

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 K & S Food Services, Inc. d/b/a Hailee's )  
 Bar and Grill, )  
 )  
 Plaintiff )  
 )  
 v. )  
 )  
 City of Mauldin, Mauldin City Council, )  
 John Gardner, Brian Turner, Peter Nomikos, )  
 And Callista, L.L.C. )  
 )  
 Defendants )  
 )

IN THE COURT OF COMMON PLEAS  
 THIRTEENTH JUDICIAL CIRCUIT  
 C.A. NO.: 2011-CP-23-6290; 2011 CP-23-4773

**ORDER**

2013 MAY 14 A 4:04  
 PROCLAMATION

This matter comes before the Court on Defendant's motion to strike and in the alternative motion for summary judgment pursuant to S.C.R.C.P. Rule 56 and Plaintiff's motion for summary judgment, permanent injunction, and attorney's fees. Plaintiff has alleged both violation of the Freedom of Information Act (hereinafter FOIA, S.C. Code Ann. § 30-40-10) and negligence against Defendants. Defendants' motion for summary judgment as to Plaintiff's cause of action for Negligence rests on the basis that it is barred by the South Carolina Tort Claims Act, (hereinafter SCTCA) S.C. Code Ann. § 15-78-60. A hearing was held on September 17, 2012 before this Court during which both parties were able to argue and respond fully. Defendant's motion for summary judgment is denied in part and granted in part. Upon review of the arguments of counsel, the pleadings, and the evidence presented, the Court issues this order granting summary judgment for Plaintiff's claim of violation of S.C. Code Ann. § 30-40-10 and granting Defendant's motion for summary judgment for the claim of negligence pursuant to S.C. Code Ann. § 15-78-10.

**ENTERED COMPUTER**

## BACKGROUND

### **I. Plaintiff's FOIA Violation Claim**

The Plaintiff alleges that Defendant City Council of Mauldin violated the FOIA by 1) failing to provide proper notice of the August 16, 2011 City Council meeting concerning the revocation of Plaintiff's business license; 2) failing to produce minutes from the August 16, 2011 meeting; and 3) improperly acting on a matter in executive session by executing its September 19, 2011 decision to revoke Plaintiff's business license without an "open meeting and without minutes of that meeting." At the September 17<sup>th</sup> hearing, Mr. Duggan, counsel for Defendants, presented the affidavit of Mauldin City Councilman Bob Cook. Mr. Cook's affidavit attests that the Council's meeting regarding the revocation of Hailee's business license commenced at 6:00 pm and continued until after midnight. At that time, the Council recessed. Mr. Cook then solicited a proposed order revoking the business license from Mr. Duggan. Mr. Cook disseminated the proposed order to the other Council members. No further meeting or hearing was held to discuss the matter. Instead, four city council members signed the order on their own without "any discussion among the Council Members about the merits of the case or the Order." Defendants contend that because no further discussion occurred and that the record of the vote and minutes of the meeting prior to adjournment were made available, they did not violate FOIA and are entitled to summary judgment on the claim.

### **II. Plaintiff's Negligence Claim**

In its Complaint, Plaintiff alleges that the Defendants were "willful, wanton, reckless, negligent, and grossly negligent" in "harassing" and "intentionally harming" Plaintiff, in failing to supervise and train its employees and/or agents in proper enforcement of Ordinances and



Laws, and in making statements to the public that Plaintiff's Business license had been revoked. Defendants contend that they are entitled to summary judgment on that claim because Plaintiff's negligence cause of action is barred by the South Carolina Tort Claims Act. *See* S.C. Code Ann. § 15-78-60.

### STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), S.C.R.C.P. When plain, palpable and indisputable facts exist upon which reasonable minds cannot differ, summary judgment should be granted. *See* Trico Surveying, Inc. v. Godley Auction Co., 314 S.C. 542, 431 S.E.2d 565 (1993). In considering a motion for summary judgment, this Court "must view the facts in the light most favorable to the non-moving party. Nonetheless a court "cannot ignore facts unfavorable to that party and [it] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *See* Bloom v. Ravoira, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) (internal citations omitted). Further, "[i]n order to resist a motion for summary judgment, the non-moving party must come forward with specific facts showing genuine issues necessitating trial. *See* NationsBank v. Scott Farm, 320 S.C. 299, 303, 565 S.E.2d 98, 100 (S.C. Ct. App. 1995).

### CONCLUSIONS OF LAW

#### **I. Plaintiffs are entitled to Summary Judgment and Attorney's Fees as to the FOIA claim**

Defendants argue that no FOIA violation occurred because the Council did not reconvene or hold further discussion. However, this is precisely where the alleged violation lies. The

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FOIA requires that public bodies conduct their business in public. See S.C. Code Ann. § 30-4-15. While the FOIA provides for certain matters to be deliberated upon in a private “executive session,” revoking a business license is not one of those matters. See S.C. Code Ann. § 30-4-70. Further, the FOIA prohibits any public body from committing to a course of action by a “polling of members in executive session.” See S.C. Code Ann. § 30-4-70(b). A public body may not avoid the requirements of FOIA through any “chance meeting, social meeting, or electronic communication.” See S.C. Code Ann. § 30-4-70(c). If a public body acts in executive session, it must ratify that action in a public session prior to such action becoming effective. See S.C. Code Ann. § 30-4-70(a)(5). It appears from Mr. Cook’s affidavit that the activities of the Council constitute a private polling of the members outside of a public meeting which were not later ratified in a public session. Though the Council did not conduct a *formal* vote in executive session, the activities of the Council still violated the statute. As no genuine issue of material fact exists as to the violation of the statute, this Court finds that summary judgment in favor of the Plaintiff is appropriate on this claim.

Plaintiff is entitled to reasonable attorney’s fees and to the costs of litigation pursuant to S.C. Code Ann. § 30-4-100(b). A hearing shall be set to determine the appropriate amount of attorney’s fees.

**II. Defendants are entitled to Summary Judgment as to Plaintiff’s claim of negligence**

Plaintiff claims that Defendants were “willful, wanton, reckless, negligent, and grossly negligent” in “harassing” and “intentionally harming” Plaintiff, in failing to supervise and train its employees and/or agents in proper enforcement of Ordinances and Laws and in making

*[Handwritten signature]*

statements to the public that Plaintiff's Business license had been revoked. Defendants argue in their motion that Plaintiff's claim is barred by S.C. Code § 15-78-60(4) and (12). These sections retain governmental immunity in the enforcement of laws, absent gross negligence, and ordinances and in the licensing activities of public bodies.

Plaintiff argues that because Defendants failed to include the affirmative defense of immunity in its original pleadings, that Defendants are barred from asserting the defense at present. Plaintiff accurately states that immunity is an affirmative defense which must be plead. *See Rayfield v. South Carolina Dep't of Corr.*, 297 S.C. 95, 105, 374 S.E.2d 910, 915 (Ct.App. 1988). Further, Rule 8(c), SCRPC requires parties to include affirmative defenses in their pleadings. However, as this State's Supreme Court has noted, the aim of rule 8(c) is to "avoid surprise defenses" and many courts allow the assertion of affirmative defenses "despite a technical failure to comply with the initial pleading requirement when the defense is timely raised to the trial court without resulting in unfair surprise to the opposing party." *See Plyler v. Burns*, 373 S.C. 637, 648, 647 S.E.2d 188, 194 (S.C. 2007).

In *Plyler*, the Horry County Probate Court had failed to plead the affirmative defense of common law judicial immunity but later raised the defense in a memorandum in support of its motion to dismiss. *See id.*, at 649, 647 S.E.2d at 195. The Court held that the defendant's inclusion of the defense in the supporting memorandum was sufficient to comply with the intent of rule 8(c), SCRPC, because the plaintiff could not demonstrate that she had suffered "prejudice or unfair surprise in anyway." *Id.*, at 649, 647 S.E.2d at 195. In this case, Plaintiff has similarly not demonstrated any prejudice or unfair surprise due to Defendant's assertion of immunity as an affirmative defense. As early as May of this year, Defendant asserted immunity pursuant to the South Carolina Tort Claims Act and has continued to assert the defense since that time. As such,

this Court finds that Plaintiff suffered no prejudice or unfair surprise as a result of the Defendants assertion of the affirmative defense and Defendants are permitted to assert immunity.

Defendants are entitled to immunity for a negligence cause of action pursuant to S.C. Code Ann. § 15-78-60(4) and (12). No genuine issue of material fact exists as to this claim and Defendant is entitled to summary judgment.

### CONCLUSION

Based upon the foregoing, this Court concludes that the defendants have failed to provide any evidence which would create a genuine issue of material fact for trial and that Plaintiff is entitled to summary judgment and attorney's fees (in an amount to be determined at a later hearing) on Plaintiff's claim of violation of the FOIA. The Court does not find that the requested equitable remedy is appropriate. This Court also concludes that the plaintiff has failed to provide any evidence which would create a genuine issue of material fact for trial and that the Defendants are entitled to summary judgment on Plaintiff's negligence cause of action. THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the motion of the defendants for summary judgment as to the Plaintiff's claim of negligence be, and it is hereby, granted and the plaintiff's complaint is hereby dismissed with prejudice and henceforth *res judicata*. Further, IT IS ORDERED, ADJUDGED, AND DECREED that the motion of Plaintiff, K & S Food Services for summary judgment as to Plaintiff's claim of violation of the FOIA be, and hereby is, granted and that Plaintiff is entitled to reasonable attorney's fees and costs. Further, IT IS ORDERED, ADJUDGED, AND DECREED that the motion of Plaintiff for injunctive relief is denied.

IT IS SO ORDERED.



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FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2011CP2304773, 2011CP2306290

K&S Food Services Inc	Hailees Bar And Grill	Mauldin City Of John Gardner Peter Nomikos	City Council Mauldin Brian Turner Callista LLC
PLAINTIFF(S)		DEFENDANT(S)	

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant
	<input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other: \_\_\_\_\_

2013 MAY 1  
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 CLERK OF COURT  
 GREENVILLE COUNTY  
 SOUTH CAROLINA

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order; (formal order to follow)  Statement of Judgment by the Court:  
The previous order of this Court is amended to include the companion case, 2011 CP 23 4773.

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk:

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**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

  
Circuit Court Judge

2162

Judge Code

5/9/13

Date

**For Clerk of Court Office Use Only**

This judgment was entered on 5/14/13, and a copy mailed first class or placed in the appropriate attorney's box on 5/14/13, to attorneys of record or to parties (when appearing pro se) as follows:

**Robert Clyde Childs III** 2100 Poinsett Hwy., Ste. E  
Greenville, SC 29609

**John B. Duggan** PO Box 449 Greer, SC 29652  
**Edward Zachary Horton** PO Box 2464 Greenville, SC  
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ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

**Paul B. Wickensimer** Greenville County Clerk Of  
Court - Clerk of Court

Court Reporter

