

STATE OF SOUTH CAROLINA)
)
 COUNTY OF HORRY)
)
 Skydive Myrtle Beach, Inc.,)
 (f/k/a Skydive Myrtle Beach, LLC),)
)
 Plaintiff,)
)
 vs.)
)
 Horry County, Horry County)
 Department of Airports,)
 H. Randolph Haldi, Pat Apone,)
 Tim Jackson and Jack Teal,)
)
 Defendants.)

IN THE COURT OF COMMON PLEAS
 C/A NO.: 2014-CP-26-1193

ORDER

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 MELANIE HUGGINS-WARD
 CLERK OF COURT
 HORRY COUNTY

This matter comes before this court upon a Motion to Dismiss filed on behalf of Defendants H. Randolph Haldi, Pat Apone, Tim Jackson, and Jack Teal. A hearing to dispose of said motion was conducted by the undersigned on the morning of June 2, 2014 in the Horry County Court of Common Pleas. Present on behalf of the moving Defendants was Samuel F. Arthur, III, Esquire, of the Florence law firm of Aiken, Bridges, Elliott, Tyler & Saleeby, P.A. Robert Eastman, Esquire appeared on behalf of Plaintiff.

The primary grounds presented on behalf of the moving Defendants in support of their Motion to Dismiss were that Plaintiff's claims, as set forth in the Complaint, are subject to the *South Carolina Tort Claims Act* ("SCTCA") and the individually named moving Defendants are therefore entitled to dismissal pursuant to a provision of the SCTCA that affords immunity to employees of governmental entities for actions taken in their capacities as employees.

In response to the arguments offered by the moving Defendants, Plaintiff's counsel argued that the claims set forth in the Complaint against the individually named Defendants state claims of fraud, actual malice, or intent to harm and therefore qualify for the exception noted in § 15-78-70(b)

of the SCTCA.

Upon careful consideration of the various arguments presented by the parties to this litigation and a review of the allegations set forth in Plaintiff's Complaint, this court finds that the allegations set forth in Plaintiff's Complaint describe conduct on the part of the individually named Defendants that falls squarely within the official duties of the individually named Defendants. Therefore, for the reasons more fully set forth below, this court finds that the individually named Defendants are entitled to the immunity provided by the SCTCA and should be dismissed from this action.

When considering the various arguments presented by the parties to this particular motion, this court finds the South Carolina Court Appeals decision in the case of *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003) particularly instructive. Similar to this case, the individually named defendants in *Flateau* moved for dismissal on the grounds that they were entitled to immunity pursuant to the provisions of the SCTCA for conduct that occurred within the scope of their official duties as employees of a governmental entity.

First, the Court of Appeals acknowledged the following standard of review applicable to a motion dismiss:

Under Rule 12(b)(6), SCRPC, a defendant may move to dismiss based on a failure to state facts sufficient to constitute a cause of action. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Bergstrom v. Palmetto Health Alliance*, 352 S.C. 221, 573 S.E.2d 805 (Ct.App.2002). A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct.App.2001). Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations *202 set forth on the face of the complaint. *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995); *Bergstrom*, 352 S.C. at 233, 573 S.E.2d at 811; *see also Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987) (trial court must dispose of motion for failure to state cause of action based solely upon allegations set forth on face of complaint); *Williams*, 347 S.C. at 233, 553 S.E.2d at 499 (trial court's ruling on 12(b)(6) motion must be bottomed and

premised solely upon allegations set forth by plaintiff).

Flateau, at 201, 584 S.E.2d 415.

Next, the Court of Appeals addressed the exclusivity provisions of the SCTCA, the immunity afforded individual employees, the exception to the immunity provision, and the overall purpose of the SCTCA - stating:

The Tort Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees. *See Murphy v. Richland Mem'l Hosp.*, 317 S.C. 560, 455 S.E.2d 688 (1995); *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct.App.1998). "The remedy provided by [the Tort Claims Act] is the exclusive civil remedy available *for any tort* committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b)." S.C.Code Ann. § 15-78-20(b) (Supp.2002) (emphasis added). "[The Tort Claims Act] constitutes the exclusive remedy *for any tort* committed by an employee of a governmental entity." S.C.Code Ann. § 15-78-70(a) (Supp.2002) (emphasis added). According to the Act, "[n]otwithstanding any provision of law, this chapter, the 'South Carolina Tort Claims Act,' is the exclusive and sole remedy *for any tort* committed by an employee of a governmental entity while acting within the scope of the employee's official duty." S.C.Code Ann. § 15-78-200 (Supp.2002) (emphasis added).

Section 15-78-70(a) provides in part that "[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b)." S.C.Code Ann. § 15-78-70(a) (Supp.2002). Subsection (b) declares: "Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is *204 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) (Supp.2002).

The Act defines a "[g]overnmental entity" as "the State and its political subdivisions." S.C.Code Ann. § 15-78-30(d) (Supp.2002). The State "means the State of South Carolina" and includes its commissions. S.C.Code Ann. § 15-78-30(e) (Supp.2002). In the present case, the Act's definition of an "employee" refers to "any officer, employee, or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf or in service of a governmental entity in the scope of official duty." S.C.Code Ann. § 15-78-30(c) (Supp.2002). " 'Scope of official duty' or 'scope of state employment' means (1) acting in and about the official business of a governmental entity and (2) performing official duties." S.C.Code Ann. § 15-

78-30(i) (Supp.2002).

The Act is intended to cover those actions committed by an employee within the scope of the employee's official duty. "The provisions of [the Act] establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State." S.C.Code Ann. § 15-78-20(f) (Supp.2002); *see also Wade v. Berkeley County*, 330 S.C. 311, 498 S.E.2d 684 (Ct.App.1998) (noting that § 15-78-20(f) **417 limits coverage to employees acting within the scope of official duty).

Flateau, at 203, 584 S.E.2d 416.

Here, as in *Flateau*, none of the parties dispute that the individually named Defendants are employees of a "governmental entity" as defined by the SCTCA. Therefore, also like *Flateau*, the primary issue that controls the disposition of this motion is a determination of whether the alleged inappropriate conduct was "outside the scope of their official duties."

In *Flateau*, the Court of Appeals relied on the specific allegations set forth in the complaints of the plaintiffs and found that "despite the contention in the brief of Flateau and Fielding, nowhere in their complaints do Flateau and Fielding allege that the Board members' actions were outside the scope of their official duty." *Flateau*, at 204, 584 S.E.2d 417. The Court of Appeals further stated:

The complaints assert tort claims against Commission board members who acted on behalf of the Commission in commanding Commission employees, including Flateau and Fielding, to attend a hearing for the purpose of being interviewed by the Board. The pleadings clearly and unequivocally allege that the Board members were meeting and acting together as the South Carolina Commission for the Blind, discussing matters in executive session, and voting in their capacity as Commissioners to take the actions in question—all official duties and actions that are about the official business of the Commission, which is a public body established by the General Assembly. *See* S.C.Code Ann. § 43-25-10 (1985) (creating the South Carolina Commission for the Blind; stating that chairman of Commission may call meeting whenever he deems it necessary); S.C.Code Ann. § 30-4-20 (1991) (defining "public body" to include state commissions). Requiring Flateau and Fielding to attend a hearing and holding them there, as Flateau and Fielding maintain in their complaints, may be argued to go beyond the *authority* of the Commission, but it does not bring the Commissioners' actions outside the

scope of their official duty. *See Crittenden v. Thompson-Walker Co.*, 288 S.C. 112, 341 S.E.2d 385 (Ct.App.1986) (distinguishing scope of servant's employment from scope of servant's authority and holding acts outside servant's authority are still within his scope of duty if done in furtherance of master's business).

Flateau, at 205, 584 S.E.2d 417.

In *Flateau*, the Court of Appeals concluded that the causes of action alleged by the plaintiffs against the individually named defendants constituted conduct within the scope of the individuals' official duties and therefore there could be no liability attached to the individuals. In so doing, the Court of Appeals stated: "[t]he statutory dialectic reveals that a governmental employee acting within the scope of official duty is exempt from personal liability." *Flateau*, at 206, 584 S.E.2d 417. The Court of Appeals added "that the efficacy of the Tort Claims Act is protection of governmental employees acting in the scope of official duties." *Id.* Finally, the Court of Appeals noted: "The remedy mandated in the Act is legal action initiated against the governmental entity rather than the individual governmental employee." *Id.*

In this case, Plaintiff's Complaint, at paragraph 2, alleges "Defendant Horry County (Defendant County) is a body politic and political subdivision of the State of South Carolina." Plaintiff's Complaint, at paragraph 3, alleges "Defendant Horry County Department of Airports (Defendant Airport) is a body politic and corporate and political subdivision of the State of South Carolina that owns, manages, and operates property in Horry County, South Carolina." Therefore, it is clear that Plaintiff recognizes Defendant County and Defendant Airport as governmental entities of South Carolina.

Paragraph 8 of the Complaint specifically states: "At all relevant times Defendants Haldi, Apone, Jackson and Teal were acting as agents of Defendants County and Airport." This language, like that in the *Flateau* pleadings, appears to be an unequivocal allegation that

Defendants Haldi, Apone, Jackson and Teal, if they acted at all, were doing so on behalf of Defendant County and/or Defendant Airport within the scope of their official duties. It is axiomatic that actions taken by an agent for the benefit of the master are not actions taken for the independent benefit of the individual actor.

At the hearing of the instant motion, counsel for Plaintiff argued that the Complaint should be liberally interpreted and the facts viewed in the light most favorable to the Plaintiff. Plaintiff's counsel further argued that the nature of the causes of action against the individual Defendants and the elements of proof somehow suggest Plaintiff intended to assert that that the individual Defendants acted outside the scope of their duties, or fraudulently, or with malice, or intent to harm that would take their respective actions outside the scope of their official duties. Upon reviewing Plaintiff's Complaint, this court is not persuaded by such an argument.

A review of the specific causes of action levied against the individually named Defendants reveals: (1) that each cause of action contains a preamble paragraph that "reincorporates and realleges each of the foregoing allegations fully as if repeated herein verbatim," including, presumably, paragraph 8 discussed above; (2) that the allegations relating to multiple causes of action contain specific allegations that the individually named Defendant(s) at issue acted as the agent(s) of Defendant County or Defendant Airport or both¹; (3) that the Complaint contains no causes of action that are directed solely to one or more of the individually named Defendants; (4) that the prayer for relief set forth in the Complaint requests the assessment of joint and several liability among the Defendants identified in each cause of action without distinction between the governmental entities and the individuals; and most importantly, (5) that the entire Complaint is devoid of any allegation that any individually named Defendant acted outside the scope of his or her official duties.

¹ See Complaint at ¶¶ 70, 75, 76, 85, 118.

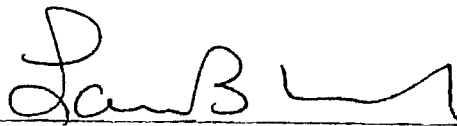
Furthermore, while this court acknowledges the second prong of the exception set forth at § 15-78-70(b) of the SCTCA for acts that are proven to constitute actual fraud, actual malice, intent to harm, or a crime involving moral turpitude, this court is simply not satisfied that Plaintiff's complaint, on its face, satisfies the requirements of the exception. This court acknowledges that Plaintiff's Complaint contains causes of action for constructive fraud, defamation, fraud and misrepresentation. However, this court also notes that each of these three causes of action contain a reiteration of Plaintiff's allegations that the individual defendants named therein were acting as agents of Defendant County and/or Defendant Airport at "all relevant times." The cause of action for "constructive" fraud clearly does not satisfy the *actual* fraud requirement. The cause of action for defamation can be interpreted to contain an allegation that Defendant Jackson's statements were made "with actual or implied malice;" however, Defendants County and Airport are included in the cause of action and the first paragraph thereof reiterates, in part, that Defendant Jackson was acting as agent of Defendant County and/or Defendant Airport at "all relevant times." The cause of action for fraud and misrepresentation appears to relate to alleged representations of Defendant Airport made by Defendant Jackson as an agent for Defendant Airport. Therefore, none of the allegations set forth in the three causes of action that could possibly qualify for the second prong of the exception set forth at § 15-78-70(b) of the SCTCA appear to suggest that the individually named Defendants acted on their own with sufficient intent to take their actions outside the protections afforded by the SCTCA.

For these reasons, and following the guidance provided by the South Carolina Court of Appeals in *Flateau*, this court finds that Plaintiff's Complaint clearly attempts to assert tort claims against individually named employees of Defendant County and/or Defendant Airport that relate to conduct performed by said individuals that, even if presumed true for purposes of this motion only,

was within the course and scope of their official duties as employees of said entities. Furthermore, it is simply an inequitable interpretation of the allegations of the Complaint to allow Plaintiff to assert responsibility on the part of Defendants County and Airport for the actions of the individually named Defendants to the extent it serves Plaintiff's interest - and then accept Plaintiff's argument at the hearing that the causes of action set forth in the Complaint somehow suggest alternate allegations that Defendants Haldi, Apone, Jackson, and Teal acted outside the scope of their official duties for the sake of conveniently exposing said individuals to personal liability. Therefore, this court finds that the Complaint, on its face, fails to properly set forth any allegations that are not subject to the limitations of the South Carolina Tort Claims Act and the individually named Defendants are entitled to the protections set forth therein, including immunity from personal liability.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that for all the foregoing reasons, Plaintiff's Complaint in this matter is hereby dismissed with prejudice as to all claims alleged against Defendants Haldi, Apone, Jackson, and Teal.

IT IS SO ORDERED!



The Honorable Larry B. Hyman, Jr.
Fifteenth Judicial Circuit

Conway, South Carolina

July 13, 2014.
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