THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

The Honorable G. Thomas Cooper, Jr., Judicial Circuit Court Judge
Case No.: 2012-CP-40-07392

Appellate Case No. 2014-001728

Frank "Doc" Haynie.....Appellant,

v.

The City of Forest Acres, Mark M. Williams, Shaun Greenwood, and Clark Frady, in their individual capacities. .....Respondents.

FINAL BRIEF OF RESPONDENT THE CITY OF FOREST ACRES

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ATTORNEYS FOR RESPONDENT
THE CITY OF FOREST ACRES

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THE CITY OF FOREST ACRES

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INTRODUCTION

At its heart, this is a case about a city's right to enforce its ordinances and to act upon the violation of those ordinances by its citizens to ensure compliance for the protection and wellbeing of all of its citizens. Appellant Frank "Doc" Haynie ("Haynie") brought suit against Respondent City of Forest Acres ("the City") for doing just that. In his Complaint, Haynie contends that the City was negligent in its supervision of its employees, Shaun Greenwood ("Greenwood") and Clark Frady ("Frady"), as they carried out their duties.[1] Specifically, Haynie alleges that the City knowingly allowed the building codes and city ordinances to be applied in a "disparate and unequal" manner. As a result of these alleged acts by the City, Haynie contends that he has been injured because his construction company has lost business, has lost earnings and potential earnings, has expended resources in bringing the current lawsuit, and "has suffered embarrassment, humiliation, and mental anguish."[2] In addition, Haynie has named as defendants, in their individual capacities, Mark M. Williams ("Williams"), Greenwood,

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[1] In his Complaint, Haynie includes allegations against the City's employee, Mark M. Williams as well. However, in connection with the specific cause of action for negligence and gross negligence, he does not mention him.

[2] In his Complaint, Haynie also contends that the City was negligent and grossly negligent in hiring Greenwood and Frady. However, Haynie has conceded that Section 15-78-110 of the South Carolina Tort Claims Act provides for a 2-year statute of limitations in which to bring a claim against a governmental entity, such as the City. *See* R. p. 65, ll. 2-4 ("And setting that aside, the hirings did occur before November 2, 2010. So, I'm not going to waste your time with that, Your Honor.") Therefore, the circuit court found that any allegations of wrongdoing that occurred before November 2, 2010 are dismissed as a matter of law. Haynie has not appealed from this ruling, and the City will not address this issue. *See Carolina Renewal, Inc. v. S.C. Dep't. of Transp.*, 385 S.C. 550, 557, 684 S.E.2d 779, 783 (Ct. App. 2009) (explaining that because the appellant did "not argue these issues on appeal, they are considered abandoned") (citing *First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994)).

and Frady (collectively "Individual Employees"), who were employees of the City during the relevant time period, and contends that these individuals conspired against him.

Based on upon the evidence presented in this case, the circuit court correctly granted the City's motion and entered judgment in its favor as a matter of law. Haynie failed to present any evidence demonstrating that he had a valid cause of action against the City for negligence or gross negligence in connection with its enforcement of its ordinances. Further, he has failed to present any evidence demonstrating that the City did not properly supervise its employees, negligently or otherwise. In addition, even if Haynie did raise a cognizable claim for relief against the City, he is barred from recovery because the City is immune from suit. Therefore, the court's order granting summary judgment should be affirmed.

STATEMENT OF THE CASE

On November 2, 2012, Haynie filed a Summons and Complaint against the City and against the Individual Employees, in their individual capacities alleging causes of action for negligence and gross negligence against the City and for civil conspiracy against the Individual Employees. On December 23, 2013, the City moved for summary judgment on Haynie's Complaint. After considering written argument and evidence, and after hearing oral argument, which was held on February 21, 2014, the circuit court granted summary judgment in favor of the City on April 14, 2014 (the "Summary Judgment Order"). In granting the Motion for Summary Judgment, the court explained that with regard to his claim for negligent hiring, Haynie conceded that "the cause of action for negligent hiring [wa]s precluded by the statute of limitations" and that "there [wa]s no evidence in the record to support a cause of action for negligent hiring." (R. pp. 19-20) The court also explained that Haynie failed to point to any evidence in the record that demonstrated that the City had any knowledge that either Greenwood or Frady had a propensity "to misconduct themselves in a manner dangerous to others at the time they were hired" to support his claim for negligent hiring. (R. p. 20)

The circuit court likewise determined that the City was entitled to grant of summary judgment in its favor with regard to Haynie's cause of action for negligent supervision. The court explained that because Haynie only contended that Frady and Greenwood acted outside of the scope of their employment and conspired against him for the purpose of injuring him, he was required to prove the elements as set forth by the Supreme Court of South Carolina in *Degenhart v. Knights of Columbus*, 309 S.C. 114, 116, 420 S.E.2d 495, 496 (1992) to support his cause of action for negligent supervision.

After determining that Haynie failed to demonstrate that these elements were satisfied, the circuit court also explained that even if the alleged acts were determined to be within the scope of their employment, his cause of action must still fail because there was no evidence in the record demonstrating that any "misconduct was foreseeable or that any harm allegedly suffered by [the City] could have been reasonably anticipated by the City." (R. p. 22) In addition, the circuit court explained that summary judgment was proper because Haynie "failed to plead or prove a cognizable cause of action against the City." (R. p. 23) Specifically, the court explained that in attempting to construe the allegations of the Complaint, which were "vague and unclear," Haynie failed to satisfy the two-pronged test for establishing a claim of selective enforcement or prosecution. The court reasoned that Haynie was unable to "articulate any reason for the alleged disparate treatment, other than asserting that the individual [employees] 'were just looking to get [him].'" (R. p. 24)

On April 28, 2014, Haynie filed a Consolidated Rule 59(e) Motion to Alter or Amend Judgment.[3] The City filed its Memorandum in Opposition to the Consolidated Rule 59(e) Motion to Alter or Amend on June 18, 2014. On June 30, 2014, the circuit court issued an order denying Haynie's motion. On August 11, 2014, Haynie filed a

[3] On December 27, 2013, the Individual Employees also moved for summary judgment. The circuit court also granted the individual employee's motion seeking entry of summary judgment in their favor. In granting the motion, the circuit court concluded that Haynie failed to state a valid cause of action against the Individual Employees for conspiracy as a matter of law. The court specifically found that "[t]he alleged actions forming the basis of [Haynie]'s civil conspiracy action were necessary to accomplish the purpose of [the Individual Employees]' employment with [the] City" and that their "actions were in furtherance of the City's business and taken within the course and scope of [their] official duties." (R. p. 13)

Notice of Appeal.

STATEMENT OF FACTS

A. Individual Employees' Employment with the City.

In May 2005, City Administrator Williams hired Greenwood for a position in Code Enforcement with the City based upon Greenwood's performance of similar duties for Williams while both were employed by the Town of Summerville. During Greenwood's tenure with Summerville, Williams was generally impressed with his intelligence and capabilities. (R. p. 919-920, ¶ 5) After hiring Greenwood, Williams eventually recommended to City Council that Greenwood be reclassified as an assistant City Administrator once he received his Master's in Public Administration. (R. p. 920, ¶ 6) In addition to his duties as Assistant City Administrator, Greenwood maintained his duties in Code Enforcement. (R. p. 926, ll. 18-22) Greenwood left the City for a similar position with the City of Cayce in April 2011. (R. p. 920, ¶ 10)

In 2010, Frady was hired by Williams as the Building Official for the City. (R. p. 920, ¶ 11) His employment was contingent upon him becoming a certified Building Official within the two-year probationary period allowed pursuant to the regulation of the Department of Labor Licensing and Regulation. (R. p. 921, ¶ 14) Frady had previously been employed by Richland County as a residential building inspector. (R. pp. 920-921, ¶ 12) He had performed inspections for the City on a contractual basis. (R. pp. 920-921, ¶ 12) In light of his previous satisfactory work with the City and his years of experience with Richland County, City Administrator Williams decided to hire Frady over other candidates for the position of probationary Building Official in 2010. (R. pp. 920-921). Frady left the City in 2012 and is currently a building inspector for Richland County. (R. p. 922, ¶ 18; R. p. 665, ¶ 4)

B. Brentwood Drive Ordinance Violations

Haynie is a self-employed contractor and has owned his residence and lived in Forest Acres for a number of years and performs about 15 to 20 percent of his work in Forest Acres. (R. p. 27, ¶ 6; R. p. 900, ll. 7-14; R. p. 917, ll. 13-18) Haynie purchased a house for his daughter at 1325 Brentwood Drive in 2006. (R. p. 903, ll. 17-18) Shortly after buying the house, he constructed a large shop in the back yard. In 2007 and 2008, the City received multiple complaints from Haynie's neighbors on Brentwood Drive regarding various ordinance violations, including, but not limited to, the following: the property was a mess; Haynie was storing construction equipment on his property; and he was operating his construction business from the residence. (R. p. 933, ll. 10-16; R. p. 928, ll. 11-15). Greenwood investigated these complaints against Haynie and inspected Haynie's property. Greenwood determined that Haynie was running a business from the shed at the back of his property. (R. pp. 928-930).

Haynie alleges that in 2007 the Defendants started harassing him about the condition and use of the Brentwood property. However, he does admit that the neighbors were complaining and that the City had an obligation to investigate those complaints. (R. pp. 912, ll. 8 – p. 914, l. 24). He also concedes that despite his neighbors' numerous complaints, he was not written a single citation for any code violation before 2011. (R. p. 915, ll. 9-13) In response to the discussions with Greenwood and Barry Epps, a provisional Building Official with the City, about the use of the property, Haynie stated he would move his business operations to another location.

In March 2011, Haynie applied for and received a permit to construct a 200-foot storage building on the Brentwood property. Frady went to the residence in March 2011 to

perform the initial inspection. Before this inspection, Frady had never heard of Haynie. (R. p. 936, ll. 9-11). Frady had questions about the manner in which Haynie was attempting to construct the footings and foundation of the storage shed. Specifically, Frady was concerned that the manner of construction was not in compliance with the applicable 2006 International Residential Code. Therefore, Frady requested that Haynie provide a set of plans to the City describing how he planned to construct the foundation, and in response, Haynie submitted the drawings a day or two later. (R. p. 939, ¶6; R. pp. 904, l. 16 – p. 906, l. 21).

Frady reviewed the plans and identified several concerns and raised additional questions. Haynie disagreed that the proposed footings violated the code, and despite these concerns, continued working. Frady posted a Stop Work Order on the Brentwood property until the issue could be resolved. (R. p. 666-667).

During the dispute, Haynie sent numerous emails to Williams questioning Frady's competence and his interpretation of the Code. After considering Haynie's complaint regarding the Stop Work Order, Williams recommended Haynie appeal the code issue to the City's Code Board of Appeals ("the Board"), which was the appropriate appellate body created by the City for contractors to challenge code interpretations by the Building Official. Qualification for membership on the three-member Board is determined by the building code. At the time, the Board included a building inspector employed by Richland County, an engineer, and a commercial real estate broker. (R. p. 922, ¶ 23).

The Board held a hearing on Haynie's complaints on May 11, 2011, at which time it affirmed Frady's Code interpretation. (R. p. 922-923). The Board gave Haynie the option of either having an engineer certify the sufficiency of the footing and foundation or adhering

to the Code. Thereafter, Haynie informed Frady and Williams that he would scale back the storage shed to less than 120 square feet. Such adjustments would no longer require a permit according to the Code. Williams acknowledged Haynie's request and confirmed that his permit fee would be refunded. (R. pp. 667-668). Haynie did not pursue any other means of redress following the Board's decision.

On June 20, 2011, Frady was called to the Brentwood property as a result of an incident involving Plaintiff and the Richland One School District. While on the property, Frady issued three citations to Haynie for rubbish and garbage on the property, operating a business out of the home, and lack of a building permit. (R. p. 669, ¶ 22). Frady issued the ticket for the lack of a building permit, because Haynie had a foundation and monolithic slab poured that was sufficient for a 200-square foot building despite Haynie's assertion that he was scaling back the building to 120 square feet.

Once again, wishing to accommodate Plaintiff as much as possible, the City's attorney, Lee Holloway, offered a compromise to Haynie, which required Haynie to agree to plead guilty to one of the citations and have a licensed engineer certify the foundation in exchange for nolle prossing the other two citations. Therefore, Haynie plead guilty to the rubbish and garbage violation and paid a $750.00 fine. Haynie hired Louis Mariaca, an engineer, who signed off on the structural integrity of the building. (R. pp. 939-940). The other two citations were *nolle prossed.*

C. Covenant Road Project

Haynie contracted with Nasser Alquza in 2008 to act as a general contractor in renovating commercial space on Covenant Road in Forest Acres. The job stopped and started over several years. At some point during the renovations, Alquza and Haynie had a

disagreement over the sufficiency of some worked performed by a subcontractor hired directly by Alquza. Haynie reported Alquza to the South Carolina Department of Licensing, Labor, and Regulation, because he did not want to be held responsible for the faulty workmanship. Thereafter, Alquza fired Haynie as his general contractor. (R. pp. 910, l. 14-19).

In April of 2011, Alquza contacted the City about moving forward with the project. At that time the building permit had expired and needed to be renewed. Alquza asked Greenwood and Frady how he could move forward on the project without Haynie being his general contractor. They told him that he could find another contractor and move forward. Haynie alleges that Greenwood and Frady told Alquza that he had to fire Haynie in order to renew his permit, but he has no competent evidence that this took place.[4] Mr. Alquza informed Frady that Haynie was finished with his portion of the project and that Haynie's services were no longer required on the project. (R. pp. 668-669; R. p. 910, ll. 11-22).

Williams made it clear that at no time has he instructed any Code Enforcement Officer or Building Official to issue citations during his tenure with the City. Rather, Williams testified that he informed Defendant Frady and Greenwood to use their best judgment and issue citations if they thought such measures were warranted under the circumstances. Likewise, Williams testified Greenwood did not require day-to-day supervision and it was within Greenwood's judgment to issue citations when he felt it necessary to do so. (R. pp. 920-921). Even Haynie's friend, City Attorney Holloway, has

[4] Haynie testified that Paul Cowles, one of his subcontractors told him that he heard Greenwood tell Alquza that Haynie was a very bad contractor and that he needed to fire him before the City would allow him to move forward on his project. (R. p. 231, ll. 1-12 – p. 232, ll. 3-13). However, Cowles denied either hearing or telling Haynie any such thing. (R. p. 945, ll. 7-16).

stated he is "unaware of any instance in which [Haynie] was selectively or unfairly prosecuted by the City." (R. p. 940, ¶ 9).

D. Allegations of Complaint

On November 2, 2012, Haynie filed his lawsuit against the City and Williams, Greenwood, and Frady, in their individual capacities. In the Complaint, Haynie contends that the Individual Employees, beginning in 2007 and continuing through 2010, "began to single him out for disparate and unfair treatment in the processing of building permits and in unwarranted inquiries, inspections and investigation," which lead to "numerous charges" against him. (R. p. 27, ¶ 8) He further contends that the Individual Employees engaged in such behavior "solely for the purpose of harassing and causing him damages." (R. p. 27, ¶ 8) Further, he alleges that "[t]he campaign against [him] by [the Individual Employees] and others continued even though protests had been made to the city council and mayor as well as the City's city attorney and totally ignored by them." (R p. 29, ¶19)

Haynie includes one cause of action against the City in the Complaint for "Negligence and Gross Negligence."[5] In support of this cause of action, Haynie contended that the City was negligent and grossly negligent in the following respects:

- appointing Frady and Greenwood to their positions because they "both lacked the experience, qualifications and background to serve in such capacities in a meaningful way";
- "failing to properly supervise the defendants Frady and Greenwood in the performance of their duties in the numerous complaints which arose from

[5] Haynie only includes one cause of action against the Individual Employees for civil conspiracy.

the same to require them to conduct their work in behalf of The City in a competent, fair and thorough manner";

- "failing to listen to or follow through with numerous complaints made by the plaintiff to members of city council, mayor and city attorney or to in any way discourage the defendants Frady and Greenwood from harassing, coercing and interfering with the plaintiff's daily activities"; and
- "knowingly allowing disparate and unequal application of the building codes and city ordinances to deny plaintiff the same or similar relief granted to numerous other residents and businesses located within the City of Forest Acres."

(R. p. 30, ¶ 21) As a result of this alleged negligence and gross negligence, Haynie contends that he has been damaged. (R. p. 30, ¶ 22)

ARGUMENT

I. Standard of Review

Summary judgment is appropriate where, as here, "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 a judgment as a matter of law." Rule 56(e), SCRCP *and Baughman v. Am. Tele. & Tel. Co.*, 306 S.C. 101, 111, 410 S.E.2d 537, 545 (1991). In determining the appropriateness of granting summary judgment, the circuit court is not "required to single out some one morsel of evidence...to create an issue of fact that is not genuine." *Englert, Inc. v. Netherlands Ins. Co.*, 315 S.C. 300, 302, 433 S.E.2d 871, 873 (Ct. App. 1993) (quoting *Main v. Corley*, 281 S.C. 525, 527, 316 S.E.2d 406, 407 (1984)). Moreover,

"[a] party opposing summary judgment must do more than rely on mere allegations." *Walton v. Mazda of Rock Hill*, 376 S.C. 301, 307, 657 S.E.2d 67, 70 (Ct. App. 2008) (citing *Dyer v. Moss*, 208 S.C. 208, 211, 325 S.E.2d 69, 70 (Ct. App. 1985)). Where a defendant establishes entitlement to judgment as a matter of law, the court must grant summary judgment. *Humana Hosp. Bayside v. Lightle*, 305 S.C. 214, 216, 407 S.E.2d 637, 638 (1991) *and Dyer*, 284 S.C. at 211, 325 S.E.2d at 70. "When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP." *Fleming v. Rose*, 350 S.C. 488, 493-494, 567 S.E.2d 857, 860 (2002) (citing *Peterson v. West Am. Ins. Co.*, 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999)).

Here, the City demonstrated that it was entitled to judgment as a matter of law, and Haynie failed to present any evidence demonstrating the existence of a genuine issue of *material* fact that would defeat a grant of summary judgment on the City's behalf. Therefore, the circuit court properly entered summary judgment on behalf of the City as a matter of law on Haynie's Complaint and should be affirmed.

II. The Circuit Court Properly Granted the City's Motion for Summary Judgment.

Despite his assertions to the contrary, none of the evidence that Haynie relies on in attempting to create a genuine issue of material fact demonstrates that the City is liable to him on any cause of action, whether for negligence/gross negligence or an equal protection violation. In contending that the circuit court incorrectly granted the City's motion, Haynie erroneously relies on facts and so-called evidence that still do not demonstrate that any of the City's actions or the actions of its employees were actionable

and support a valid cause of action against the City. The failure to present such evidence is fatal to Haynie's case. Therefore, because the circuit court properly granted the City's motion and entered summary judgment in its favor on Haynie's claims, this Court should affirm the grant of summary judgment.

A. The circuit court correctly determined that Haynie failed to demonstrate that he had a valid cause of action for negligent supervision.

Haynie contends that the circuit court misapplied the reasoning of the Supreme Court of South Carolina in *Degenhart v. Knights of Columbus*, 309 S.C. 114, 115-117, 420 S.E.2d 495, 496 (1992). Haynie's reliance upon this argument to demonstrate that the circuit court improperly granted the City's motion is misplaced. Haynie fails to first consider that he has no valid cause of action against the City.[6]

1. Haynie has failed to state a valid cause of action for negligent supervision.

Haynie has offered no legal support demonstrating that he has a valid cause of action for negligent supervision against the City as a result of an alleged failure to listen to or follow through with his complaints regarding the employees' alleged harassment, coercion, and interference with his daily activities.

With regard to Haynie's allegations that the City is somehow liable to him for "failing to listen to or follow through with" his complaints, Haynie has improperly tried

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[6] In fact, with regard to the circuit court's application of *Degenhart*, Haynie only contends that the circuit court "unduly restricts the *Degenhart* holding...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." *See* Initial Brief of Appellant, p. 10. He does not explain how he has a "triable negligence/gross negligence claim." *See id.*

to categorize this alleged failure as "negligence." South Carolina courts will look beyond the labels describing the acts and will consider the alleged acts to determine what is actually being alleged. *See Prior v. S.C. Med. Malpractice Liab. Ins. Joint Underwriting Assoc.*, 305 S.C. 247, 407 S.E.2d 655 (Ct. App. 1991) ("In examining the complaint, we must look beyond labels describing the acts, to the acts themselves which form the basis of the claim against the insurer.") *and Richland County v. Kaiser*, 351 S.C. 89, 567 S.E.2d 260 (Ct. App. 2002) ("It is the substance of the requested relief that matters 'regardless of the form in which the request for relief was framed.'"). Haynie has not cited to any authority that lends any support to his allegations against the City being recognized as a valid cause of action.

Likewise, Haynie has failed to demonstrate that he has a valid cause of action for failing to prevent employees from "harassing, coercing and interfering with [his] daily activities." Apparently, this allegation is based upon Haynie's belief that Frady was wrong and overzealous in applying the City's ordinances to the construction of the storage building and the issuance of several tickets in 2011. Even assuming that these actions somehow constituted a valid cause of action, as Williams stated in his affidavit, the only City employee at that time who was trained and knowledgeable regarding the building codes was Frady. Williams had insufficient knowledge upon which to overrule Frady's interpretation of the Code. Instead, after listening and responding to Haynie regarding his concern, the City provided him the opportunity to appeal the interpretation of the Code to the Board. After losing the appeal, Haynie made the decision to not pursue the matter any further.

Similarly, Haynie agreed to plead guilty to one of the tickets written by Frady in exchange for the City nolle prossing the other two charges. Notably, Haynie has not alleged

a malicious prosecution or wrongful arrest cause of action, and in fact would be barred from doing so as a result of his own decision to enter a guilty plea. *See Keenan v. Tejeda,* 290 F.3d 252, 262 (5th Cir. 2002) (holding that if probable cause existed for any of the charges made, or if a reasonable police officer could believe probable cause existed, a false arrest/malicious prosecution claim fails); *see also Ruff v. Eckerds Drugs, Inc.*, 265 S.C. 563, 220 S.E.2d 649 (1975) ("It affirmatively appearing the respondent was guilty of the criminal offense of simple assault, he cannot successfully maintain this action for malicious prosecution."). Despite his admission and acquiescence, Haynie is still attempting to litigate whether Frady acted "inappropriately" by issuing the tickets through a non-existent "harassment" cause of action. However, there is simply no cognizable cause of action against the City, and the circuit court should be affirmed.

2. Haynie failed to present any evidence demonstrating that the alleged misconduct was foreseeable or that any harm to him could have been reasonably anticipated by the City.

Furthermore, even if Haynie has presented valid causes of action and were permitted to be brought under the Act, they still must fail. Under South Carolina law, 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. 2005) (citing *Di Cosala v. Kay,* 91 N.J. 159, 450 A.2d 508, 516 (1982)). Such cases are ripe and proper for summary judgment "when no reasonable factfinder could find the risk foreseeable or that the employer's conduct has fallen below the acceptable standard." *Doe*, 367 S.C. at 206, 624 S.E.2d at 450. Because the record is void of any evidence demonstrating that the City's conduct fell below the acceptable standard, the City is entitled to summary judgment in its favor and the grant by the circuit court

should be affirmed.

While Haynie has presented no competent evidence of the individual City employees' alleged malfeasance, even assuming such evidence existed, he has failed to present any evidence that the City knew or should have known of the necessity to exercise control of them, including the City Administrator himself. Furthermore, Haynie has failed to present any evidence that the risk of harm to third parties was foreseeable. Mere speculation and conjecture that the City knew of any intentional and deliberate acts aimed at harming him is not enough. *See Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 299, 701 S.E.2d 742, 754 (2010) ("To survive summary judgment, the evidence presented must amount to more than mere speculation and conjecture."). Haynie has failed to present any competent evidence that the City's actions fell below the acceptable standard. In fact, even viewing the "evidence" upon which he relies in the light most favorable to him, he has failed to establish a genuine issue of material fact that would lead to a reasonable inference that the City was negligent. Therefore, because "no reasonable factfinder could find the risk foreseeable or the employer's conduct to have fallen below the acceptable standard," the circuit court properly granted the City's motion for summary judgment. *Doe*, 367 S.C. at 206, 624 S.E.2d at 450.

3. The City is entitled to immunity regarding its supervision of its employees.

In addition, it is clear that the City exercised a comparable degree of discretion in choosing how and to what degree to supervise Frady and Greenwood, such that the City is entitled to discretionary immunity from suit pursuant to § 15-78-60(5) of the South Carolina Tort Claims Act ("the Act"). The Act "governs all tort claims against governmental entities" and provides "the exclusive civil remedy available for any tort committed by a governmental entity," such as the City. *Hawkins v. City of Greenville*, 358 S.C. 280, 292, 594 S.E.2d 557, 563 (2004). Further, the Act has provisions that establish "limitations on and exemptions to the liability of [governmental entities that] must be liberally construed in favor of limiting liability of the State." *Hawkins*, 358 S.C. at 292, 594 S.E.2d at 563 (citing S.C. Code Ann. § 15-78-20(f)). It is Haynie's burden "to present evidence of the [City]'s duty to act in order to recover under the Act." *Id.* at 293, 594 S.E.2d at 564.

Under the Act, a governmental entity is not liable for a loss resulting from "the exercise of discretion or judgment by the governmental entity or employee or the performance or failure to perform any act or service which is in the discretion of the governmental entity or employee." S.C. Code Ann. § 15-78-60(5). "[T]he determination of immunity from tort liability turns on the question of whether the acts in question were discretionary rather than ministerial." *Hawkins*, 358 S.C. at 294, 594 S.E.2d at 564. "A finding of immunity under the Act 'is contingent on proof the government entity, faced with alternatives, actually weighed competing considerations and made a conscious choice using accepted professional standards.'" *Id.* at 294, 594 S.E.2d at 564 (quoting *Wooten ex rel. Wooten v. S.C. Dep't of Transp.*, 333 S.C. 464, 468, 511 S.E.2d 355, 357 (1999)).

As Williams attested, Greenwood's elevated position after receiving his Master's ensured that Greenwood was capable of exercising his own judgment in the performance of

his duties and Williams made a conscious choice to lessen the degree of day-to-day supervision. Likewise, it is clear that Frady, who was under Greenwood's direct supervision, was properly and adequately supervised by the City through Williams, which supervision included sufficient interaction related to zoning, planning, and enforcement. Furthermore, with regard to Haynie's allegations that the City allegedly failed to respond to his concerns, he concedes that Williams received and responded to his emails and, in fact, scheduled a meeting before the Board to discuss the issues regarding the storage building. Thus, it is clear the City exercised its discretion in how to handle the dispute between Haynie and Frady over the Code interpretation. Therefore, the City is immune from suit, and the grant of summary judgment in the City's favor should be affirmed.

B. The circuit court properly granted summary judgment in the City's favor on Haynie's claim that it knowingly allowed disparate and unequal application of the building codes and ordinances to deny him the same or similar relief granted to numerous other residents and businesses located in Forest Acres.

The circuit court properly determined that the City was entitled to summary judgment on Haynie's claim that the City "knowingly" allowed Frady and Greenwood to selectively enforce the building code and city ordinances against him. While Haynie has presented no legal authority providing that such a cause of action is valid, even assuming that it is a valid cause of action, Haynie alleges an intentional tort. The City, however, is not liable for loss resulting from "employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, *intent to harm*, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-60(17) (emphasis added).

Haynie's allegations are circular. He alleges that the Individual Employees, including Williams, *intentionally* conspired for the purpose of injuring him. Civil

conspiracy is an intentional tort requiring specific intent to accomplish a contemplated wrong. *See Allegro, Inc. v. Scully*, 409 S.C. 392, 762 S.E.2d 54 (Ct. App. 2014) ("A civil conspiracy is a combination of two or more persons joining for the purpose of injuring and causing special damage to the plaintiff.") (internal quotations omitted). An intentional tort cannot be committed through negligence. 16 Am Jur 2d Conspiracy § 51 ("Elements, agreement.") *citing Young v. F.D.I.C.*, 103 F.3d 1180 (4th Cir. 1997) *cert. denied,* 118 S. Ct. 329 (U.S. 1997). Haynie has testified that Williams does not like him and has set out to injure him. (R. p. 143, ll. 21-25, p. 240, ll. 23-25 – p. 241, ll. 1-13). However, Williams is the person charged with supervising Frady and Greenwood. If, as Haynie claims and alleges, Williams was acting intentionally to injure him, the claim against the City must be dismissed pursuant to the above-referenced immunity provision of section 15-78-60(17) of the Tort Claims Act and the order of the circuit court must be affirmed.

Furthermore, in connection with the Individual Employees' motion for summary judgment, the circuit court made specific findings that their alleged actions were taken within the course and scope of their employment and that they were not engaged in a "conspiracy" against Haynie. Haynie's allegations regarding the City's alleged negligence/gross negligence are solely premised upon the alleged actions make up this alleged conspiracy. Because the circuit court found that a civil conspiracy did not exist, the City cannot be liable to Haynie for negligent supervision. Therefore, the circuit court's Summary Judgment Order should be affirmed.

C. Haynie has failed to allege a valid cause of action for violation of equal protection.

Notably, Haynie has not contended that any of the City's ordinances and regulations were invalid, which admittedly would be difficult for him to demonstrate on this record. *See Whaley v. Dorchester County Zoning Bd. of Appeals*, 337 S.C. 568, 575, 524 S.E.2d 404, 408 (1999) ("A municipal ordinance is a legislative enactment and is presumed to be constitutional.") (citing *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 504 S.E.2d 112 (1998)). He also does not contend that the City enforced any of the ordinances in a discriminatory manner, and in fact, specifically states that "he did not allege an equal protection violation." *See* Initial Brief of Appellant, p. 7, n. 3. The record is also absent of any evidence demonstrating that the ordinances were invalid or unconstitutional. However, he, apparently, is contending that the City allegedly singled him out to ensure he complied with the City's ordinances, which means that allegedly others were not required to comply with those ordinances. Assuming that Haynie's Complaint could be construed to raise a claim for a violation for equal protection, the circuit court properly determined that Haynie failed to establish a valid cause of action under South Carolina law.

A claim of selective enforcement or selective prosecution is rooted in the Equal Protection Clause. To establish a claim of selective prosecution, Haynie must satisfy a two-pronged test. First, he must establish that "'he has been singled out for prosecution while others similarly situated have not been prosecuted for conduct similar to that for which he was prosecuted.'" *State v. 192 Coin-Operated Video Game Machines*, 338 S.C. 176, 200, 525 S.E.2d 872, 885 (2000) (quoting *United States v. Catlett*, 584 F.2d 864, 864 (8th Cir. 1978)). Second, he "'must demonstrate that the government's discriminatory selection of him for prosecution was based upon an impermissible ground, such as race,

religion or his exercise of his first amendment right to free speech.'" *192 Coin-Operated*, 338 S.C. at 200, 525 S.E.2d at 885 (quoting *Catlett*, 584 F.2d at 865). In addition, "one seeking to show discriminatory enforcement ... must demonstrate arbitrary and purposeful discrimination in the administration of the law being enforced." *Harbit v. City of Charleston*, 382 S.C. 383, 396, 675 S.E.2d 776, 782 (Ct. App. 2009).

Thus, "even assuming [the] City is not enforcing [an] ordinance equally, the fact that there is some unequal treatment does not necessarily rise to the level of a constitutional equal protection violation." *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 96, 596 S.E.2d 917, 922 (2004) (holding that even if there is evidence in the record of unequal enforcement, any such evidence only rose to the level of the exercise of some selectivity in enforcement of the ordinance). Indeed, "'the conscious exercise of selectivity in enforcement is not in itself a federal constitutional violation' provided the selection is not 'deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.'" *Denene, Inc.*, 359 S.C. at 96, 596 S.E.2d at 922 (quoting *Oyler v. Boyles*, 368 U.S. 448, 456 (1962)). *See also Hill v. S.C. Dep't of Health & Envt'l Control*, 389 S.C. 1, 20, 698 S.E.2d 612, 622 (2010) (holding plaintiff failed to provide any evidence as to the identity of neighboring landowners and their alleged transgressions, such that he could not show that he was similarly situated or evidence of bias or discrimination).

Haynie has not properly pled or proven a cause of action for selective enforcement or selective prosecution. He has failed to plead that this alleged disparate treatment was based upon an impermissible ground, such as race, religion, or another impermissible

classification.[7] He has neither pled nor proven that the City has failed to investigate or enforce codes and ordinances against similarly situated landowners or contractors.[8] *See Hill*, 389 S.C. at 20, 698 S.E.2d at 622. Moreover, even assuming either the Individual Employees or the City were enforcing the Code and ordinances unequally, Haynie has failed to provide any evidence that the minimal selective enforcement, which is constitutionally permissible, was deliberately based upon an unjustifiable standard. *See Denene, Inc.*, 359 S.C. at 96, 596 S.E.2d at 922. In fact, Haynie cannot articulate any reason for the alleged disparate treatment, other than asserting that the Individual Employees "were just looking to get [him]." Therefore, the grant of summary judgment in the City's favor should be affirmed.

[7] Moreover, because Haynie is not a member of a suspect class, the ordinances and Code requirements for which he was cited need only have a rational basis to a legitimate government purpose. *See Denene, Inc.*, 359 S.C. at 92, 596 S.E.2d at 920.

[8] As Greenwood testified "if [the officers] received a specific complaint, [they] would go by there at least to look at the property to assess if the call addressed a valid complaint or not." (R. p. 496, ll. 10-16).

D. The grant of summary judgment in the City's favor should be affirmed because the City is entitled to Quasi-Judicial Immunity pursuant to S.C. Code Ann. § 15-78-60(1) and (2).

In granting the City's motion, the circuit court did not need to address the City's argument that it is entitled to quasi-judicial immunity pursuant to Section 15-78-60(1) and (2) of the South Carolina Code of Laws in granting its motion for summary judgment. However, the fact the City is entitled to such immunity provides an alternative ground upon which the circuit court's decision may be affirmed. Under South Carolina law, a governmental entity is not liable for a loss resulting from "legislative or judicial action or inaction" or "administrative action or inaction of a legislative, judicial or quasi-judicial nature." S.C. Code Ann. § 15-78-60(1) and (2).

Haynie testified that he believed the hearing before the Board was a "kangaroo court" and that it was created and designed so that he would lose his appeal. However, beyond these bald assertions, he has provided no competent evidence indicating the Board was a sham body or that any member or City employee orchestrated the loss of the appeal.[9] Moreover, the Board is either itself quasi-judicial or performs administrative actions of a quasi-judicial nature. *See Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, 403 S.C. 623, 743 S.E.2d 808 (2013) (holding that the Board of Dentistry was entitled to immunity from tort claims asserted by plaintiff pursuant to subsections (1), (2), and (4) of the Tort Claims Act). Therefore, because the City is immune from suit for any damages

[9] Haynie alleged that Frady met with the Board prior to the hearing. All Board members and Frady deny this allegation. Furthermore, even assuming such meeting took place, there is absolutely no evidence that the meeting in any way improperly influenced the Board's decision. Such assertion is mere conjecture and does not create a genuine issue of material fact to defeat the grant of summary judgment. *See Harris Teeter, Inc.*, 390 S.C. at 299, 701 S.E.2d at 754.

Haynie claims to have suffered as a result of the hearing before the Board, the grant of summary judgment in the City's favor should be affirmed.

E. The grant of summary judgment in the City's favor should be affirmed because the City is entitled to immunity under S.C. Code Ann. § 15-78-60 (4), (12), (13), and (23).

Again, while the circuit court did not need to reach the issue regarding whether the City is entitled to immunity under subsections (4), (12), (13), and (23) of the Act, the immunity afforded to the City under these subsections provide an additional sustainable ground to affirm the grant of summary of judgment. The Act provides that a governmental entity is not liable for loss resulting from: (4) "adoption, enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation, or written policies"; (12) "licensing powers or functions including, but not limited to, the issuance, denial, suspension, renewal, or revocation of or failure or refusal to issue, deny, suspend, renew, or revoke any permit, license, certificate, approval, registration, order, or similar authority except when the power or function is exercised in a grossly negligent manner; or (13) "regulatory inspection powers or functions, including failure to make an inspection, or making an inadequate or negligent inspection, of any property to determine whether the property complies with or violates any law, regulation, code, or ordinance or contains a hazard to health or safety;" and (23) "institution or prosecution of any judicial or administrative proceeding."

Haynie's allegations regarding the issuance or renewal of the building permits are subject to these exceptions. At a minimum, Haynie must prove that the City was grossly negligent in allowing its employees to wrongly issue stop work orders or refuse to renew

permits. "A defendant is guilty of gross negligence if he is so indifferent to the consequences of his conduct as not to give slight care to what he is doing." *Jackson v. S.C. Dep't of Corrs.*, 301 S.C. 125, 126, 390 S.E.2d 467, 468 (Ct. App. 1989). Haynie, however, has presented no evidence that the City was grossly negligent in enforcing its ordinances or code regulations, in issuing Stop Work Orders, in making decisions related to the building permit, in inspecting his property to determine whether it complied with the Code and ordinances, or in adjudication of code interpretations through the Board. Rather, the record is replete with evidence that the City had in place a proper administrative system for the enforcement of building codes and ordinances, decisions concerning permits and work orders, and property inspections, and that the system was properly followed in each of these instances. Because Haynie has failed to provide any evidence demonstrating negligence or gross negligence by the City, the grant of summary judgment in the City's favor should be affirmed.

F. The circuit court's orders granting summary judgment in favor of the City and the Individual Employees are not inconsistent.

Haynie asserts that the circuit court's orders granting summary judgment to the City and the Individual Employees are inconsistent and that "the inherent contradiction" in the court's orders is indicative that issues of fact exist with regard to whether the Individual Employees were acting within the course and scope of their employment with the City." *See* Initial Brief of Appellant, p. 16. Haynie clearly misapprehends the bases for the circuit court's grant of summary judgment to the City and the Individual Employees.

In granting the City's motion, the circuit court made three findings: 1) the

applicable statute of limitations barred Haynie's cause of action for negligent hiring; 2) Haynie's negligent supervision claim failed because the Individual Employees' conduct occurred away from the City's premises; and 3) the City could not be held liable for alleged intentional torts by the Individual Employees. *See* South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-60 (17). In addition, the circuit court correctly recognized that, based on Haynie's allegations alone, the City could not be held liable as a matter of law.

With regard to the Individual Employees' separate motion, the circuit court dismissed Haynie's civil conspiracy cause of action against them based on a lack of evidence amounting to a civil conspiracy. The circuit court found that Haynie's code issue was "referred to and resolved by the [Board] in accordance with the dictates of the building code," and did not evidence any civil conspiracy. *See* R. pp. 10, 13. The circuit court specifically held that Haynie failed to come forward with any factual evidence to substantiate his allegations of civil conspiracy, including that the Individual Employees' actions were motivated by personal reasons. *See* R. p. 24. ("In fact, Plaintiff cannot articulate any reason for the alleged disparate treatment, other than asserting that the individual Defendants 'were just looking to get [him].'").

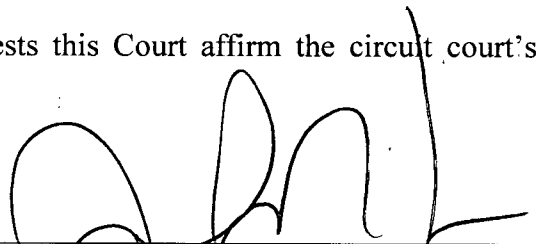
Therefore, contrary to Haynie's assertion, the circuit court's order dismissing the City was based on Haynie's own contradictory allegations that the Individual Employees' conduct was intentional but that the City was still responsible for their conduct. Haynie is bound by his allegations set forth in his Complaint. *See Elrod v. All*, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964). In short, the circuit court's findings do not create a genuine issue of material fact regarding whether the Individual Employees were acting

within the course and scope of their employment. The circuit court's Summary Judgment Order granting the City's motion is therefore consistent with its order granting the Individual Employees' motion. Accordingly, the circuit court's grant of summary judgment should be affirmed.

CONCLUSION

The circuit court properly granted the City's motion and entered summary judgment in its favor. Viewing the record evidence in the light most favorable to Haynie reveals that he has failed to set forth a cognizable cause of action against the City and that even if he did, the City is entitled to immunity against any such causes of action. Therefore, the City respectfully requests this Court affirm the circuit court's grant of summary judgment in its favor.

3/9, 2015

By: 

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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court Of Common Pleas

The Honorable G. Thomas Cooper, Jr., Judicial Circuit Court Judge
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Appellate Case No. 2014-001728

Frank "Doc" Haynie.....Appellant,

v.

The City of Forest Acres, Mark M. Williams, Shaun Greenwood, and Clark Frady, in their individual capacities. .....Respondents.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of Respondent The City of Forest Acres complies with Rule 211(b), SCACR.

Respectfully Submitted,

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PROOF OF SERVICE

I, Susan Book, the undersigned employee of Gallivan White & Boyd, P.A., attorney for Respondent The City of Forest Acres, do hereby certify that I have served a copy of the foregoing Final Respondent's Brief, in connection with the above-referenced case by mailing a copy of same on March 9, 2015, by U.S. Mail, with sufficient first class postage, addressed as listed below:

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