek; Coleman, Gledhill, Hargrave & Peek, P.C.; Donna Ambler Davis; and Donna Ambler Davis, P.C.*

ELMORE, Judge.

Emily M. McManaway (plaintiff) appeals a 20 March 2009 order dismissing with prejudice her complaint for failure to state a claim. For the reasons stated below, we affirm the decision below.

**Background**

On 24 November 2008, plaintiff filed her amended complaint against the following defendants: LDS Family Services, Inc. (LDS Family Services); Cecil L. Bohannon, plaintiff's brother; Marvilyn B. Bohannon, Cecil Bohannon's wife; Kristin Bradley Branch; Johnny Lee Branch; Leigh A. Peek, an attorney who represented the Bohannons and Branches in the related custody dispute; Coleman, Gledhill, Hargrave & Peek, P.C., defendant Peek's law firm; Donna Ambler Davis, an attorney who represented the Bohannons and Branches in the related custody dispute; and Donna Ambler Davis, P.C., defendant Davis's law firm.

Because we are reviewing an order dismissing plaintiff's amended complaint for failure to state a claim pursuant to Rule 12(b)(6) of our Rules of Civil Procedure, we treat plaintiff's actual allegations as true, construe the complaint liberally, and view the evidence in the light most favorable to plaintiff. *Turner v. Hammocks Beach Corp.*, 363 N.C. 555, 559, 681 S.E.2d 770, 774 (2009). The factual allegations set out in plaintiff's amended complaint are highly detailed and go on for thirteen pages.

The facts, as alleged in the amended complaint,<sup>1</sup> are these: In August 2003, plaintiff gave birth to her son, "Bobby,"<sup>2</sup> in Nevada. Bobby's biological father, Johnny Michael Murray, committed an act of domestic violence on 13 September 2003. Three days later, plaintiff flew to North Carolina with Bobby to stay with her brother, Cecil Bohannon, and his wife, Marvilyn. In December 2003, plaintiff returned to Nevada to finalize her disability application, and she left Bobby with the Bohannons at their urging. Before plaintiff left, the Bohannons advised plaintiff that "under the new HIPPA[A] laws, . . . if anything happened to [Bobby] while in their temporary care, the hospital would refuse to treat [Bobby] unless there was a court order giving them custody of [Bobby]." Relying on these statements, plaintiff agreed to give them temporary physical custody of her son. On the recommendation of their bishop, the Bohannons retained defendant Peek to help them obtain a custody order. The Bohannons did not retain separate counsel for plaintiff and "[a]t no time did Peek tell Plaintiff she was representing only the Bohannons, nor does the consent order prepared by Peek recite that she was only representing the Bohannons." On or about 14 November 2006, Peek prepared a consent order that gave the Bohannons temporary joint legal custody of

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<sup>1</sup> Plaintiff filed a second motion to amend her complaint, which the trial court denied. That denial is one of the subjects of this appeal. When we refer to the amended complaint, we mean the complaint as amended by plaintiff's first motion to amend.

<sup>2</sup> "Bobby" is not the minor child's real name.

Bobby and primary physical custody. Then, at this point, according to plaintiff, the real trouble began:

21. Instead of initiating a cause of action and issuing a summons to the Plaintiff, which would have given the Orange County District Court subject matter jurisdiction, Peek prepared a consent order and submitted it *ex parte* to the Honorable Patricia DeVine for entry after Plaintiff and the Bohannons had signed the order in her office. After Judge DeVine entered Peek's consent order, Peek filed the consent order with the Orange County Clerk of Superior Court in File No. 03 CVD 2133.

22. Upon information and belief, Peek did not initiate a custody action in North Carolina because she was aware that Nevada was the home state of [Bobby] on November 14, 2003, and she wished to hide that fact from the court and from the Plaintiff.

23. The consent order prepared by Peek reads as follows: "THIS CAUSE, coming on to be heard and being heard before the undersigned district court judge during a regularly scheduled session of Civil District Court." This statement made by Peek is false for the following reasons:

a. There was no "CAUSE" because Peek failed to commence a cause of action by filing a complaint. Since no complaint was filed, no summons was issued. Since no summons was issued to the Plaintiff, Orange County District Court never obtained jurisdiction over the Plaintiff or the subject matter, [Bobby]. Subject matter jurisdiction cannot be conferred by consent, waiver or estoppel by the Bohannons, the Plaintiff or Peek.

b. There was no hearing before a judge. Plaintiff was driven to Peek's office by Ms. Bohannon to sign the consent order. Mr. Bohannon drove separately to Peek's office from his work at Blue Cross Blue Shield to sign the consent order. Peek submitted the consent order *ex parte* to Judge DeVine

for entry after the Plaintiff and the Bohannons signed the consent order in Peek's office.

24. Peek's consent order also states: "WHEREAS, at the call of the calendar for trial, counsel indicated to the court that an Agreement with regard to the issues of child custody had been executed and was ready for entry of judgment." This statement made by Peek is false because there was no cause of action to call to trial since Peek failed to file a complaint and issue a summons.

25. Peek's consent order further states, "WHEREAS, it is the desire of the parties to this consent order that it be entered at this time, that they do hereby consent to the entry of this order, as evidenced by their signatures below." This statement is another misrepresentation to the court as it implies there was a valid cause of action pending before the court, that the Plaintiff had been served with a copy of the summons and complaint in accordance with Rule 4 of the North Carolina Rules of Civil Procedure, that the hearing for entry of the consent order had been calendared, that the Plaintiff had received proper notice and that the parties had appeared before Judge DeVine to express their consent to the entry of the consent order and for Judge DeVine to make the proper inquiries of the parties before the custody order was entered. None of the foregoing is true.

26. Peek's consent order further states, "[a]t this time, no biological father has been identified or named." This statement is also false. The Bohannons were aware that Johnnie Michael Murray was the biological father of [Bobby], but expressly instructed Peek not to name or contact him because they were concerned that he or his family would attempt to seek custody of [Bobby].<sup>3</sup>

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<sup>3</sup> We addressed the 2003 consent order's lack of validity in *Bohannan v. McManaway* (COA 09-887).

While plaintiff was in Nevada, she received a Christmas postcard from Marvilyn Bohannon that said, "When you arrive, call this number." When plaintiff called the number, she learned that it was the number of a homeless shelter in North Carolina. Plaintiff asked Marvilyn Bohannon why she had provided plaintiff with the number to a homeless shelter, and Marvilyn Bohannon replied that plaintiff "was not welcome in their home and that they were keeping [Bobby]." Plaintiff called the Bohannons repeatedly between December 2003 and March 2004, and the Bohannons eventually agreed to return Bobby. Plaintiff took physical custody of him again in March 2004. After plaintiff and Bobby returned to Nevada, "Ms. Bohannon called the Clark County Department of Family Services on numerous occasions, saying that she and her husband wished to be notified of any problems because they shared joint custody of [Bobby] with Plaintiff." On 5 March 2006, Johnny Michael Murray kidnapped Bobby. Plaintiff reported Bobby missing to the Las Vegas Metro Police and the Clark County Department of Family Services (Clark County DSS).

A Clark County DSS social worker found the Bohannons' phone number in Bobby's case notes associated with the domestic violence incident involving Johnny Michael Murray. The social worker called the Bohannons and, "according to her case notes, was given the following information from Ms. Bohannon":

[Ms. Bohannon's] husband does have joint legal custody of [Bobby]. That the documents are legal and have been signed by a judge in North Carolina. That they spent a lot of money to do it. That they did it because they didn't want [Bobby] to ever end up in foster care.

That they have had concerns about [Plaintiff] and her lifestyle. That [Plaintiff] and [Bobby] had lived with them in North Carolina for 8 months. [Ms. Bohannon] said that her husband has a completely different lifestyle than [Plaintiff]. That he works for Blue Cross/Blue Shield and was one of the people involved in implementing HIPPA[A]. [Ms. Bohannon] said that her husband will fly out to Las Vegas tonight and will be present for tomorrow's court hearing with the Custody Papers.

Although the amended complaint does not make specific mention of when or how the authorities recovered Bobby from his father, it appears that they did because,

[o]n the morning of March 8, 2006, Mr. Bohannon appeared in juvenile court in Clark County, Nevada, with a copy of the November 14, 2003[,] consent order prepared by Peek and entered by Judge DeVine. Based on the allegations made by the social worker who had spoken with the Bohannons the day before, the Juvenile Hearing Master recommended that [Bobby] be released to Mr. Bohannon "pending further proceedings." The Juvenile Hearing Master also recommended that the "Clark County Department of Family Services provide for the placement, care, and supervision of the above-named subject minor(s) until further order of the court." The findings and recommendations of the Juvenile Hearing Master were approved later by a Clark County district court juvenile judge, and became an order of that court. Immediately after the court hearing on March 8, 2006, Mr. Bohannon removed [Bobby] from the State of Nevada and returned with him to North Carolina.

After Cecil Bohannon's return to North Carolina with Bobby, plaintiff "made numerous telephone calls to the Bohannons requesting that [Bobby] be returned to her. The Bohannons refused to return [Bobby] to the Plaintiff and even refused to allow the Plaintiff to speak with [Bobby] on the telephone." In March 2006,

the Bohannons retained child psychologist Dr. Mary Baker Sinclair as their "consultant." According to Ms. Bohannon's sworn testimony at her January 2, 2008[,] deposition, Dr. Sinclair was retained as part of their "strategy" to keep [Bobby] from the Plaintiff. Upon information and belief, the strategy was to get Dr. Sinclair to write a letter to the court stating that it was in [Bobby]'s best interest to remain with the Bohannons and to have no contact with the Plaintiff so that, later, Plaintiff's parental rights to [Bobby] could be terminated based upon her "abandonment" of [Bobby].

In September 2006, plaintiff hired a Nevada attorney to help her regain custody of Bobby. Until that time, plaintiff had represented herself because "she had no money to retain a lawyer. She continued to call the Bohannons; they refused to return [Bobby] to her and they refused to allow her to speak with [Bobby]." The amended complaint describes the ensuing legal activity as follows:

40. Plaintiff's attorney in Nevada filed a Complaint for Immediate Return of the Child and a Motion for Immediate Return of the Child. Plaintiff's attorney alleged that the November 14, 2003[,] consent order was null and void because North Carolina was not [Bobby's] home state when the consent order was entered, and because Plaintiff had revoked the order when she arrived in North Carolina on April 17, 2005[,] to take [Bobby] back to Nevada. Plaintiff's attorney was apparently unaware that [the] Orange County District Court never obtained jurisdiction over the parties or the subject matter[.]

41. On or about September 20, 2006, the Bohannons retained an attorney in Las Vegas to respond to the pleadings filed by Plaintiff's attorney. Upon information and belief, Peek provided the Bohannons' attorney in Las Vegas, Nevada, with a copy of Peek's November 14, 2003[,] consent order and told him it was a valid court order in the State of North Carolina.



42. Throughout his Opposition to Plaintiff's Motion for Immediate Return of the Child and Countermotion for North Carolina to Assume UCCJ[E]A Jurisdiction, Bohannons' Nevada attorney asserts to the Clark County Juvenile Court that Peek's November 14, 2003[,] consent order is a valid court order. Upon information and belief, Peek took no action to correct this misrepresentation to the court. This misrepresentation was in violation of the Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA") and the Parental Kidnapping Prevention Act ("PKPA").

43. On September 20, 2006, the Honorable Gloria Sanchez presided over a hearing at which she expressed her concern over numerous procedural defects. Judge Sanchez noticed that the Bohannons had failed to register Peek's consent order as a Foreign Judgment in the State of Nevada. Judge Sanchez was obviously unaware that the November 14, 2003[,] consent order was invalid. Judge Sanchez continued the matter for a UCCJ[E]A hearing and ordered that "[t]elephone contact [with [Bobby]] shall be facilitated as to Plaintiff so she doesn't go without." The Bohannons did not provide Plaintiff with telephone contact with [Bobby] pursuant to Judge Sanchez' order.

44. A telephonic hearing to determine UCCJ[E]A jurisdiction of [Bobby] was scheduled for September 27, 2006[,] before Judge DeVine in Orange County and Judge Sanchez in Clark County, Nevada. Peek was present in the courtroom with Judge DeVine and gave Judge DeVine a letter from Dr. Sinclair in which she stated that it was in [Bobby]'s best interest to remain with the Bohannons and to have no contact with Plaintiff. At no time during the hearing did Peek inform Judge DeVine or Judge Sanchez that Peek's November 14, 2003[,] consent order was invalid. The omission by Peek was material and in violation of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") and the Parental Kidnapping Prevention Act ("PKPA").

45. An order was entered by Judge Sanchez on October 6, 2006[,] stating as follows: "That it is hereby ordered that this court does not

have UCCJEA Jurisdiction, and the State of North Carolina has UCCJEA Jurisdiction **due to valid court order.**" [Emphasis added by plaintiff.]

46. As an officer of the court, Peek had a duty and obligation to inform the Courts in Orange County, North Carolina, and in Clark County, Nevada, that the November 14, 2003[,] consent order was not valid and that she had perpetuated a fraud upon both courts.

The amended complaint then describes the custody complaint that defendant Peek filed in Orange County on behalf of the Bohannons on 13 October 2006 (06 CVD 1810). That custody suit is the subject of our opinion in *Bohannon v. McManaway* (COA 09-887). The amended complaint alleges that attorney Peek engaged in various shenanigans designed to prevent plaintiff from participating in the custody suit. For example, plaintiff alleged, "At the call of the case, on January 2, 2007, Peek told the Honorable Joseph M. Buckner that the Bohannons' complaint for sole custody of [Bobby] was 'unopposed,'" but both defendant Peek and the Bohannons had signed the U.S. Mail return receipt for plaintiff's verified answer several months earlier. According to plaintiff, "Peek and the Bohannons engaged in a common scheme to hide Plaintiff's answer from the court." Plaintiff alleged that defendant Peek had informed Judge Buckner that "other orders in this case have been entered," and that "Peek made these statements to Judge Buckner so that he would sign her custody order giving her clients sole legal and physical custody of [Bobby] without reviewing the pleadings in the court file and/or holding a hearing. According to the clerk's log, Judge Buckner entered a custody order on January 2, 2007, without a hearing."

Plaintiff also noted that defendant Peek had filed a notice of hearing and calendar request for January 2, 2007, Orange County District Court Calendar Call, and "[c]ontested hearings are not heard at calendar call unless consented to in advance by the parties."

Defendant Peek re-served plaintiff with the 2006 custody complaint, but used service by publication, which plaintiff alleges was improper because defendant Peek did not try to obtain plaintiff's address. Defendant Peek drafted a custody order that gave the Bohannons sole legal and physical custody of Bobby and, on 15 March 2007, Judge Buckner gave his secretary "telephonic authority to sign Peek's custody order." Judge Buckner entered this order without hearing evidence, for which reason this Court vacated the order in our opinion in *Bohannon v. McManaway* (COA 09-887).

The next series of factual allegations involves the Branches' attempt to adopt Bobby from the Bohannons, who now had legal and physical custody of Bobby pursuant to the 2007 custody order:

63. As early as January of 2007, Peek was aware that the Bohannons wanted to place [Bobby] outside their home. On January 26, 2007, Ms. Bohannon told Joseph Daines ("Daines"), a licensed marriage and family therapist, employed by LDS Family Services, Inc., that their attorney, Peek, had met with Chapel Hill lawyer, Donna Ambler Davis, who "specializes in unique/unusual adoptions." According to Ms. Bohannon, the plan was for the Bohannons to receive sole custody of [Bobby] so they could enter into a private agreement giving an adoptive family sole custody of [Bobby]. The adoptive family would terminate Plaintiff's parental rights to [Bobby] and proceed with the adoption. The

basis for terminating Plaintiff's parental rights to [Bobby] would be that she had willfully left him in placement outside her home for twelve months. Once twelve months had passed, the adoptive family could allege that Plaintiff had abandoned Murray and proceed with terminating her parental rights.

64. At her January 2, 2008[,] deposition, Ms. Bohannon admitted that the Defendants wanted to hide the adoption of [Bobby] from the Plaintiff and their family so they would not have the opportunity to contest the adoption. Ms. Bohannon further admitted that they did not inquire of Plaintiff's whereabouts with family members because they did not want to give a "heads up" that they were giving [Bobby] away to the Branches.

65. In January of 2007, without informing Dr. Mary Baker Sinclair, [Bobby]'s purported therapist, Ms. Bohannon contacted Daines of LDSFS to find a Mormon adoptive family for [Bobby]. At her January 2, 2008[,] deposition, Ms. Bohannon testified that her first criterion for [Bobby] was that he be raised in a Mormon home. Her second criterion was that the adoptive family have enough money to fight the Plaintiff and their family if they found out about the adoption.

66. According to Daines of LDSFS, "Marvilyn [Bohannon] contacted [LDS] on January 4, 2007. She requested assistance in finding potential adoptive parents for her nephew of whom they expect to be awarded custody once the judge signs the order, expected January 8, 2007." Ms. Bohannon told Daines that Plaintiff had made no attempt to contact [Bobby] or establish visitation since they removed him from the State of Nevada on March 8, 2006. Upon information and belief, Ms. Bohannon did not tell Daines that Plaintiff had obtained legal counsel in Nevada in September of 2006 in order to have [Bobby] returned to Nevada, his home state.

67. In February of 2007, LDSFS, acting as a de facto adoption agency, "presented" the Branches to the Bohannons for the purpose of facilitating [Bobby]'s adoption into a Mormon

home. The Branches paid LDSFS for its services.

68. On February 9, 2007, Daines encouraged Ms. Branch to keep the adoption of [Bobby] "under wraps so that you can keep control over this as much as you can."

69. The Branches retained Donna Amber Davis to terminate Plaintiff's parental rights to [Bobby] and to file their adoption petition for [Bobby].

70. On 5 July 2007, Davis filed a petition for adoption in Surry County District Court on behalf of the Branches. Simultaneously with Davis filing the adoption petitions, the Bohannons filed their consents to the adoption. As the legal custodians of [Bobby], the Bohannons did not have legal standing under the North Carolina Adoption Statutes to consent to [Bobby]'s adoption. Because the Bohannons did not have legal standing to consent to the adoption, it was unlawful for the Branches to attempt to adopt [Bobby] from the Bohannons without the Plaintiff's consent.

71. On July 27, 2007, the Surry County Assistant Clerk of Superior Court issued an Order in which LDSFS was required to "investigate and make appropriate inquiry to determine whether the proposed home is a suitable one for the child and to investigate any other circumstances or conditions that may have a bearing on the cause and of which the Court should have knowledge; and that you are further ordered to report to the court with respect to such matters within 60 days after the mailing or delivery of this Order." Upon information and belief, LDSFS failed to make a report to the court as required by [the] July 27, 2007[,] Order.

72. On July 21, 2007, Davis filed a petition on behalf of the Branches in Orange County District Court File No. 07-JT-89 to terminate Plaintiff's parental rights to [Bobby]. . . .

73. After Davis made one attempt to serve Plaintiff by mail, Davis served Plaintiff with the Branches' petition to terminate her

parental rights by publication in Las Vegas, Nevada.

74. The notice prepared by Davis did not comply with the North Carolina Rules of Civil Procedure as it contained no identifying information whatsoever that would put Plaintiff on notice that the notice pertained to [Bobby].

75. On or about August 13, 2007, Plaintiff spotted the Notice of Service of Process by Publication in a Las Vegas newspaper. Although the notice contained no identifying information for [Bobby] or the Plaintiff, the Plaintiff intuitively felt the notice pertained to [Bobby].

76. On or about August 13, 2007, Plaintiff began calling Davis to inquire about the notice in the newspaper. Because Davis was moving into her new office on Legion Road in Chapel Hill, North Carolina, she did not immediately return Plaintiff's telephone calls. When Davis did return Plaintiff's call and Plaintiff asked Davis how she was supposed to know the notice applied to her or [Bobby], Davis told the Plaintiff that she was unable to answer her questions because she was not her attorney. Davis also told Plaintiff that she had very strict guidelines to follow in serving the Plaintiff by publication and those guidelines had been followed to a "T."

77. Davis' Notice of Service of Process by Publication did not meet the strict requirements of Rule 4(j1). Rule 4(j1) requires in relevant part that that [sic] the notice designate the court where the action is filed and the caption, including at least the name of the first plaintiff and defendant, be directed to the defendant sought to be served, and require defendant to enter a defense to such pleading within 40 days after a date stated in the notice. The notice prepared by Davis did not name either of the Bohannons as "plaintiff" nor did it name either of [Bobby's] biological parents as "defendant." The notice was not directed to the Plaintiff who was the defendant Davis sought to serve. The only information Davis provided was the file number: 07-JT-89. Furthermore, Davis

stated in the notice, "[y]ou are required to make a defense to such pleading not later than August 29, 2007, which is 30 days from the first date of this publication." Rule 4(j1) requires 40 days['] notice. Upon information and belief, Davis intentionally left out any identifying information in hopes that Plaintiff would not spot the notice, or if she spotted the notice, would not know that the notice applied to her and [Bobby].

On 29 October 2007, plaintiff's attorney filed a motion to dismiss the Branches' termination petition on the ground that the Branches lacked standing to bring the petition. "On November 5, 2007, Ms. Branch contacted Daines at LDSFS and told him that someone had 'ratted' or 'disclosed' to Plaintiff the Notice of Service by Publication that Davis had run in the Las Vegas newspaper." On 26 November 2007, plaintiff filed a Rule 11 motion alleging that the Bohannons, Branches, and attorneys Davis and Peek had filed an unlawful adoption petition. On 15 February 2008, the Branches dismissed their adoption petition in Surry County. Ten days later, the Branches dismissed their termination of parental rights petition in Orange County.

On 24 November 2008, plaintiff filed her complaint against defendants. On 2 December 2008, plaintiff filed an amended complaint. On 2 January 2009, plaintiff filed an amendment to her amended complaint, which defendants opposed. On 23 January 2009 and 28 January 2009, defendants filed motions to dismiss plaintiff's amended complaint, pursuant to Rule 12(b)(6) of our Rules of Civil Procedure. On 17 February 2009, plaintiff withdrew her motion for leave to amend, but on 19 February 2009, plaintiff filed another motion for leave to amend. On 20 March 2009, the

trial court filed its order granting defendants' motions to dismiss and denying plaintiff's motion for leave to amend.

### **Arguments**

Plaintiff makes three arguments on appeal: First, the trial court erred by granting defendants' motions to dismiss. Second, the trial court erred by denying plaintiff's motion to amend the complaint to include a claim for unfair and deceptive business practices. Third, the trial court erred by not converting defendants' Rule 12(b)(6) motions to dismiss into Rule 56 motions for summary judgment because the trial court considered matters outside the pleadings during the hearing on the motions to dismiss.

#### **A. Motion to Dismiss**

We review de novo the grant of a motion to dismiss. . . . The system of notice pleading affords a sufficiently liberal construction of complaints so that few fail to survive a motion to dismiss. Accordingly, when entertaining a motion to dismiss, the trial court must take the complaint's allegations as true and determine whether they are sufficient to state a claim upon which relief may be granted under some legal theory. This rule . . . generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.

*Lea v. Grier*, 156 N.C. App. 503, 507, 577 S.E.2d 411, 414-15 (2003) (quotations and citations omitted). The "trial court should not dismiss the complaint unless it appears beyond doubt that [the] plaintiff could prove no set of facts in support of his claim which would entitle him to relief." *State ex rel. Cooper v. Ridgeway*



*Brands Mfg., LLC*, 362 N.C. 431, 444, 666 S.E.2d 107, 116 (2008) (quotations and citations omitted; alteration in original).

Plaintiff alleged nine causes of action in her complaint: (1) civil conspiracy; (2) abuse of process; (3) common law obstruction of justice; (4) fraud, constructive fraud, and fraudulent concealment; (5) aiding and abetting; (6) intentional infliction of emotional distress; (7) negligent infliction of emotional distress; (8) breach of fiduciary duty; and (9) negligence. We affirm the dismissal of all nine causes of action because plaintiff's factual allegations in support of these claims are protected by absolute privilege.

It is now well-established that defamatory statements made in the course of a judicial proceeding are absolutely privileged and will not support a civil action for defamation, even if made with malice. In determining whether or not a statement is made in the course of a judicial proceeding, the court must decide as a matter of law whether the alleged defamatory statements are sufficiently relevant to the issues involved in a proposed or ongoing judicial proceeding.

*Jones v. Coward*, 193 N.C. App. 231, 233, 666 S.E.2d 877, 879 (2008) (quotations and citations omitted).

The public policy underlying this privilege is grounded upon the proper and efficient administration of justice. Participants in the judicial process must be able to testify or otherwise take part without being hampered by fear of defamation suits.

In deciding whether a statement is absolutely privileged, a court must determine (1) whether the statement was made in the course of a judicial proceeding; and (2) whether it was sufficiently relevant to that proceeding. These issues are questions of law to be decided by the court. *Scott v. Statesville Plywood & Veneer Co.*, 240 N.C. 73,

76, 81 S.E.2d 146, 149 (1954) ("the question of relevancy or pertinency is a question of law for the courts").

Statements made in a deposition are unquestionably statements made in the course of a judicial proceeding if they meet the relevance requirement. See 50 Am. Jur. 2d *Libel and Slander* § 300 (1995) ("The absolute privilege has been extended to statements made . . . in pretrial deposition and discovery proceedings."). Plaintiff does not contend otherwise. See also *Gibson v. Mutual Life Ins. Co. of N.Y.*, 121 N.C. App. 284, 290-91, 465 S.E.2d 56, 60 (1996) (statements made during a break in a deposition were made in the course of a judicial proceeding); *Rickenbacker v. Coffey*, 103 N.C. App. 352, 357, 405 S.E.2d 585, 588 (statements made by a witness in a pre-deposition conference were absolutely privileged), *disc. review denied*, 330 N.C. 120, 409 S.E.2d 600 (1991).

. . . Our Supreme Court has held that statements in a judicial proceeding lose the privilege only "if they are not relevant or pertinent to the subject matter of the action, . . . and the matter to which the privilege does not extend must be so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety." *Scott*, 240 N.C. at 76, 81 S.E.2d at 149. On the other hand, if the statement at issue "is so related to the subject matter of the controversy that it may become the subject of inquiry in the course of the trial, the rule of absolute privilege is controlling." *Id.*

*Harman v. Belk*, 165 N.C. App. 819, 824-25, 600 S.E.2d 43, 47-48 (2004) (additional quotations and citations omitted).

This Court has previously applied absolute immunity for statements in judicial proceedings to claims for negligence or intentional infliction of emotional distress, where those claims arise out of statements made in the course of judicial proceedings and those statements were also the basis of a defamation claim. *Jones*, 193 N.C. App. at 235, 666 S.E.2d at 880. In *Jones*, this

Court held that the plaintiff's claims for defamation, intentional infliction of emotional distress, and negligence against an attorney arising from statements the attorney made to a potential witness in a lawsuit he had filed were properly dismissed based upon immunity. We noted that,

[a]ccording to the Restatement (Second) of Torts § 586 (1977), [a]n attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

*Id.* at 234, 666 S.E.2d at 879 (additional citations omitted). In applying the privilege to the negligence and intentional infliction of emotional distress claims, this Court explained:

These claims [of emotional distress and negligence] are based upon the exact same question or comment plaintiff alleges defendant put to [the witness] Bracken. Were plaintiff allowed to pursue the additional claims in this instance, and on these facts, the privilege we have held protects defendant from an action for defamation would be eviscerated, and the public policy providing advocates the security to zealously pursue cases on behalf of their clients would be completely undermined.

*Id.* at 235, 666 S.E.2d at 880 (citation omitted). Therefore, this Court held that the defendant attorney's statement to the witness was "not 'so palpably irrelevant to the subject matter of the controversy that no reasonable man can doubt its irrelevancy or impropriety[,]'" and it was 'so related to the subject matter of the controversy that it may [have] become the subject of inquiry in the course of the trial[.]'" *Id.* (quoting *Scott*, 240 N.C. at 76, 81

S.E.2d at 149; additional citations omitted; alterations in original). Therefore, the scope of the absolute privilege may cover statements in judicial proceedings made by parties or counsel, whether made orally to the court or in written pleadings filed with the court, and oral or written statements occurring outside of the court, if the statement is "is so related to the subject matter of the controversy that it may become the subject of inquiry in the course of the trial." *Id.* (quotations and citations omitted).

Long before this Court's application of the doctrine of absolute immunity to claims for negligence and infliction of emotional distress, our Supreme Court recognized that the labels that a party places upon his claims are not controlling; instead, the court must consider the substance of the claim. In *Bailey v. McGill*, the plaintiff alleged that two of the defendants, who were physicians, negligently provided a "false certificate of insanity"; the clerk relied upon the physicians' certificates in entering an order for plaintiff's involuntary commitment in a mental hospital, pursuant to state statute. 247 N.C. 286, 290, 100 S.E.2d 860, 864 (1957). The trial court dismissed the plaintiff's claim against the two physicians based upon their certificates of the plaintiff's insanity. *Id.* There was some dispute about the exact nature of the plaintiff's claim before the trial court; his counsel stated that the plaintiff was not relying "upon a cause of action for malicious prosecution, or for abuse of process, or for false imprisonment." *Id.* The plaintiff also did not consider it to be

a defamation claim, instead identifying it as a malpractice claim. *Id.* at 293, 100 S.E.2d at 866. Our Supreme Court affirmed the dismissal, noting that the title placed upon his claim by plaintiff did not determine the applicability of privilege:

Plaintiff says in his brief that he has not placed any precise label on his cause of action, and it is not necessary for him to do so. Plaintiff apparently presents his case against Drs. Kenneth H. McGill and Thomas H. Wright, Jr. [,] as a malpractice suit. The nature of his allegations and charge against these two physicians would seem to be that of libel.

*Id.* (citations omitted). The *Bailey* Court then noted the applicability of the law regarding absolute privilege in the context of the action against the physicians, regardless of how the plaintiff billed his claim:

The rule in this jurisdiction is that a defamatory statement made by a witness in the due course of a judicial proceeding, which is material to the inquiry, is absolutely privileged, and cannot be made the basis of an action for libel or slander, even though the testimony is given with express malice and knowledge of its falsity.

*Id.* (citations omitted).

Although plaintiff here did not entitle any of her claims as a defamation claim, we consider the "nature of [her] allegations," *see id.*, and all of her allegations are based upon false and defamatory representations and statements by defendants made before the various courts in which the custody, adoption, and termination of parental rights claims were brought. The import of all of her claims is the same. There is no practical difference between an action for libel or slander and the claims brought herein by

plaintiff for purposes of the doctrine of immunity as to statements made in judicial proceedings. Thus, we consider whether the statements that plaintiff alleged were made by defendants, which led to entry of the court orders that she claims were fraudulently procured, fall within the scope of immunity.

The first question is "whether the statement was made in the course of a judicial proceeding." *Harman*, 165 N.C. App. at 824, 600 S.E.2d at 47. The allegations of the complaint, which are assumed to be true for purposes of review, set forth details of statements and representations of defendants in the course of various judicial proceedings; indeed, the entries of the 2003 consent order and the 2007 custody order are the basis of plaintiff's entire theory of her case. Our courts have defined the term "judicial proceeding" liberally for purposes of this privilege,

encompassing much more than civil litigation or criminal trials. *See, e.g., Scott*, 240 N.C. at 76, 81 S.E.2d at 149 (absolute privilege applies to statements made in pleadings and other papers filed in a judicial proceeding); *Jarman v. Offutt*, 239 N.C. 468, 472, 80 S.E.2d 248, 252 (1954) ("lunacy proceeding is a judicial proceeding within the rule of absolute privilege"); *Harris*, 85 N.C. App. at 674, 355 S.E.2d at 842 (absolute privilege extends to out-of-court communications relevant to proposed judicial proceedings); and *Angel v. Ward*, 43 N.C. App. 288, 293-94, 258 S.E.2d 788, 792 (1979) (absolute privilege applicable to communications in administrative proceedings where officer or agency exercises quasi-judicial function).

*Houpe v. City of Statesville*, 128 N.C. App. 334, 346-47, 497 S.E.2d 82, 90-91 (1998) (additional quotations and citation omitted).

Plaintiff's factual allegations all address statements or representations made by various defendants in various stages of child custody cases in North Carolina and Nevada, an adoption proceeding, and a proceeding for termination of parental rights. There is no question that these were all "judicial proceedings."

In her general factual allegations, plaintiff describes the actions of defendant Peek in preparing the 2003 consent order and her false representations to the court in having the order entered. For example, plaintiff alleges that Peek falsely represented to the court that there was a pending cause of action regarding child custody and that "no biological father has been identified or named." The complaint also makes allegations regarding statements and misrepresentations made in the juvenile court in Clark County, Nevada, in 2006, resulting in an order by the Nevada court which released Bobby to the Bohannons. The complaint continues with extensive allegations regarding additional court proceedings in Nevada which resulted in the Nevada court's 20 September 2006 order concluding that North Carolina "has UCCJ[E]A Jurisdiction **due to a valid court order.**" (Plaintiff's emphasis in original.) The complaint then details the events leading up to the filing of the custody complaint in Orange County File no. 06 CVD 1810 by defendant Peek on behalf of the Bohannons in 2006. Plaintiff notes the allegations of the custody complaint which she alleges to be false. She also makes allegations regarding representations made by defendant Peek to the Orange County District Court at various hearings in the matter. The complaint also includes allegations

regarding the 5 July 2007 filing of an adoption petition by defendant Davis in the Surry County District Court on behalf of the Branches and regarding the actions taken by defendant LDS Family Services in relation to the adoption petition. The complaint makes allegations regarding defendant Davis's filing of a petition to terminate plaintiff's parental rights, on behalf of the Branches, in Orange County District Court on 21 July 2007, including details of allegations from the petition and regarding defects in notice and service of process of this petition. There are also detailed allegations regarding various motions filed by plaintiff's counsel in regard to the various actions and the courts' actions on the same, including the ultimate dismissal of the adoption petition and the petition for termination of parental rights. In sum, all of plaintiff's claims are based upon statements which she claims are false, fraudulent, or misleading, which were made by various defendants in the course of judicial proceedings in both North Carolina and Nevada, with the purpose and effect of procuring orders from the courts which would secure the Bohannons' right to custody of Bobby and ultimately the Branches' adoption of Bobby. All of plaintiff's substantive claims--civil conspiracy, abuse of process, common law obstruction of justice, fraud, constructive fraud, fraudulent concealment, aiding and abetting, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of fiduciary duty, negligence, and injunctive relief--are based upon these same factual allegations. All were in



the course of judicial proceedings and thus meet the first requirement for immunity.

The second inquiry is whether the statements were "sufficiently relevant" to the judicial proceedings. *Harman*, 165 N.C. App. at 824, 600 S.E.2d at 47. Again, as very specifically alleged by plaintiff's complaint, all of the false, fraudulent, or misleading statements of the various defendants were directly relevant to the judicial proceedings. Indeed, plaintiff alleges in her claim for civil conspiracy that the purpose of defendants' actions and statements was

to (1) obtain joint custody of [Bobby]; (2) remove [Bobby] from the State of Nevada, his home state; (3) obtain a court order changing jurisdiction to North Carolina; (4) obtain a court order giving the Bohannons sole custody of [Bobby]; (5) place [Bobby] with the Branches; (6) prevent the Plaintiff from having any contact with [Bobby] for 12 months; and (7) facilitate the Branches' adoption of [Bobby] and the termination of the Plaintiff's parental rights, all without the Plaintiff's knowledge or consent.

All of plaintiff's allegations detail the efforts of the various defendants to accomplish these purposes, all of which required various court proceedings, and all the statements alleged could be more relevant to the judicial proceedings.

Because all of the allegations of the complaint, as to all defendants, fall within the scope of absolute immunity for statements made in judicial proceedings, the trial court properly dismissed plaintiff's complaint. Because we are reviewing an order granting a motion to dismiss, we have taken all of the allegations of plaintiff's complaint as true. To the extent that they are in

fact true, they reveal an appalling scheme to separate a child from his mother by misrepresentations and manipulation fo court proceedings. Our conclusion that the trial court properly dismissed the complaint should not be read as an endorsement of defendants' actions. Other legal remedies may be available to plaintiff for these wrongs. However, just as in *Jones v. Coward*, the "public policy providing advocates the security to zealously pursue cases on behalf of their clients would be completely undermined" if plaintiff's claims arising from these judicial proceedings were permitted. *Jones*, 193 N.C. App. at 235, 666 S.E.2d at 880. Based upon the complaint and record before us and the applicable law, the trial court properly dismissed the complaint in its entirety.

**B. Motion to Amend**

Plaintiff next argues that the trial court erred by denying her motion to amend her complaint. She sought to add a claim for unfair and deceptive trade practices against the following defendants: Donna Ambler Davis, P.C.; Coleman, Gledhill, Hargrave and Peek, P.C.; and LDS Family Services. According to her motion, all three businesses were aware of and authorized the improper conduct of their agents: defendant Peek, defendant Davis, and LDS Family Services employee Joseph Daines. However, it is unnecessary for us to address plaintiff's arguments as the claim for unfair and deceptive trade practices arises from the same facts as the other claims, and it also would be barred by defendants' immunity for

statements made in the course of judicial proceedings. Even if the trial court had allowed the amendment to the complaint, the complaint was properly dismissed for the reasons discussed above.

**C. Conversion of Rule 12(b) (6) Motions to Rule 56 Motions**

Plaintiff next argues that the trial court erred by considering matters outside the pleadings during the Rule 12(b) (6) hearing. According to plaintiff's brief, defense counsel served plaintiff with a twenty-eight-page brief with ninety-six pages of exhibits in support of their motions to dismiss. Plaintiff alleges that she was served with these items at 1:56 p.m. on Friday, 13 March 2009, and that her attorney did not receive the brief and exhibits until the morning of the 12(b) (6) hearing on Monday, 16 March 2009. In her brief, plaintiff alleges that her attorney objected to the documents at the beginning of the hearing, but the trial court did not rule on the objection during the hearing. However, the 20 March 2009 order states that the trial court had "review[ed] the file and arguments of counsel[.]"

Rule 12(b) of our Rules of Civil Procedure states, in relevant part:

If, on a motion asserting the defense numbered (6), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

N.C. Gen. Stat. § 1A-1, Rule 12(b) (2009). With respect to ruling on a 12(b)(6) motion to dismiss, “[t]rial courts may properly take judicial notice of its own records in any prior or contemporary case when the matter noticed has relevance.” *Stocum v. Oakley*, 185 N.C. App. 56, 61, 648 S.E.2d 227, 232 (2007) (quotations and citations omitted). In addition, “[m]emoranda of points and authorities as well as briefs and oral arguments . . . are not considered matters outside the pleading for purposes of converting a Rule 12 motion into a Rule 56 motion.” *Privette v. University of North Carolina*, 96 N.C. App. 124, 132, 385 S.E.2d 185, 189 (1989) (quotations and citations omitted; alteration in original).

The brief and exhibits in question were included in a supplement to the record on appeal. The exhibits include pleadings and motions filed in Orange County and orders entered by Orange County courts. The exhibits also include pleadings and motions filed in Nevada and orders entered by the Nevada court. In addition to these court documents, the exhibits include a birth certificate, plaintiff’s affidavit, Bobby’s social security card, domestic court minutes from the Nevada court, the Branch’s adoption petition, LDS Family Service’s pre-placement adoption investigation, and an addendum to that pre-placement adoption investigation. Obviously, not all of these items qualify as the Orange County District Court’s own records or briefs, oral arguments, or memoranda of points and authority. Nevertheless, the trial court’s acceptance and possible consideration of them does not itself warrant reversal.

With respect to the provision in Rule 12(b)(6) that requires a trial court to treat a motion to dismiss as a motion for summary judgment if "matters outside the pleading are presented to and not excluded by the court,"

[t]his Court has stated that the purpose of this provision is to avoid unfair surprise to the nonmoving party if extraneous materials are presented on a 12(b)(6) motion, and to allow that party reasonable time to produce materials to rebut. *Coley v. Bank*, 41 N.C. App. 121, 254 S.E.2d 217 (1979). However, this Court in *Coley* has further stated that a trial court's consideration of a contract which is the subject matter of the action does not expand the scope of the hearing and should not create justifiable surprise in the nonmoving party. Since no prejudice results to the nonmoving party, dismissal may be properly had under Rule 12(b)(6). *Id.* at 126, 254 S.E.2d at 220.

*Brooks Distributing Co. v. Pugh*, 91 N.C. App. 715, 718, 373 S.E.2d 300, 302 (1988), *rev'd on other grounds*, 324 N.C. 326, 378 S.E.2d 31 (1989).

Here, plaintiff mentions or discusses all of the contested exhibits in her amended complaint except Bobby's social security card and birth certificate, the contents of which plaintiff could not have been surprised by. In fact, whether considered as a motion to dismiss or a motion for summary judgment, plaintiff's complaint was properly dismissed because the claims were barred by immunity as discussed above. Accordingly, we hold that the trial court did not err by not converting defendants' 12(b)(6) motions to dismiss into Rule 56 motions for summary judgment.

### **Conclusion**

For the reasons stated above, we affirm the decision below.

Affirmed.

Judges BRYANT and STROUD concur.

Report per Rule 30(e).