THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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SC Court of Appeals

Case No. 2012-CP-40-7392
Appellate Case No. 2014-001728

Frank "Doc" Haynie, Appellant,

v.

The City of Forest Acres, Mark W. Williams, Shaun Greenwood, and Clark Frady, Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Appellant, Frank "Doc" Haynie, filed this action on November 2, 2012 alleging negligence/gross negligence against the Respondent City of Forest Acres ("Respondent City") and civil conspiracy against respondents Mark Williams, Shaun Greenwood, and Clark Frady ("Individual Respondents"). (Complaint). Appellant is a licensed general contractor. (Id. ¶ 6). The Individual Respondents are employees or former employees of the Respondent City; respectively: Respondent Williams is the City Administrator, Respondent Greenwood was the Assistant City Administrator, and Respondent Frady is a former building official. (*Id.* ¶¶ 3,4, 5).

The Respondent City filed its motion for summary judgment on December 23, 2013, and the Individual Respondents filed their motion for Summary Judgment on December 26, 2013. (Respondent City Motion); (Individual Respondents' Motion). Appellant opposed that motion. (Appellant Memorandum in Opposition). Those motions were heard by the Honorable G. Thomas Cooper, Jr. on February 21, 2014. (Transcript of the Record, February 21, 2014). Thereafter, the parties served competing proposed orders. (Appellant Proposed Order); (Respondent City Proposed Order); (Individual Respondents' Proposed Order). The Honorable Judge Cooper filed the separate proposed orders submitted by the Respondents on April 15, 2014 granting summary judgment on both claims. (Order; Respondent City); (Order; Individual Respondents). Appellant subsequently filed a Rule 59(e), SCRCP motion to reconsider on April 28, 2014; that motion was denied on June 30, 2014. (Rule 59(e) Motion); (Rule 59(e) Order).

FACTS

Appellant has been a licensed general contractor for approximately 40 years. (Dep. of Frank Haynie, p. 7:7-11). Beginning in 2007, the Respondent City's Code Enforcement Office began to monitor Appellant in a "hyper-vigilan[t]" manner as both a resident and contractor

within the Respondent City. (Aft. of Barry Epps, ¶ 5). A former inspector for the Respondent City, Reverend Barry Epps testified that he had standing instructions "to go regularly by the property to check it, not necessarily because [of] complaint[s]." (Dep. of Barry Epps, p. 103:16-18). Rev. Epps further testified that he was instructed to inspect Appellant's property excessively and more than other properties by comparison. (Dep. Epps., pp. 104:23-105:2). In his Affidavit, Rev. Epps stated that he was instructed to monitor Appellant's home, check in his dumpsters, and find evidence of code violations committed by Appellant; however, he "never uncovered any major code or other violations on the part of [Appellant]." Rev. Epps also stated, in his affidavit, that Respondent Greenwood directed him to ticket cars parked in Appellant's yard, but not similarly parked cars in other yards; even though ticketing cars was wholly outside of Rev. Epps' jurisdiction. (Aft. Epps ¶ 10). Rev. Epps further testified that Respondent Williams once remarked to him "I have no use for [Appellant]." (Dep. Epps p. 105:13-22).

Respondent Frady became the Respondent City's building inspector on March 8, 2010 and the monitoring intensified and continued throughout his tenure which concluded on December 31, 2012. (Dep. Frady p. 61:3-6). Margo Pierce ("Pierce"), the former city clerk for the Respondent City, stated, by affidavit, that Respondents Williams and Greenwood "direct[ed] first inspector Mr. Barry Epps and later inspector Mr. Frady to monitor [Appellant] in a hyper-vigilant manner," and that "the manner in which they were asked to monitor [Appellant] was uncommon compared to other builders in the community;" Pierce surmised that the same amounted to a "witch-hunt" toward Appellant. (Aft. of Pierce ¶¶ 7, 10).

Appellant complained that he was being targeted and harassed by the Respondent City's officials to the Respondent City's Mayor, two City Councilmen, and the City Attorney placing them on notice of the same. (Dep. Haynie pp. 33:18-34:17); (Aft. of Carl Holloway, ¶¶ 3, 5, 6,

8). Despite Appellant's complaints to the City's governing authority, the conduct continued, Pierce stated, in her affidavit, that the Individual Respondents regularly asked about when Appellant's building permits were to expire, and on one such occasion she recalled that either Respondent Williams or Greenwood stated "We'll get him now." (Aft. Pierce ¶ 9).

On one occasion, Respondent Frady placed a stop work order on a 10 by 20 foot storage shed Appellant was building on his own property. (Dep. Haynie, pp. 78:23-79:2). Respondent Frady cited the shed for improper footings susceptible to uplift; Respondent Frady requested that the footings for the 200 square foot shed be placed three feet in the ground and encased in 2 feet of concrete. (Dep. Haynie, pp. 10:4-7, 81:5-8, 85:16-86:19). Appellant, who has an Industrial Engineering Degree from Georgia Tech, researched and find that the sole building code section dealing with footing only stated that footings needed to be deep enough not to kick out of the ground. Appellant thought Respondent Frady's citation was suspect and requested that Respondent Frady cite specific codes sections in support of the same. *Id.* Respondent Frady then cited to a section in the code book which states generally that a contractor shall abide by the building inspector's wishes, and maintained the stop work order. *Id.*

Appellant appealed Respondent Frady's decision to the Respondent City's Code Board of Appeals. (Haynie Dep. p. 102:9-11). Respondent Frady met with the Code Board of Appeals' members prior to the hearing to persuade them to vote against Appellant. (Memorandum of Interview: Clark Frady); (Aft. Pierce ¶ 6). Specifically, Respondent Frady "told [the board members] his side of the case and how he wanted it handled." (Memorandum of Interview:

Margo Pierce). The Code Board of Appeals ruled against Appellant, without stating their grounds.[1] (Dep. Haynie, pp. 102:17-103:15).

Weeks after the appeal hearing, several Forest Acres police officers and Respondent Frady reported to Appellant's home at 7:30 on a Monday morning over misplaced yard rubbish. (Haynie Dep. pp. 100:2-101:20, 111:2-112:4). Appellant received four citations that day for various alleged infractions including high grass (that was not on his property), and rubbish. (Dep. Haynie, pp. 100:2-101:20, 111:2-112:4).

Appellant lost contracts as a result of the Respondents' actions including a $60,000 contract with a long time customer who would not hire him for fear of undue interruption and delay caused by the Individual Respondents' sentiment toward Appellant. (Dep. Haynie pp. 32:9-33:24). The Individual Respondents also encouraged a customer of Appellant, Nassar Alquza ("Alquza"), to terminate Appellant, and that customer did so. (Dep. Haynie, pp. 98:15-99:12). Before he was terminated from the Alquza job, Respondent Frady requested design changes to the bathroom after the inspection for the lay out had already been approved; such a request was uncommon. (Dep. of David Cook p. 98:7-99:21). Paul Cowles, a subcontractor on the Alquza job, testified that after Alquza terminated Appellant he witnessed Respondent Frady joking with Alquza at Appellant's expense while Alquza was pulling his own permit for the subject job. (Dep. of Paul Cowles p. 42:2-18). Once Appellant was no longer the contractor on the Alquza job, Respondent Frady stated that the design changes, he had requested earlier, need not be made to the broad magnitude he had earlier required. (Dep. Cook pp. 58:5-60:20).

[1] Appellant subsequently had a certified engineer verify the shed's integrity and scaled it back to a 10 by 10 foot structure to resolve the stop work order against him. (Haynie Dep. p. 103:16-19); (Aft. of Holloway, ¶ 6); (Excerpts from Engineer Report).

Respondent Frady then admonished the plumbing contractor on that job, David Cook, "You better be careful if you're still doing work with Appellant." (Dep. Cook pp. 64:22-65:7).

STANDARD OF REVIEW

This is an appeal from the lower Court's decision to grant the Respondents' Rule 56(c) Motions for Summary Judgment, and to deny the Appellant's Rule 59(e) Motion to Alter or Amend that ruling. Rule 56(c), SCRCP; Rule 59(e), SCRCP. "An appellate court reviews the granting of summary judgment under the same standard applied by the trial court under Rule 56(c), SCRCP." *Sea Cove Development, LLC v. Harbourside Community Bank*, 387 S.C. 95, 101, 691 S.E.2d 158, 161 (2010). "On appeal from summary judgment, the reviewing court must consider the facts and inferences in the light most favorable to the nonmoving party. The judgment may be affirmed only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Singletary v. The Aetna Casualty & Surety Co.*, 316 S.C. 199, 200, 447 S.E.2d 869, 870 (Ct. App. 1994). When "the appeal is from the granting of summary judgment, there must be no genuine issue of fact . . . in order for the judgment to be affirmed." *SCNB v. Southern Polymers, Inc.*, 313 S.C. 246, 248, 437 S.E.2d 148, 149 (Ct. App. 1993).

"In determining whether a genuine issue of fact exists, a court must consider everything in the record . . ." *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.d 180, 183 (Ct. App. 1986). "In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co. Inc.*, 381 S.C. 326, 673 S.E.2d 801 (2009). "Moreover, since it is a drastic remedy, summary judgment should be cautiously invoked so that

a litigant will not be improperly deprived of a trial on disputed factual issues." *Englert, Inc. v. LeafGaurd USA, Inc.*, 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

ARGUMENTS

As relevant to this Appeal[2] and to Appellant's negligence/gross negligence claim, the Circuit Court held that because the actions of the Individual Respondents, acting outside of the scope of their employment, occurred outside of the City's physical premises the Respondent City, the City was entitled to Summary Judgment. (Order; Respondent City, p.6). The Court further concluded that there was not sufficient evidence of record of foreseeability.[3] (*Id.* at pp. 6-7). As to Appellant's civil conspiracy claim, the Circuit Court held that there was insufficient evidence that the Individual Respondents were acting outside of the course and scope of their employment with the Respondent City, and that therefore the South Carolina Tort Claims Act barred liability. (Order; Individual Respondents, p. 4-5). For the reasons that follow, the lower Court's ruling was reversible error.

I. THE CIRCUIT COURT'S DECISION TO GRANT SUMMARY JUDGMENT ON APPELLANT'S NEGLIGENCE CLAIM WAS REVERSIBLE ERROR BASED ON THE EVIDENCE OF RECORD AND THE GOVERNING LAW.

Negligence requires: (1) a duty of care owed by the defendant to the plaintiff, (2) a breach of that duty by the defendant, (3) that the breach was the proximate and cause in fact of

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[2] The Lower Court also ruled, that actions occurring outside of the Respondent City's two year statute of limitations, including any claim for negligent hire, were not actionable. (Order; Respondent City, pp. 4-5). Appellant stipulated to this contention, but maintains that occurrences more than two years prior to the date this action was filed are suitable evidence for the context of actionable occurrences within the subject statute of limitations.

[3] Last, the Court held that Appellant had not established an equal protection clause cause of action, Appellant did not allege an equal protection violation, and the elements of an equal protection violation are distinct from the elements of a negligence/gross negligence claim; therefore, this holding is irrelevant and need not be addressed. (Order, Respondent City at pp. 7-10)(*citing*, *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 200, 525 S.E.2d 872, 885 (2000).

the plaintiff's injury, and (4) damages caused by the breach. *Steike v. South Carolina Dep't of Labor, Licensing and Regulation*, 336 S.C. 373, 520 S.E.2d 142 (1999). Gross Negligence is the failure to exercise a slight degree of care, it involves an intentional, conscious failure to do something which one ought to do or the doing of something one ought to not do. *See*, *Clark v. South Carolina Dep't of Safety*, 362 S.C. 377, 608 S.E.2d 573 (2005); *see also*, *Jinks v. Richland County*, 355 S.C. 341, 585 SE.2d 281 (2003). Generally, gross negligence is a factually controlled concept whose determination best rests with the jury. *Faile v. South Carolina Dep't of Juvenile* Justice, 350 S.C. 315, 566 S.E.2d 536 (2002). Negligent supervision cases "generally turn on two fundamental elements – knowledge of the employer and foreseeability of harm to third parties." *Doe v. ATC, Inc.*, 367 S.C. 199, 206, 624 S.E.2d 447, 450 (Ct. App. 2004). A court should deny summary judgment where a "reasonable fact-finder could find that the employer's conduct has fallen below the acceptable standard." *See*, *Id.*

A. That events giving rise to Appellant's negligence claim occurred outside of the Respondent City's physical premises was not a suitable ground for summary judgment.

That the actions complained of here occurred outside of the Respondent City's physical premises, and as the result of actions outside of the Respondent City's employees employment is not dispositive. The Court relied on the holding in *Deganhart v. Knights of Columbus* to reason that the Respondent City could not be held liable for the actions of the Individual Respondents. 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992). The lower Court misapplied *Degenhart*.

The Circuit Judge reasoned:

> The Court in *Degenhart* found that an employer may be liable for negligent supervision if the employee intentionally harms another when the employee: (1) is upon the premises of the employer, or is using a chattel of the employer, (2) the employer knows or has reason to know that he has the ability to control his employee, and

> (3) the employer knows or should know of the necessity and opportunity for exercising such control.

(Order; Respondent City, p. 6)(*citing*, *Degenhart*, at 115-17; *and* Restatement (Second) of Torts § 317 (1965). However, the citied portion of the *Degenhart* decision states the following verbatim:

> An employer may be liable for negligent supervision if the employee intentionally harms the employee when he: (i) is upon the premises in possession of the [employer] *or upon which the [employee] is privileged to enter only as his [employee]*, or (ii) is using a chattel of [the employer]; and . . . [the employer] (i) knows or has reason to know that he has the ability to control his [employee] and (ii) knows or should know of the necessity and opportunity of the necessity and opportunity for exercising such control.

Degenhart, 114 S.C. at 115-117 (bracket modifications original)(emphasis added); *citing*, Restatement (Second) of Torts § 317 (1965). Thus the lower Court, and the Respondent City in its proposed order, left out a key portion of the *Degenhart* analysis which fits the facts of this case. (Order; Respondent City, p. 6); (Respondent City Proposed Order p. 6).

The record evidence indicates that the intentional conduct giving rise to Appellant's negligence claim occurred, in part, on job sites that the Individual Respondents were privileged to enter as a component of their employment.[4] *See*, *Degenhart*, 114 S.C. at 115-117. Appellant proffered evidence that the Respondent City's employees, namely the Individual Respondents, harassed and targeted him at his home and job sites causing him a loss of business and other damages. (*See*, Facts *supra*). The lower court's holding unduly restricts the *Degenhart* holding

[4] The applicability of the evidence to the later *Degenhart* elements is discussed more fully in the foreseeability analysis *infra*. It is also necessary to note, that while some of the Individual Respondents' actions occurred off of the Respondent City's premises (particularly those of Respondent City who as a building inspector for the Respondent City was permitted access Appellant's job sites) many occurrences happened on the Respondent Cities' premises such as those of Respondents Williams and Greenwood. (*See*, pp. 2-6 *supra*).

without a basis in the law; because, the holding overlooks the precedent's recognition that negligent supervision claims may lie where an employee is permitted to be at an off-premise location per his job duties. The evidence submitted, when viewed in the light most favorably to Appellant, sufficiently establish a triable negligence/gross negligence claim, and a conclusion that the Individual Respondents acted outside of the scope of their employment is not legally preclusive. *Degenhart*, 114 S.C. at 115-117.

B. There is sufficient evidence of record of foreseeability.

The final factors of the *Degenhart* analysis concern foreseeability: that the employer "(i) knows or has reason to know that he has the ability to control his [employee] and (ii) knows or should know of the necessity and opportunity of the necessity and opportunity for exercising such control." *Id.* "Legal cause is proved by establishing foreseeability." *Madison ex. Rel. Bryant v. Babcock Center Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006); *citing*, *Oliver v. S.C. Dept. of Highways and Pub. Transp.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992); *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). "Foreseeability is determined by looking to the natural and probable consequences of the complained of act, although it is not necessary to prove that a particular event or injury was foreseeable." *Maddison*, 371 S.C. at 147; 638 S.E.2d at 662; *citing*, *Koester*, 313 S.C. at 493, 443 S.E.2d at 394; *Oliver*, 309 S.C. at 317, 422 S.E.2d at 131; *Childers v. Gas Lines, Inc.*, 248 S.C. 316, 325, 149 S.E.2d at 761,765 (1966). That is, legal cause is proven if the defendant should have foreseen that his negligence would probably cause injury to someone. *Hubbard v. Taylor*, 339 S.C. 582, 529 S.E.2d 549 (Ct. App. 2000). In a negligent supervision action, an employer owes a duty of care to a third party where the resulting harm could have been reasonably anticipated by the employer. *See*, *Rickborn v. Liberty Life Ins. Co.*, 321 S.C. 291, 303, 468 S.E.2d 292, 299 (1996).

Appellant presented competent evidence that he complained about the conduct of the Individual Respondents to the Respondent City's mayor, two of its councilmen, and City Attorney. (Dep. Haynie pp. 33:18-34:17). The City Attorney admitted to receiving Appellant's complaints. (Aft. of Carl Holloway, ¶¶ 3, 5, 6, 8). Despite Appellant's complaints, the complained of conduct continued. (*See*, Facts *supra*). Based on the evidence, viewed in the light most favorable to Appellant, a reasonable jury could conclude that the harm to Appellant caused by the Individual Respondents could or should have been anticipated by the Respondent City. *See*, *Maddison*, 371 S.C. at 147; 638 S.E.2d at 662.

II. THERE IS SUFFICIENT EVIDENCE OF RECORD THAT THE INDIVIDUAL RESPONDENTS ACTED OUTSIDE OF THE COURSE AND SCOPE OF THEIR EMPLOYMENT.

A triable civil conspiracy claim requires: (1) A combination of two or more persons, (2) for the purpose of injuring the plaintiff, which (3) causes the Plaintiff special damage. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E. 2d 91, 95 (Ct. App. 1989). To establish the first two elements the plaintiff needs to show "additional acts in furtherance of the conspiracy." *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981). The third element, special damages, must be satisfied to prevent a double recovery. *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 610, 538 S.E.2d 15, 31 (Ct. App. 2000); *See Also*, *Anthony v. Ward*, 336 Fed. Appx. 311, 318, (C.A.4 S.C. (2009)) (interpreting South Carolina civil conspiracy law and recognizing: "The case law makes clear that the concern is with the plaintiff receiving a double recovery".) In a civil conspiracy claim "[t]he essential consideration is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff." *Lee v. Chesterfield General Hosp., Inc.*, 289 S.C. 6, 13, 344 S.E.2d 379, 385-86 (Ct. App. 1986).

"[I]n order to establish a conspiracy, evidence, direct or circumstantial, must be produced from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." *Island Car Wash, Inc. v. Norris*, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987); *accord Cowburn v. Leventis*, 366 S.C. 20, 49, 619 S.E.2d 437, 453. "Because, civil conspiracy is 'by its very nature covert and clandestine,' it is usually not provable by direct evidence." *Peoples Federal Savings & Loan Ass'n of S. Carolina v. Resources Planning Corp.*, 358 S.C. 460, 470, 596 S.E.2d 51, 56-57 (2004); *quoting*, *Norris*, 292 S.C. at 601, 358 S.E.2d at 153. "Moreover, the field of admissibility of evidence is broadened in proof of conspiracy." *Norris*, 292 S.C. at 601, 358 S.E.2d at 453; *citing Hall v. Walters*, 226 S.C. 430, 85 S.E.2d 729 (1955).

The lower Court, while basing its holding that Appellant's negligent supervision claim could not stand against the Respondent City on the premise that the Individual Respondents' acted intentionally *outside* the scope of their employment, held that the Appellant's civil conspiracy claim against the Individual Respondents was not actionable because the Individual Respondents were acting *inside* the scope of their employment.[5] (Order; Respondent City, pp. 5-7)(Order; Individual Respondents, pp. 4-7). The Circuit Judge ruled that because the Individual Respondents were acting inside the course and scope of their employment they were immune from liability under S.C. Code Ann. § 15-78-70(a) and protected by the doctrine of intracorporate immunity. The Individual Respondents' South Carolina Tort Claims Act Defense and their common law defense of intracorporate immunity legally turn on whether or not the Individual Respondents were acting outside of the course and scope of their employment.

[5] As noted above (*supra*, pp. 8-9), Appellants Negligence claim is triable on these facts regardless of whether or not the Court concludes that the Individual Respondents were acting inside or outside of the course and scope of their employment.

A. The Individual Respondents are not entitled to immunity under S.C. Code Ann. § 15-78-70(a).

Subsection (a) of S.C. Code Ann. § 15-78-70 protects public employee's from liability for torts they commit while acting within the course and scope of their employment. However, subsection (b) of that same provision states:

> Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, *intent to harm,* or a crime involving moral turpitude.

S.C. Code Ann. §15-78-70(b)(emphasis added). Thus, intent to harm, overcomes any applicable bar set by subsection (a) of S.C. Code Ann. § 15-78-70. Civil conspiracy, by its elemental nature, requires proof of intent to harm. *Vaught*, 300 S.C. at 208, 387 S.E. 2d at 95. Appellant has presented competent evidence, based on the testimony of disinterested witnesses that the Individual Respondents intended to harm Appellant. (Aft. of Barry Epps, ¶ 5); (Dep. of Barry Epps, pp. 103:16-18, 104:23-105:2, 105:13-22); (Aft. of Pierce ¶¶ 7, 10); (Aft. Pierce ¶ 9). Thus, the Individual Respondents statutory defense under the South Carolina Tort Claims Act fails in light of the evidence presented, and the lower Court's decision otherwise was error. Furthermore, for the reasons elaborated upon below, there is sufficient evidence that the Individual Respondents' actions were outside of the course and scope of their employment thus bringing this claim wholly outside of the immunity provision in S.C. Code Ann. § 15-78-70(a).

B. The actions of the Individual Respondents were outside of the course and scope of their employment; thus Intracorporate Immunity is an improper basis for summary judgment.

Civil conspiracies between the employees of a principal and an agent are recognized in South Carolina where the employees and agents acted outside of the scope of their employment. *See*, *Anthony*, 336 Fed. Appx 311. (unpublished); *citing*, *McMillan v. Occonee Memorial*

Hospital, inc., 367 S.C. 559, 565, 626 S.E.2d 884, 886 (2006). Although, the acts of an entity's employees and agents are usually considered the acts of an entity; where those acts fall outside of the scope of employment or agency, the employees and agents may be liable for civil conspiracy. *Anthony,* 336 Fed. Appx 311; *See also, Pridgen v. Ward*, 391 S.C. 238, 246, 705 S.E.2d 58, 63 (Ct. App. 2010); *see also, Crittenden v. Thompson-Walker Co., Inc.*, 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986); (*holding*, "On the other hand, if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, his conduct falls outside the scope of his employment").

The Trial Court concluded that the Individual Respondents were acting in the furtherance of their employer's interest in accord with this Court's holding in *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003). However, the *Flauteau* case is dissimilar to the present case and its procedural posture. *Id.* In *Flauteau,* the Court upheld a grant of dismissal under rule 12(b)(6) on a civil conspiracy claim, and other tort claims, where the plaintiff did not allege that the defendants committed torts outside of their of their official duty. *Id.* 355 S.C. at 205-06, 584 S.E.2d at 417. This case was distinguished in 2010 by the South Carolina District Court in *Smith v. City of Greenwood* where then Magistrate Judge Hendricks on report and recommendation noted that "*Flateau*, specifically turned on the way in which the Complaint had been pled." *Smith*, 2010 U.S. Dist. LEXIS 58986, C/A No.: 8:09-2061-HFF-BHH (Report and Recommendation) *Smith*, 2010 U.S. Dist. LEXIS 59076, C/A No.: 8:09-cv-2061-HFF-BHH) (Order). Like in *Smith*, the Plaintiff properly pled that the actions of the Individual Respondents fell outside of the course and scope of their employment. (Complaint ¶¶ 24, Case Caption). Furthermore this case, procedurally, is based on a Rule 56, SCRCP motion, not a Rule 12,

SCRCP motion, and the record evidence supports a finding that the Individual Respondents acted outside of the course and scope of their employment.[6] (*See*, pp. 2-6 *supra*).

This case is more in line with this Court's more recent holding in *Pridgen v. Ward. Pridgen*, 391 S.C. 238, 246, 705 S.E.2d 58, 63 (Ct. App. 2010). In *Pridgen* the Court, on the issues of intracorporate immunity and employee scope, found that "the evidence in the record creat[ed[ore than one reasonable inference as to whether the [individual defendants] acted outside the scope of their employment" and "the jury could infer from the evidence presented that the [individual defendants'] actions were personally, not professionally, motivated, and were wholly disconnected from the business of their employer. *Id.* 391 S.C. at 245, 705 S.E.2d at 62-63. Here Appellant presents evidence that the Individual Respondents had a personal distaste for him, and acted outside of the scope of their employment duties to harm him. The Trial Court's conclusion that intracorporate immunity and the South Carolina Tort Claims Act barred Appellant's civil conspiracy claim was reversible error in accord with this Court's decision in *Pridgen*. (Aft. of Barry Epps, ¶ 5); (Dep. of Barry Epps, pp. 103:16-18, 104:23-105:2, 105:13-22); (Aft. of Pierce ¶¶ 7, 10); (Aft. Pierce ¶ 9).

III. THE LOWER COURT'S CONTEMPORANEOUS ORDERS IN THIS CASE ARE IN CONFLICT, AND MISAPPLY THE SUMMARY JUDGMENT STANDARD.

On Summary Judgment, "All ambiguities, conclusions, inferences arising from the evidence must be construed most strongly against the movant." *Bayle v. SCDOT*, 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001). Here, the lower Court concluded, on the one hand, that the Respondent City was entitled to summary judgment under a negligent supervision analysis because the Individual Respondents were acting intentionally *outside* of the course and

[6] Appellant contends that to view the record evidence as indicative of actions by the Individual Respondent's in accord with their official duties requires impermissible inferences to be drawn in the Individual Respondents' favor. *See*, *Singletary*, 316 S.C. at 200, 447 S.E.2d at 870.

scope of their duties; while on the other hand, the lower Court held that the Individual Respondents were entitled to South Carolina Tort Claims Act Immunity because they were acting *within* the course and scope of their employment. (Order; Respondent City, pp. 5-7) (Order; Individual Respondents, pp. (4-7) (emphasis added). These two holdings based on the same set of facts are inconsistent. Furthermore, the inherent contradiction in these holdings is indicative that issues of fact exist as to whether or not the Individual Respondents were acting within the course and scope of their employment – those issues should be decided by a jury. *Singletary v. The Aetna Casualty & Surety Co.*, 316 S.C. 199, 200, 447 S.E.2d 869, 870 (Ct. App. 1994); *see also*, *SCNB v. Southern Polymers, Inc.*, 313 S.C. 246, 248, 437 S.E.2d 148, 149 (Ct. App. 1993) ("the appeal is from the granting of summary judgment, there must be no genuine issue of fact . . . in order for the judgment to be affirmed.") The Lower Court's rulings on a material issue in this case, employee scope, are self-contradicting and merit reversal.

CONCLUSION

For the foregoing reasons Appellant respectfully asks this Honorable Court to Reverse the holding of the Circuit Court and Remand this case for the trial.

Respectfully Submitted,

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