

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Court Judge

Appellate Case No. 2014-002578

Ryan Powell,

Appellant,

v.

Amy Boheler d/b/a York County Auditor,
Beth Latham d/b/a York County Treasurer, and
Robert Kiser d/b/a York County Delinquent Tax Collector,
each in their official capacities .,

Respondents.

Respondents' Initial Brief

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STATEMENT OF ISSUES ON APPEAL

I. Did the circuit court properly dismiss a lawsuit challenging the authority of York County to assess and collect taxes on a parcel of real property, where the Revenue Procedures Act vests South Carolina's Administrative Law Court with the exclusive jurisdiction to decide such cases and where the Revenue Procedures Act provides the exclusive remedy "in any case involving the illegal or wrongful collection of taxes, or attempt to collect taxes?"

II. Did the circuit court properly dismiss an individual's lawsuit against three York County employees where the lawsuit was based entirely upon the employees' efforts to assess and collect delinquent property taxes, and where the Tort Claims Act has expressly preserved the government's immunity from liability and suit in such cases?

III. Did the circuit court properly dismiss an individual's claim for breach of contract where the facts alleged in the plaintiff's complaint failed to establish the existence of any valid or enforceable contract?

IV. Should this court consider Appellant's arguments related to his mother's desire to provide him with legal assistance where the circuit court's written order did not even mention the issue, much less rule upon it, and where Appellant did not properly preserve the issue for appellate review?

STATEMENT OF THE CASE

The procedural history of this case¹ is relatively short, but quite involved. Appellant Ryan Powell (“Powell”) filed this action in the Court of Common Pleas on May 1, 2014, asserting multiple causes of action against York County’s auditor, treasurer and delinquent tax collector (the “County Employees”) – all related to the County’s efforts to assess and collect taxes on a piece of real property that Powell claims to own.² See Complaint. Powell’s complaint included ten causes of action: sham legal process; fraud; trespass *quare clausum fregit*; money had and received; slander of title; false light invasion of privacy/libel; breach of contract; negligence per se; civil conspiracy; and intentional infliction of emotional distress. *Id.* Powell’s complaint also included a motion for writ of mandamus, seeking an order compelling the County Employees to perform various tasks, including: return money allegedly “extorted from Powell” (i.e. – the money Powell paid to avoid sale of his property at the York County delinquent tax sale); and update York County’s records to “remove all reference to [Powell’s] allodial land.” *Id.* at 4-5.

Rather than answer Powell’s complaint, York County appeared on behalf of the County Employees, asserting that York County should be substituted as defendant in Powell’s lawsuit.

¹ This case is but one salvo in an ongoing barrage of litigation that Powell and his mother have launched against York County in the past several months concerning the same issues that are at the heart of Powell’s complaint. In December 2013, Powell filed suit in the original jurisdiction of the South Carolina Supreme Court. See *Kendree Aff.* and Exhibit F thereto. The Supreme Court dismissed that case on February 20, 2014 and then denied Powell’s petition for rehearing. Exhibits G and I to *Kendree Aff.* In May 2014, Powell filed this case in York County’s Court of Common Pleas. In August 2014, Powell and his mother attempted to file a second action in the original jurisdiction of the South Carolina Supreme Court. Exhibit J to *Kendree Aff.* The Supreme Court dismissed that case on September 25, 2014. Exhibit K to *Kendree Aff.* Finally, in October 2014 Powell and his mother filed a petition for writ of error in the original jurisdiction of the South Carolina Supreme Court. The Supreme Court dismissed that petition on November 21, 2014 and threatened Powell with sanctions “should he continue to file frivolous petitions which are not proper for this Court in its original jurisdiction.” Supreme Court Order of Dismissal, dated Nov. 21, 2014.

² Powell has not filed any deed to evidence his ownership. According to publicly-filed property records maintained by the York County Clerk of Court, the most recent owner of record is a private trust called San Juan Holdings.

Motion to Dismiss for Lack of Subject Matter Jurisdiction / Motion to Substitute Defendant and to Dismiss in Whole or in Part, filed May 21, 2014 (hereafter “Motion to Dismiss”). York County also moved to have Powell’s complaint dismissed pursuant to Rules 12(b)(1) and 12(b)(6) S.C.R. Civ. P. Id.

On June 19, 2014, Special Circuit Court Judge S. Jackson Kimball, III heard York County’s Motion to Dismiss. During that hearing, Powell’s mother attempted to argue in opposition to the county’s motions. After determining that Powell’s mother was not a licensed South Carolina attorney, Judge Kimball refused to let the woman argue her son’s case. *See* Transcript of June 19, 2014 Hearing, at 13-14. Powell then argued his own case. Powell also orally moved to continue the hearing so that he could amend his complaint and add Powell’s mother as a plaintiff. Id. at 21. Judge Kimball denied Powell’s motion. Id.

On June 25, 2014, Judge Kimball issued a written order granting each of York County’s motions and dismissing Powell’s complaint pursuant to Rules 12(b)(1) and 12(b)(6) S.C. R. Civ. P. *See* Order Substituting Defendant and Order of Dismissal, filed June 25, 2014. Judge Kimball’s written order did not address Ms. Powell’s attempts to argue her son’s case, or the court’s refusal to allow her to do so.

On July 1, 2014, Powell moved to have Judge Kimball recuse himself and also moved for reconsideration of the court’s order of dismissal. *See* Rule 59 Motion and Judicial Notice of Disqualification, filed July 1, 2014. Powell also included in that motion a “Judicial Notice of Disqualification,” notifying Judge Kimball that the judge was “obligated to void [the court’s] order and disqualify [himself] *sua sponte* from hearing anything associated with [Powell’s] case.” *See* Id.

On October 16, 2014, the parties appeared before Judge Kimball for a hearing on Powell's pending motions. Powell argued his motions for reconsideration, but did not pursue his motion to have Judge Kimball recused or disqualified. Nor did Powell seek reconsideration of the court's refusal to allow Powell's mother to argue Powell's case. *See* Transcript of October 16, 2014 Hearing. Judge Kimball denied Powell's motion for reconsideration. *See* Order filed October 23, 2014. On October 28, 2014, York County filed a motion for sanctions, pursuant to South Carolina's Frivolous Civil Proceedings Act. Motion for Sanctions, filed Oct. 28, 2014. That motion is pending, but has been stayed by this appeal.

On October 21, 2014, before Judge Kimball's order denying rehearing was even filed, Powell filed a Petition for Writ of Error in the original jurisdiction of the South Carolina Supreme Court. Petition for Writ of Error, filed Oct. 21, 2014. That petition was dismissed by the Supreme Court on November 21, 2014. *See* S.C. Supreme Court Order, dated November 21, 2014.

Powell filed this appeal on November 21, 2014. *See* Notice of Appeal.

STATEMENT OF FACTS

Assuming that the factual allegations of Powell's complaint are true, Powell is "one of the people of South Carolina" and the owner of a piece of land, which he describes as "allodial land,"³ located within the geographic boundaries of York County, South Carolina (the "Property").⁴ Complaint at 1, ¶ 1. Powell acquired the Property on or about December 20, 2012 from a private unregistered trust, San Juan Holdings. *Id.* at 3, ¶ 11

Powell intentionally did not record his deed to the Property in York County's public records. Instead, Powell required San Juan Holdings to record a document captioned a "Notice of Sale, Transfer or Exchange." *Id.* at 3, ¶ 12. That document purports to evidence transfer of the Property from San Juan Holdings to an unidentified "unenfranchised living man" (presumably Powell) and also purports to give notice of San Juan Holdings' immediate dissolution. Exhibit A to Complaint.

York County did not update its tax records to reflect San Juan Holdings' transfer of the Property. Complaint at 4, ¶ 20. Nor did York County receive payment of 2012 property taxes that were owed on the Property. In September 2013, the County's delinquent tax collector posted a Notice of Levy on the Property, and the Property was listed for sale at the York County delinquent tax sale. *Id.* at 5, ¶ 31. On the day of that sale, Powell paid 2012 property taxes, fees and penalties under protest. *Id.* at 8, ¶¶ 55-56.

³ Powell initially alleged that he held "absolute" allodial title to his land. *See* Complaint at 1, ¶ 1. Powell now seems to have abandoned his claim to "allodial" title, asserting that "allodial land" is "simply a handle to refer to my land." June 19, 2014 Trans. at 22.

⁴ York County will use the handle "Property" to refer to Powell's land.

ARGUMENT

This appeal – indeed, this entire dispute – is part of Powell’s orchestrated and contrived attempt to circumvent and frustrate the authority of York County to assess and collect taxes on real property that Powell claims to own. Powell’s entire case is based upon his erroneous belief that he has somehow removed his land from the “private company” of York County by not recording his deed, so that his land can no longer be taxed by the County. Complaint at 3, ¶ 17. To advance his case, Powell relies upon misunderstood or misapplied principles of law, archaic or non-existent concepts of property ownership, absurd word choice and placement,⁵ and slanderous attacks on any person opposing or questioning his position.^{6,7}

The circuit court quickly saw through Powell’s game, and summarily dismissed his entire case. In doing so, the circuit court concluded that Powell’s claims for damages are barred by the doctrine of sovereign immunity, so that the allegations of Powell’s complaint did not state an actionable claim. The circuit court also concluded that, to the extent Powell’s complaint was a challenge to the taxing authority of York County, the circuit court lacked subject matter jurisdiction to consider that challenge. The circuit court’s rulings were correct, and dismissal of

⁵ For example, Powell refuses to refer to his land as “real property,” asserting that there is a legal distinction between “land” and “real property.” Appellant’s Brief at 9-11. Powell also stresses that his land is “on” South Carolina, not “in” South Carolina. *Id.* Powell has compared himself to a “slave,” both in filings and in argument before the circuit court. Appellant’s Brief at 19; Oct. 16, 2014 Hearing Trans. at 9. Finally, Powell instructed the circuit court not to refer to him as “Mister Powell,” asserting that he is “not a corporate fiction created by and subject to the state” so the courtesy title “Mister” does not apply to him. Oct. 16, 2014 Trans. at 4.

⁶ See Judicial Notice of Disqualification, filed by Appellant July 1, 2014 (accusing circuit court judge of “prejudice, partiality and prejudgment”); see also Appellant’s Return to Respondent’s Motion for Extension of Time, filed January 27, 2015 in this court (accusing York County’s attorney of incompetence and misrepresentations).

⁷ Like the circuit court, York County sees Powell’s principal theory as a “rambling presentation of twisted, disconnected and inapplicable legal theories that contradicts all statutory and case law governing the issues presented.” See June 25, 2014 Order at 1. York County believes that it is unnecessary to address Powell’s principal argument in substantive detail, since that argument was not addressed by the circuit court and is not properly on appeal. York County’s silence should not be construed as acquiescence or tacit acceptance of Powell’s arguments.

Powell's complaint was entirely appropriate and proper. The circuit court's order of dismissal must be affirmed on appeal.

I. The circuit court properly dismissed Powell's lawsuit challenging the authority of York County to assess and collect taxes on a parcel of real property, because the Revenue Procedures Act vests South Carolina's Administrative Law Court with the exclusive jurisdiction to decide such cases and provides the exclusive remedy⁸ "in any case involving the illegal or wrongful collection of taxes, or attempt to collect taxes."

As Powell's appellate brief makes abundantly clear, his lawsuit has more to do with challenging the validity, enforceability and applicability of South Carolina's tax laws than it does with attempting to recover damages. Indeed, a significant portion of Powell's brief is essentially a "doctrinal manifesto,"⁹ espousing legal arguments in an effort to support Powell's philosophical belief that York County has no power or right to issue a tax bill for Powell's Property. *See* Appellant's Brief at 5-21. However, those arguments were never substantively addressed by the circuit court, because the circuit court determined that it did not have subject matter jurisdiction to hear Powell's arguments. June 25, 2014 Order at 3.

On appeal, this court cannot review rulings that the circuit court *never made*. The circuit court did not rule that Powell was liable for taxes; nor did the circuit court rule that Powell's Property could be "taken" by the County. *Compare* Appellant's Brief at 6 to June 25, 2014 Order. Those issues were never taken up by the circuit court, and they certainly were not "findings" or "conclusions" of the court's order. "The written order is the trial judge's final order and as such constitutes the final judgment of the court." Ford v. State Ethics Comm'n, 344 S.C.

⁸ The Revenue Procedures Act vests the circuit court with jurisdiction to hear "an action for a declaratory judgment where the sole issue is whether a statute is constitutional." S.C. Code § 12-60-80 (Law. Co-op. 2014). As the circuit court noted, that provision of the Revenue Procedures Act is inapplicable to this case. *See* June 25, 2014 Order at 3.

⁹ *See* June 25, 2014 Order at 1 "Plaintiff's complaint and legal memoranda read like a doctrinal manifesto."

642, 646, 545 S.E.2d 821, 823 (2001). Appeal may be taken from a “final judgment,” not from comments made by the court during argument. Rule 201(a) S.C. App. Ct. R.

Powell has yet to present his substantive challenge to York County’s taxing procedures and authority to South Carolina’s Administrative Law Court, the *only* trial court with jurisdiction to consider the merits of his challenge. See S.C. Code Ann. § 12-60-80(A)(Law. Co-op. 2014). As the circuit court recognized, the Revenue Procedures Act (“RPA”) provides the exclusive remedy “in any case involving the illegal or wrongful collection of taxes, or attempt to collect taxes.” S.C. Code Ann. § 12-60-80(A)(Law. Co-op. 2014). The RPA contains a “contested case” procedure whereby a “property taxpayer” may challenge a county’s property tax assessment, and it vests South Carolina’s Administrative Law Court with the exclusive jurisdiction¹⁰ to decide contested cases. *Id.* §§ 12-60-2520 – 2540; see also Brackenbrook N. Charleston, LP v. Cnty. of Charleston, 360 S.C. 390, 398, 602 S.E.2d 39, 44 (2004)(“[R]elief under the [RPA] is not limited to [property tax assessment disputes].”). If Powell truly believes that York County is wrongly assessing taxes against his Property or wrongly attempting to collect taxes from him, then Powell’s remedy is under the RPA. The circuit court properly ruled that it did not have jurisdiction to hear Powell’s tax protest, and dismissed that portion of his complaint without prejudice. S.C. Code Ann. § 12-60-3390 (Law. Co-op. 2014)(“If a taxpayer brings an action covered by this chapter in circuit court, the circuit court shall dismiss the case without prejudice.”).

Powell strenuously disputes that the RPA applies to him, asserting that he is not a “property taxpayer” within the meaning of the RPA. Appellant’s Brief at 24. However, the RPA defines “property taxpayer” as “a person who is liable for, *or whose property or interest in*

¹⁰ See note 8, *infra*.

property is subject to, or liable for, a property tax imposed by this title.” S.C. Code Ann. §12-60-30(22)(Law. Co-op. 2014)(emphasis added). Thus, while Powell clearly disputes that he is a “person who is liable for . . . a property tax,” he cannot credibly dispute that his “property or interest in property is subject to,¹¹ or liable¹² for, a property tax.” Indeed, that is the very crux of Powell’s case – he claims that his property was, and is, wrongfully exposed to liability for a tax debt owed by another. Appellant’s Brief at 2, 6. Powell, therefore, squarely meets the RPA’s definition of “property taxpayer,” and the RPA provides his exclusive avenue to challenge York County’s taxing authority. The circuit court properly refused to decide Powell’s challenge, because it did not have the requisite subject matter jurisdiction to consider that issue. S.C. Code Ann. § 12-60-3390 (Law. Co-op. 2014).

On appeal, this court should consider only whether the circuit court properly decided that it lacked subject matter jurisdiction to consider Powell’s tax challenge. Rule 201(a) S.C. App. Ct. R.; S.C. Code Ann. § 14-8-200 (Law. Co-op. 2014). If the answer to that question is yes, then the circuit court’s order of dismissal must be affirmed. If the answer is no, then this court should still affirm if it determines that the circuit court properly dismissed Powell’s damage claims pursuant to Rule 12(b)(6). Even if this court answers both questions “no,” Powell’s remedy is for remand of his case to the circuit court for further proceedings. Powell is not entitled to litigate his substantive tax challenge in the appellate courts of this state. S.C. Code Ann. § 14-8-200(a)(Law. Co-op. 1976)(“Jurisdiction of [South Carolina Court of Appeals] is appellate only. . . .”); Key v. Currie, 305 S.C. 115, 116, 406 S.E.2d 356, 357 (1991)(“In Rule

¹¹ “subject to – Liable, subordinate, subservient, inferior, obedient to; **governed or affected by**; provided that; provided; **answerable for**.” Black’s Law Dictionary (6th ed. 1991); “subject – **suffering a particular liability or exposure (to)**.” Webster’s Collegiate Dictionary (10th ed. 1994).

¹² “Definition of liable from Merriam-Webster’s dictionary: – legally responsible for something, likely to be affected or harmed by something, likely to do something.” Appellant’s Brief at 6 n. 1.

229, SCACR, [South Carolina Supreme] Court has indicated it will not entertain matters in its original jurisdiction where the matter can be entertained in the trial courts of this State.”). As tempting as it may be, this court should not take that bait.

II. The circuit court properly dismissed Powell’s lawsuit against three York County employees because his lawsuit was based entirely upon the employees’ efforts to assess and collect delinquent property taxes owed to the County, and the Tort Claims Act has expressly preserved the government’s immunity from liability and suit in such cases.

The circuit court had subject matter jurisdiction to consider Powell’s claims for damages, and correctly concluded that each of those claims is barred by the doctrine of sovereign immunity. June 25, 2014 Order at 3-4. By its express terms, South Carolina’s Tort Claims Act grants “the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit from any tort *except as waived* by this chapter” and “expressly preserve[s]” “*all other immunities* applicable to a governmental entity, its employees and agents.” S.C. Code Ann. § 15-78-20(b)(Law. Co-op. 2005). As the circuit court recognized, the state has not waived, and has therefore preserved, its immunity from “liability and suit” for, among other things, “any loss resulting from . . . (3) execution, enforcement or lawful implementation of any process; (4) adoption, enforcement or compliance with any law . . . whether valid or invalid . . . ; (9) entry upon any property where the entry is expressly or impliedly authorized by law; [and] (11) assessment or collection of taxes or special assessments or enforcement of tax laws.” S.C. Code Ann. § 15-78-60 (Law. Co-op. 2005). The Tort Claims Act also makes clear that it is to be “liberally construed in favor of limiting the liability of the State.” S.C. Code Ann. § 15-78-20 (Law. Co-op. 2005).

“The provisions of Section 15-78-60 (4) [and the other sections cited by the trial court] are clear and unambiguous on their face, and are not subject to judicial interpretation.” Adkins

v. Varn, 312 S.C. 188, 192, 439 S.E.2d 822, 824 (1993). York County and its employees are plainly immune from both liability and suit, where the only claims asserted against them arise from the County's efforts to assess and collect delinquent taxes.

Powell argues that his claims are not barred by the doctrine of sovereign immunity for three reasons. First, Powell argues that the Tort Claims Act does not apply because he brought a "common law" action against the County Employees in their "individual capacities," rather than a suit under the Tort Claims Act. Appellant's Brief at 28-31. Next, Powell argues that the trial court should not have considered whether the County Employees were entitled to immunity because immunity is an affirmative defense that must be "proven at trial." Id. at 31-32. Finally, Powell argues that, because his complaint included a claim for breach of contract, the Tort Claims Act could not bar that cause of action. Each of these arguments is flawed and erroneous.

A. The circuit court properly applied the doctrine of sovereign immunity, as "expressly preserved" by the South Carolina Tort Claims Act, because the Act applies to all claims against a governmental entity or its employees.

Contrary to Powell's contention,¹³ litigants who seek to sue the state, its political subdivisions, or governmental employees are not at liberty to choose whether their claims are governed by the Tort Claims Act. The "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." Flateau v. Harrelson, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct. App. 2003)(citing 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)). Furthermore, the Act provides that "[i]n the event [an] employee is individually named, the agency or political

¹³ "Ryan did not bring his action under the TCA. . . ." Appellant's Brief at 30.

subdivision for which the employee was acting must be substituted as the party defendant.” S.C. Code Ann. § 15-78-70 (Law. Co-op. 2005). The circuit court properly applied the Tort Claims Act, and properly ordered that York County must be substituted for the County Employees as Powell’s defendant. *See* June 25, 2014 Order at 2-3.

While Powell contends that he somehow “opted out” of the Tort Claims Act by bringing his claims under the common law, South Carolina’s Supreme Court has rejected the notion that a plaintiff may avoid the Tort Claims Act through artful pleading. *See, e.g., Adkins v. Varn*, 312 S.C. 188, 192, 439 S.E.2d 822, 824 (1993). In *Adkins*, a plaintiff tried to avoid the bar of sovereign immunity by alleging that his claim was based on Greenville County’s failure to “respond to citizens’ complaints” about vicious dogs, rather than the county’s failure to enforce its leash law.¹⁴ Describing the plaintiff’s argument as an attempt to draw “distinction without a difference,” South Carolina’s Supreme Court held that the plaintiff’s complaint failed to state an actionable claim, and that the complaint had been properly dismissed pursuant to the doctrine of sovereign immunity. *Id.* Like the plaintiff in *Adkins*, Powell cannot avoid the Tort Claims Act by characterizing his lawsuit as a “common law” action, or by including non-tort claims in his complaint.

The real issue, and one Powell either overlooks or ignores, is that the Tort Claims Act is merely a limited waiver of the state’s sovereign immunity. *Moore v. Florence School Dist. No. 1*, 314 S.C. 335, 339, 444 S.E.2d 498, 500 (1994). The Act makes clear the Legislature’s intent to grant government officials immunity “*except as waived*” by the Act. S.C. Code § 15-78-20(b)(Law. Co-op. 2005)(emphasis added). The Act also “expressly preserves” “*all other immunities* applicable to a governmental entity, its employees and agents.” *Id.* (emphasis

¹⁴ The Tort Claims Act “clearly exempts from liability any loss resulting from the failure to enforce an ordinance.” *Adkins*, 312 S.C. at 192, 439 S.E.2d at 824; S.C. Code Ann. § 15-78-60(4)(Law. Co-op. 2005).

added). Thus, the relevant inquiry is not whether Powell labeled his claims “tort” claims or “common law” claims. The relevant inquiry is whether Powell seeks to impose liability where the County and its employees are entitled to immunity. If so, his claims are barred – irrespective of his theories of liability or the labels placed on his causes of action. The circuit court properly analyzed that issue, and properly dismissed Powell’s damages claims with prejudice. June 25, 2014 Order at 3-4; *see also* S.C. Code Ann. §§ 15-78-60(3),(4), (9) and (11)(Law. Co-op. 2005).

Powell also asserts that, because he has alleged that the County Employees acted “individually, and not in their official capacity,” he has pled his way around the Tort Claims Act and its immunity provisions. Appellant’s Brief at 30. After all - Powell argues - the Tort Claims Act only grants immunity to governmental officials “acting within the scope of their official duty” and he has alleged that the County Employees acted outside of their “official duty” to cause him harm. *Id.* Powell also contends that the circuit court was bound to accept the allegations of his complaint as true, at least when considering whether to dismiss his complaint under Rule 12(b)(6). *Id.* While Powell accurately states the standard for the circuit’s consideration of a Rule 12(b)(6) motion, he misses the mark in applying that standard to his complaint.

As an initial matter, Powell’s complaint does not contain any allegation that the County Employees acted outside of their “official duty” to cause Powell harm. *See* Complaint at 1, ¶ 2 (“Defendant[s] . . . are all public officers”) and ¶ 3 (“Defendants act in their official capacity as taxing and collection agents for the private company named ‘County of York.’”). More importantly, whether the County Employees acted “within” the scope of their “official duty” or “in excess” of that duty is a legal conclusion, not a factual allegation. The United States Supreme Court has made clear that, when a court is considering whether a complaint is sufficient

to avoid dismissal pursuant to Rule 12(b)(6), only the *factual* allegations of the complaint are entitled to a presumption of truth. Papasan v. Allain, 478 U.S. 265, 286 (1986). A “legal conclusion couched as a factual allegation” is entitled to no such presumption. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009); Papasan, 478 U.S. at 286. Powell’s contention that the County Employees acted outside their official duty is not a factual allegation – it is an unsupported legal conclusion. Therefore, even if that allegation were contained in Powell’s complaint, which it is not, the allegation would be entitled to no presumption of truth. Id. The *facts*, as alleged in Powell’s complaint, plainly demonstrate that the County Employees were merely carrying out their official duties to assess and collect taxes. For that reason, the circuit court correctly concluded that the Tort Claims Act and its grant of sovereign immunity applies.

B. The circuit court properly dismissed Powell’s lawsuit because the Tort Claims Act preserves York County’s immunity from liability and trial, effectively granting York County and its employees an entitlement “not to stand trial or face the other burdens of litigation.”

Powell next argues that, even if Respondents are entitled to immunity, it was premature for the trial court to decide that issue on a motion to dismiss, because immunity is an affirmative defense “that must be proved by the defendant at trial.” Appellant’s Brief at 31. Again, Powell’s argument misses its mark.

The Tort Claims Act clearly states that its purpose is “to grant . . . immunity from *liability and suit* for any tort except as waived” by the Act. S.C. Code Ann. § 15-78-20(b)(Law. Co-op. 2005). “Where a statute contains terms that are clear and unambiguous, a court must apply those terms according to their literal meaning.” Adkins v. Varn, 312 S.C. 188, 191, 439 S.E.2d 822, 824 (1993). By its express terms, the Act preserves the government’s right to immunity - not only from liability, but also from suit. Powell’s reading of the Act, as one that requires a

defendant to prove its entitlement to immunity by evidence presented at trial, would provide no immunity from suit and would frustrate a clearly stated objective of the statute. Powell's interpretation of the Tort Claims Act cannot be reconciled with the Act's plain language.

Furthermore, the United States Supreme Court has recognized that sovereign immunity provides two important protections to government officials. First, it "shields government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights.'" Ashcroft v. Iqbal, 556 U.S. 662, 672 (2009)(quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)) Second, it provides a "limited 'entitlement not to stand trial or face the other burdens of litigation.'" Id. (quoting Mitchell v. Forsyth, 472 U.S. 511, 530 (1985)). For this reason, "unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985).

An immunity which could be enforced only through litigation or invoked only after discovery would give the government little or no relief from the "burdens of litigation." Id. ("The entitlement is an *immunity from suit* rather than a mere defense to liability; . . . it is effectively lost if a case is erroneously permitted to go to trial.")(emphasis is the Court's). Where, as here, the undisputed factual allegations of a plaintiff's complaint do not allege that the government or its employees violated a "clearly established law," the complaint is subject to dismissal upon the pleadings. *See, e.g., Mitchell*, 472 U.S. at 526 (denial of motion to dismiss under doctrine of immunity effects substantial right of defendants and is immediately appealable); Stewart v. North Carolina, 393 F.3d 484 (4th Cir. 2005) (involving motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6) where state asserted immunity to plaintiff's

claims); *see also* S.C. Code Ann. §15-78-60(11)(“The governmental entity is not liable for loss resulting from . . . assessment or collection of taxes . . . or enforcement of tax laws.”). The circuit court did not prematurely decide that York County was entitled to immunity from Powell’s suit. The circuit court properly granted the county’s motion to dismiss before the county and its employees were subjected to unnecessary and disruptive “burdens of litigation.” *See Mitchell* 472 U.S. at 526 (“even such pretrial matters as discovery are to be avoided if possible, as ‘[i]nquiries of this kind can be peculiarly disruptive of effective government.’”)(quoting *Hartlow v. Fitzgerald*, 457 U.S. 800, 817 (1982)).

III. The circuit court properly dismissed Powell’s claim for breach of contract because the facts alleged in Powell’s complaint failed to establish the existence of any valid or enforceable contract between Powell and York County’s employees.

Powell’s final challenge to the County’s sovereign immunity is based upon his inclusion of a breach of contract claim in his complaint. Appellant’s Brief at 30-31. As Powell recognizes, the Tort Claims Act does not affect “the government’s liability based on contract.” S.C. Code Ann. § 15-78-20(d)(Law. Co-op. 2005). What Powell overlooks, however, is that the circuit court did not rule that Powell’s contract claim was barred by the doctrine of sovereign immunity. Instead, the circuit court ruled that Powell had failed to allege sufficient facts to support his claim. June 25, 2014 Order at 4, n.1. The circuit court’s conclusion is sound, and should be affirmed on appeal.

Powell’s alleged contract is based upon his contention that each of the County Employees “signed an oath of office agreeing to uphold the Constitutions of the State of South Carolina and of the United States before legally entering public office” (presumably, their offer to Powell). Complaint ¶ 71. Powell then alleges that he wrote each of the County Employees to “accept their oaths of office thereby contractually binding each of them to their contract offers.” *Id.* ¶ 74.

Finally, Powell's complaint includes a "legal conclusion couched as a factual allegation" that his letters formed a binding and enforceable contract between him and the County Employees. Id. ¶ 75. The trial court saw Powell's breach of contract claim as an attempt to circumvent the Tort Claims Act, and found that Powell had failed to allege any facts by which "this court could conclude or infer that he entered into an enforceable contract with York County, or with any of the individuals named as defendants in Plaintiff's lawsuit." June 25, 2014 Order at 4, n.1. The trial court properly dismissed Powell's contract claim pursuant to Rule 12(b)(6), and its dismissal of that cause of action should be affirmed on appeal.

IV. This court should refuse to consider whether Powell's mother was entitled to assist Powell in prosecuting his case because the circuit court's written order did not even mention the issue, much less rule upon it, and because Powell did not properly preserve that issue for appellate review.

Powell's brief devotes significant argument to whether his mother should have been permitted to assist him in opposing York County's motions to dismiss. However, that issue was not even addressed by the circuit court's order. Nor did Powell seek a definitive ruling on that issue through his motion for reconsideration. Therefore, that issue is not preserved for appellate review, and should not be considered by this court. Elam v. South Carolina Dep't. of Trans., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004); *see also* Ford v. State Ethics Comm'n, 344 S.C. 642, 646 (2001)("The written order is the trial judge's final order and as such constitutes the final judgment of the court."); *Cf.* Kitchen v. Upshaw, 286 F.3d 179, 187 (4th Cir. 2002) ("It is well established that . . . trial courts speak only through their written orders.")(Virginia law).

CONCLUSION

The circuit court properly dismissed Powell's complaint in its entirety. Powell's complaint did not allege any cause of action that would entitle him to recover monetary damages from York County or from the County Employees. The circuit court properly substituted York

County for the County Employees and properly dismissed Powell's damages claims with prejudice. The circuit court also properly determined that it did not have subject matter jurisdiction to consider Powell's challenge to the authority of York County to assess and collect taxes, and dismissed Powell's "tax challenge" without prejudice. If Powell wishes to pursue that case, he must bring it in the Administrative Law Court. However, he has no right to pursue damages against York County or against the County Employees based upon the facts alleged in his complaint. On appeal, this court should affirm the circuit court's order of dismissal in its entirety.

Respectfully Submitted,

March 10, 2015



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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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SC Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas
The Honorable S. Jackson Kimball, Master-in-Equity

Case No.: 2014-CP-46-01425
Appellate Case No.: 2014-002578

Ryan Powell. Appellant,

v.


Amy Boheler d/b/a York County Auditor,
Beth Latham d/b/a York County Treasurer, and
Robert Kiser d/b/a York County Delinquent Tax Collector,
Each in their individual and official capacities. Respondents.

CERTIFICATE OF SERVICE

The undersigned, an employee of Hamilton Martens Ballou & Carroll, LLC certifies that the Respondents' Initial Brief and Designation of Matter to be included in the Record on Appeal was served upon other counsel of record by depositing same in the United States Mail, with sufficient postage affixed and addressed as follows:

Mr. Ryan Powell
25056 Timberlake Drive
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March 10, 2015



L. Melia Sweatt
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