

21878

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APR 10 2015

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

SC Court of Appeals

Maite D. Murphy, Circuit Court Judge

Case No. 2013-000820

Lauren L. Kyle, ...Appellant,

v.

Dorchester County Chapter SPCA,
a/k/a Francis R. Willis SPCA, ...Respondent,

RECORD ON APPEAL

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SPCA

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CASE NO 2012-CP-18-393
	)	
LAUREN L KYLE,	)	
	)	
Plaintiff,	)	
	)	
v	)	
	)	
DORCHESTER COUNTY CHAPTER	)	
SPCA, a/k/a FRANCES R WILLIS	)	
SPCA,	)	
	)	
Defendants	)	

ORDER
 CLERK OF COURT
 DORCHESTER COUNTY
 2012 NOV -7 AM 11:10
 CERTIFIED COPY

This matter was before the Court on Motion of the Defendant, Dorchester County Chapter SPCA, a/k/a Frances R. Willis SPCA, to dismiss pursuant Rule 12(b)(1) of the South Carolina Rules of Civil Procedure for lack of subject matter jurisdiction. For the following reasons the Defendant's Motion to Dismiss is hereby GRANTED

FACTS

This case stems from a cat bite that the Plaintiff, Lauren Kyle, suffered while performing public service employment at the Dorchester County SPCA. The Plaintiff was arrested on or about June 16, 2006 in connection with the robbery of a home. On or about, January 25, 2007, Ms. Kyle pleaded to a lesser offense and received probation, a fine, and public service employment. Ms. Kyle performed her public service employment through the South Carolina Department of Probation, Parole and Pardon Services (the "Department"). Ms. Kyle performed the first portion of her public service employment at the Dorchester County Chapter SPCA

On or about, November 20, 2007, while Ms. Kyle was performing her public service employment at the SPCA, she was bitten by a cat and suffered personal injuries. On or about December 29, 2009 Ms. Kyle filed a negligence law suit against the SPCA in the Court of Common Pleas for Dorchester County. Ms. Kyle never filed a workers' compensation claim for the injuries.

STANDARD

The Court can consider evidence outside of the pleadings in a motion to dismiss for lack of jurisdiction. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). The existence of an employer-employee relationship is a jurisdictional question which the court must determine on its review of all evidence in the record. Posey v. Proper Mold & Engineering, Inc., 378 S.C. 210, 216, 661 S.E.2d 395, 398 (Ct. App. 2008). The proper procedure for raising lack of subject matter jurisdiction before trial is to file a motion to dismiss pursuant to Rule 12(b)(1) SCRPC. Id. at 217, 661 S.E.2d at 399. Additionally, the Court may consider affidavits on a question of law in a jurisdictional motion without converting the motion into one for summary judgment. Id. (citing Baird at 528, 511 S.E.2d at 74). The undisputed law of South Carolina is that when an employer and its employee have accepted the provisions of the Act, it shall exclude all other rights and remedies of such employee. S.C. Code Ann. § 42-1-540. Any doubts as to a worker's status should be resolved in favor of finding her covered by the Act. Posey, 378 S.C. at 218-19, 661 S.E.2d at 400.

FINDINGS

The Court finds that the Plaintiff was a covered employee of the Department of Probation, Parole, and Pardon Services during her public service employment pursuant to § 42-1-505, S C Code Ann. The Department submitted an affidavit which evidences that it did elect to provide workers' compensation coverage to convicted persons, including the Plaintiff, under its supervision during their public service employment. The Court further finds that Ms. Kyle was a statutory employee of the Defendant during her public service employment pursuant to § 42-1-400 S.C. Code Ann. as interpreted by Bailey v. Owens, 298 S.C. 36, 39, 378 S.E.2d 63, 64 (Ct. App. 1989); Carter v. Florentine Corp., Inc. 310 S.C. 228, 230-1, 423 S.E.2d 112 (1992), Voss v. Ramco, Inc. 325 S.C. 560, 566, 482, S.E.2d 582, 585 (Ct. App. 1997), Olmstead v. Shakespeare, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003). The Court further finds that Ms. Kyle was not a true "volunteer" as contemplated by McCreery v. Covenant Presbyterian Church, 303 S.C. 271, 400 S.E.2d 130 (1990) as she did receive consideration for her work, i.e. credit to satisfy her probationary sentence.

The Court further finds that there is a strong public policy issue at hand that to allow offenders to sue public service employers would chill their participation in the public service employment program thereby harming the criminal justice system in general. Ms. Kyle's injuries arose out of and in the course and scope of her public service employment and she is thereby bound by the exclusivity provision of the South Carolina Workers' Compensation Act.

Therefore, it is hereby

ORDERED that the Defendant's Motion to Dismiss is hereby GRANTED and the Plaintiff's Summons and Complaint are hereby DISMISSED pursuant to Rule 12(b)(1) of the South Carolina Rules of Civil Procedure

IT IS SO ORDERED

New 1 2012
St George SC

Maite D Murphy
The Honorable Maite D Murphy

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

FORM 4

CERTIFIED COPY
2012 NOV -7 AM 11:10

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP1800393

Lauren L Kyle

Christina B. ...
CLERK OF COURT
DORCHESTER COUNTY

Dorchester County
Chapter SPCA

Frances R Willis SPCA

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Jason Alan Daigle 531 Savannah Hwy
Charleston, SC 294077209

Attorney for: ☐ Plaintiff ☒ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED:

☒ See attached order, (formal order to follow)

☐ Statement of Judgment by the Court

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk

INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Maitc' Murphy
Circuit Court Judge

3075
Judge Code

11-1-12
Date

For Clerk of Court Office Use Only

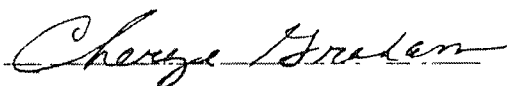
This judgment was entered on 11-7-10212, and a copy mailed first class or placed in the appropriate attorney's box on 11-7-2012 to attorneys of record or to parties (when appearing pro se) as follows

Waring Simons Howe Jr. 57 Broad St Charleston, SC
29401

Roy Pearce Maybank PO Box 12579 Charleston, SC 29422
Jason Alan Daigle 531 Savannah Hwy Charleston, SC
294077209

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)


Cheryl Graham - Clerk of Court

Court Reporter

FORM 4

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

CERTIFIED COPY
2013 MAR -6 AM 11:05

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2012CP1800393

Lauren L Kyle	Dorchester County Chapter SPCA	Frances R Willis SPCA
PLAINTIFF(S)		DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant
---------------	---

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order, (formal order to follow) ☒ Statement of Judgment by the Court.
Based upon the Court's review of the pleadings on file, memorandums submitted together with arguments of counsel, the Court finds that Plaintiff's Motion for Reconsideration is hereby denied.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk

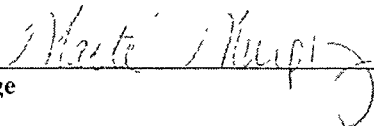
INFORMATION FOR THE JUDGMENT INDEX

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

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

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

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

Maité Murphy 	3075	3/4/2013
Circuit Court Judge	Judge Code	Date

For Clerk of Court Office Use Only

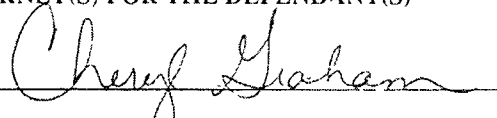
This judgment was entered on 3/6/2013, and a copy mailed first class or placed in the appropriate attorney's box on 3/6/2013, to attorneys of record or to parties (when appearing pro se) as follows:

Waring Simons Howe Jr. 57 Broad St Charleston, SC
29401

Roy Pearce Maybank PO Box 12579 Charleston, SC 29422
Jason Alan Daigle 531 Savannah Hwy Charleston, SC
294077209

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)


Cheryl Graham - Clerk of Court

Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF DORCHESTER

LAUREN L. KYLE,

Plaintiff(s)

VS

DORCHESTER COUNTY CHAPTER SPCA
a/k/a FRANCES R. WILLIS SPCA,

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2010-CP-18-28

2010 JAN -6 PM 4:42
CLERK OF COURT
DORCHESTER COUNTY

(Please Print)

Submitted By Waring S. Howe Jr., Esquire
Address 57 Broad Street
Charleston SC 29401

SC Bar #: 2709
Telephone # (843) 722-8269
Fax #: (843) 722-6722
Other: _____
E-mail: waringsh@bellsouth.net

NOTE: The cover sheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

**If Action is Judgment/Settlement do not complete*

- ☒ JURY TRIAL demanded in complaint ☐ NON-JURY TRIAL demanded in complaint
☐ This case is subject to **ARBITRATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules
☐ This case is subject to **MEDIATION** pursuant to the Court Annexed Alternative Dispute Resolution Rules
☐ This case is exempt from ADR (Proof of ADR/Exemption attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|---|--|---|--|
| Contracts
☐ Constructions (100)
☐ Debt Collection (110)
☐ Employment (120)
☐ General (130)
☐ Breach of Contract (140)
☐ Other (199)
_____ | Torts-Professional Malpractice
☐ Dental Malpractice (200)
☐ Legal Malpractice (210)
☐ Medical Malpractice (220)
Previous Notice of Intent Case #
20____-CP____-_____
☐ Notice/File Med Mal (230)
☐ Other (299)
_____ | Torts-Personal Injury
☐ Assault/Slander/Libel (300)
☐ Conversion (310)
☐ Motor Vehicle Accident (320)
☐ Premises Liability (330)
☐ Products Liability (340)
☒ Personal Injury (350)
☐ Wrongful Death (360)
☐ Other (399)
_____ | Real Property
☐ Claim & Delivery (400)
☐ Condemnation (410)
☐ Foreclosure (420)
☐ Mechanic's Lien (430)
☐ Partition (440)
☐ Possession (450)
☐ Building Code Violation (460)
☐ Other (499)
_____ |
| Inmate Petitions
☐ PCR (500)
☐ Mandamus (520)
☐ Habeas Corpus (530)
☐ Other (599)
_____ | Judgments/Settlements
☐ Death Settlement (700)
☐ Foreign Judgment (710)
☐ Magistrate's Judgment (720)
☐ Minor Settlement (730)
☐ Transcript Judgment (740)
☐ Lis Pendens (750)
☐ Transfer of Structured Settlement Payment of Rights Application (760)
☐ Other (799)
_____ | Administrative Law/Relief
☐ Reinstate Driver's License (800)
☐ Judicial Review (810)
☐ Relief (820)
☐ Permanent Injunction (830)
☐ Forfeiture-Petition (840)
☐ Forfeiture-Consent Order (850)
☐ Other (899)
_____ | Appeals
☐ Arbitration (900)
☐ Magistrate-Civil (910)
☐ Magistrate-Criminal (920)
☐ Municipal (930)
☐ Probate Court (940)
☐ SCDOT (950)
☐ Worker's Comp (960)
☐ Zoning Board (970)
☐ Public Service Commission (990)
☐ Employment Security Comm (991)
☐ Other (999)
_____ |
| Special/Complex/Other
☐ Environmental (600)
☐ Automobile Acc (610)
☐ Medical (620)
☐ Other (699)
_____ | ☐ Pharmaceuticals (630)
☐ Unfair Trade Practices (640)
☐ Out-of State Depositions (650)
☐ Motion to Quash Subpoena in Out-of -County Action (660)
☐ Sexual Predator (510)
_____ | | |

Submitting Party Signature Waring S. Howe Jr. Date December 28, 2009

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 et seq.

The State of South Carolina, }

County of DORCHESTER

COURT OF COMMON PLEAS
CASE NO. : 2010 -CP-18-28

LAUREN L. KYLE,

ANIMAL ATTACK
WITH BODILY INJURIES

against

Plaintiff

DORCHESTER COUNTY CHAPTER SPCA
a/k/a FRANCES R. WILLIS SPCA,

Defendant

JURY
SUMMONS FOR RELIEF
(Complaint Served)

DEC 29 9-10-10
CHAS. SC

TO THE DEFENDANT

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to said Complaint on the subscribed at Waring S. Howe, Jr.'s office
57 Broad Street, Charleston, SC 29401 within thirty days after the service hereof,
exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the plaintiff in this action will apply to the Court for the relief demanded in this Complaint.

Dated December 28, 2009

Waring S. Howe, Jr.
Waring S. Howe, Jr.
Plaintiff's Attorney

STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
LAUREN L. KYLE,)
Plaintiff,)
vs)
DORCHESTER COUNTY)
CHAPTER SPCA, a/k/a)
FRANCES R. WILLIS SPCA)
Defendant)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
CASE NO 2010 -CP-18-28

COMPLAINT

2010-11-06
FILED
CLERK OF COURT
DORCHESTER COUNTY
SOUTH CAROLINA

The Plaintiff, complaining of the Defendant above-named, would respectfully show unto this Honorable Court

FIRST That the Plaintiff is a resident of the County of Dorchester State of South Carolina

SECOND That the Defendant is a non-profit entity organized and existing pursuant to the laws of the State of South Carolina, doing business as a non-profit organization caring for and maintaining various kinds of animals in Dorchester County, South Carolina

THIRD That the Defendant was the employer generally of individuals who at all times mentioned hereinafter were acting in the scope of their employment as agents and employees of said Defendant, thus this Defendant is vicariously liable for the acts and omissions of these agents and employees regarding the subject incident under the legal doctrine, *respondeat superior*.

FOURTH That at all times material, the Defendant had sole and exclusive custody of

and dominion over a certain animal, believed to have been a brownish, striped tabby-type cat, (hereinafter referred to as "the cat") that the Defendant kept at 136 Four Paws Lane, Town of Summerville, County of Dorchester, South Carolina

FIFTH That at all times material, the Defendant had knowledge of the vicious propensities of the cat

SIXTH That the Defendant had the cat in their care and keeping, had duties with regard to taking care of and preventing injuries to others, and was required to perform the duties to prevent the cat from biting, scratching, and harming other persons

SEVENTH: That at all times material, the Defendant knew that the harboring of the cat and maintenance of the cat caused a dangerous condition

EIGHTH That at all times material, the Defendant had actual knowledge of the dangerous propensity of the cat and had the right to and could have provided proper safeguards and thus ended the dangerous condition

NINTH: That on November 20, 2007, at approximately 9:45 a m , the Plaintiff was on the Defendant's premises, located at 136 Four Paws Lane, Summerville, South Carolina, with permission and was walking along and engaging in various activities on the Defendant's premises for a legitimate and allowable purpose While engaged in one particular activity, the Plaintiff was caused to open the door of the cat's cage; the cat walked out of the cage and wandered nearby, the Plaintiff continued with the activity in which she was involved and completed said activity the Plaintiff then went to pick up the cat, whereupon, the cat, suddenly and without warning, wrapped itself around the Plaintiff's right hand and proceeded to attack the Plaintiff, including biting the Plaintiff's right hand

and also scratching her severely causing various severe physical and mental injuries to the Plaintiff

TENTH That the Defendant, by and through their agents and/or employees, was negligent, reckless, wanton, careless, and grossly negligent at the time and place above mentioned in the following particulars.

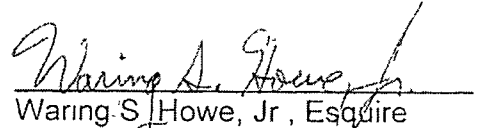
- a) in keeping, maintaining, and harboring a dangerous animal with knowledge that it had dangerous propensities;
- b) in failing to warn the Plaintiff of the dangerous propensities of the cat,
- c) in failing to muzzle or otherwise restrain the cat prior to allowing the Plaintiff to have contact with the cat;
- d) in that the Defendant knew or should have known that the cat had dangerous propensities, and in fact the Defendant had actual knowledge that the cat had dangerous propensities and did nothing to prevent the cat from injuring persons which were in its vicinity, in particular, the Plaintiff,
- e) in failing to use the degree of care and caution that a reasonably prudent custodian, keeper, or harbinger would have used under the circumstances then and there prevailing;
- f) in failing to take corrective action or otherwise restrain the animal or keep it from persons, all of which were the direct and proximate causes of the injuries and damages suffered by the Plaintiff herein, all in violation of the statutes and laws of the State of South Carolina and in violation of legal and statutory and common law principles of the State of South Carolina

ELEVENTH That at all times material, the maintenance, harboring, keeping, and allowing to remain on the premises of the cat that attacked the Plaintiff constituted an inherently dangerous condition

TWELFTH That by reason of one or more of the aforescribed acts of negligence, carelessness, recklessness, willfulness, heedlessness, and wantonness of the Defendant, by and through their agents and/or employees, the Plaintiff was caused to be viciously attacked by the cat, that the vicious attack to which the Plaintiff was subjected caused her to receive numerous wounds and injuries about her right hand and elsewhere as she was unexpectedly mauled, she was required to employ the services of hospitals, physicians, including medical specialists, and physical therapists for the treatment of her injuries, which hospitals, physicians, including medical specialists, and physical therapists were required to thoroughly treat the troublesome injuries to her right hand and elsewhere, that she suffered great pain in body and mind and upon information and belief will continue to suffer great pain in body and mind, that she has been and will be impaired in her enjoyment of life, that she has further been caused to experience great amounts of inconvenience, that she was also caused to have to alter her ordinary activities in which ways not of her personal choosing, that it is probable she will have to incur additional medical expenses in the future regarding her cat-attack injuries, that she has been caused to lose income from her employment; that she has been caused to become permanently disfigured as a result of her cat-attack injuries, that she has been caused to sustain permanent disability as a direct result of her cat-attack injuries, all to her damage, both actual and punitive, in the sum of ONE HUNDRED, EIGHTY THOUSAND (\$180,000 00) DOLLARS

WHEREFORE, PLAINTIFF PRAYS JUDGEMENT AGAINST THE DEFENDANT, BOTH ACTUAL AND PUNITIVE, IN THE SUM OF ONE HUNDRED, EIGHTY THOUSAND (\$180,000 00) DOLLARS TOGETHER WITH THE COSTS AND

DISBURSEMENTS OF THIS ACTION, AND SUCH OTHER AND FURTHER RELIEF AS
THIS COURT DEEMS JUST AND PROPER


Waring S. Howe, Jr., Esquire
57 Broad Street
Charleston, SC 29401
(843) 722-8269
ATTORNEY FOR THE PLAINTIFF

Charleston, South Carolina
December 28, 2009

TRANSCRIPT

Transcript of hearing on Dorchester County SPCA's Motion to Dismiss, held on August 29, 2012, was requested, was not produced, and was presumed lost. This page is intended to be a place holder in the event the transcript is located at a later time and the Record on Appeal supplemented accordingly.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER) FIRST JUDICIAL CIRCUIT

2012-CP-18-383

Lauren L. Kyle,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Transcript of Record
	)	
Dorchester County Chapter SPCA,	)	
a/k/a Francis R. Willis SPCA,	)	
	)	
Defendant.	)	
	)	
	)	

February 8, 2013
St. George, South Carolina

B E F O R E:

The Honorable Maite D. Murphy, Judge

A P P E A R A N C E S:

Waring S. Howe, Jr., Esquire
Attorney for the Plaintiff

Jason A. Daigle, Esquire
Attorney for the Defendant

Hilda M. Jordan, CVR-M
Circuit Court Reporter

I N D E X

WITNESS/DESCRIPTION

PAGE NO.

Motions

EXHIBITS:

No exhibits were marked to this proceeding.

Certificate of Court Reporter 16

1 THE CLERK: Lauren Kyle verses Dorchester County.

2 THE COURT: Are you ready to proceed, Mr. Howe?

3 MR. HOWE: I am, Your Honor.

4 THE COURT: I'll be happy to hear from you, sir.

5 MR. HOWE: Okay. May it please the Court. Your Honor,
6 I am Waring Howe, Jr. I represent the plaintiff in this
7 action, Lauren L. Kyle. And it was before you before, the
8 Defendant's Motion to Dismiss back in November and it was
9 granted as to whether the Court of Common Pleas had subject
10 matter jurisdiction over this matter because it was the
11 position of defense that the plaintiff's exclusive remedy
12 under South Carolina law was any benefits provided under the
13 South Carolina Workers' Compensation Act where they allege
14 an employment relationship existed in a couple of forms
15 between the plaintiff, Lauren Kyle and the organization for
16 which she was performing work, and that is the Dorchester
17 County Chapter SPCA. The Motion to Dismiss was granted. We
18 timely filed a Motion for Reconsideration under Rules 52 and
19 or Rule 59.

20 We think that this should be reconsidered and we think
21 that the Motion to Dismiss ought to be rescinded and this
22 placed back on the trial roster for the following reasons.
23 There were three basic bases included in the Court's order
24 as to why the action should be dismissed under a lack of
25 subject matter jurisdiction.

1 Now, I think I want to go over the matter of statutory
 2 employer statutory employee first, because I think that's
 3 where the greatest confusion lay. In order for their to be,
 4 Ms. Kyle, the plaintiff to be deemed a statutory employee
 5 there has to be a statutory employer. Now, in order, I
 6 believe, to understand, and it's sometimes not easily
 7 understood, the statutory employee statute. I believe
 8 what's first should be offered is why it exists. Why it was
 9 created, and I want to offer you what was offered before
 10 when this motion was originally heard. The statutory
 11 employer statute was created to offer protection in the form
 12 of making workers' compensation benefits available to
 13 injured employees in situations where there are direct
 14 employers, usually subcontractors, did not offer such
 15 protections coverage. Should the particular circumstances
 16 exist allow it to apply an injured employee can go to, i.e.
 17 seek to claim against an entity positioned on a higher rung
 18 on the ladder. Some say, quote, go upstream, end quote in
 19 order to obtain worker compensation benefits. This higher
 20 position entity very often includes general contractors and
 21 owners of plants and businesses. It was noted in Marsh
 22 Banks v. Duke Power Company 343 344 SE2d 825 1939 case.
 23 That regarding those on lower rungs of the ladder oftentimes
 24 -- that regarding those who are on lower rungs of the ladder
 25 oftentimes greater financially -- greater financial

1 irresponsibility exists or these lower entities employ so
2 few employees that they're not required under the Workers'
3 Compensation Act to carry compensation insurance.

4 So even if the defendant, the SPCA, was attempting to
5 apply the statutory employer statute it would try to tag the
6 department, the Department of Pardon and Parole with having
7 to pay workers' compensation benefits and not the entity for
8 which the plaintiff did chores directly, which was the SPCA.
9 To analogize, the Department is positioned like the general
10 contractor, the SPCA is a subcontractor and the plaintiff
11 did chores directly for the subcontractor whose work
12 benefitted the general contractor.

13 The statute, itself, is worth taking another look at,
14 the statutory employee employer statute, which goes,
15 basically -- statutory employment exists when an owner, and
16 that's a key term, undertakes to perform or execute any work
17 which is a part of his trade business or occupation and
18 contracts with any other person for the execution or
19 performance by or under such subcontractor or the whole or
20 any part of the work undertaken by such owner. The owner
21 shall be liable to pay to any workman employed and worked
22 any compensation under this title which he would have been
23 liable to pay if the workman had been immediately employed
24 by him.

25 In no instance, in no instance under the statutory

employee -- statutory employment statute is the statutory employer the entity for whom the employee worked directly. It is the next up or higher up on the rungs of that ladder.

Here the plaintiff did work directly for the SPCA. Therefore the SPCA cannot, by the statute be considered the statutory employer, therefore, the plaintiff, Laurer Kyle, cannot be the statutory employee of the SPCA. And, in fact, the statutory employment statute really doesn't have appropriate application here because for purposes of those who are required to do community service like Lauren Kyle was doing when she got attacked by the dangerous cat, there's a special statute that provides workers -- that offers the vehicle for which such community service workers have injuries while performing community service and it's Statute 42-1505 that says, quote, for purposes of this section, i.e., providing workers' compensation benefits, the department, that's the department of parole and pardons is considered the employer for those persons under its custody or supervision performing public service employment. This says, this establishes who Lauren Kyle's employer was for the -- in the context of from whom would she seek and obtain workers' compensation benefits. Not the SPCA for whom she was directly doing chores. So number one, as I said, the only time an entity can be considered the statutory employer is if they're not the entity for whom the worker is

1 performing duties directly. So on that basis alone there is
2 no such employment relationship as is required in order to
3 have workers' comp be the exclusive remedy. So on that
4 basis Lauren Kyle cannot be considered the statutory
5 employee and thus that is an inappropriate form to allege
6 there was an employment relationship existing at the time of
7 the cat attack between the plaintiff, Lauren Kyle, and the
8 defendant, the SPCA.

9 Now, also in the order which stated that an employment
10 relationship existed was -- because for an employment
11 relationship to exist there has to be that the employee was
12 either compensated with money or had the quote, right, to
13 demand payment from the employer for work the employee has
14 performed. That's the Kirtsey verses Assurance Tire case,
15 426 SE2d 721. It's a 1993 Court of Appeals case. And here
16 the one -- here's the one that I think probably is the most
17 analogous, because in the court order it said that she was,
18 in fact, compensated, thus an employment relationship
19 existed between she and the SPCA because she was given quote
20 credit towards her required performance of the community
21 service work

22 Here's the case most analogous because in this instance
23 the employee was likewise was getting credit, getting
24 classroom credit and that's the one involving the candy
25 straper. Doe verses Greenville Hospital Systems. Where it

1 says that the candy stripper who received classroom credit,
2 job training and free lunches and uniforms was deemed an
3 unpaid volunteer, not an employee. She would not have been
4 able to receive workers' compensation benefits. She would
5 have had the ability to hold the hospital accountable in
6 tort because she was -- an employment relationship did not
7 exist because she was an unpaid volunteer. You have to have
8 been either compensated in the usual good old American
9 sense that is a check or cash or direct deposit or have had
10 the right to demand payment.

11 Lauren Kyle cleaning out the animal cages, the cat
12 cages, at the Dorchester County SPCA had no right to demand
13 payment for services.

14 There's another case that talks to that, the McCleary
15 verses Covenant Presbyterian Church that held that an
16 employee is one that works for wages or salary and has the
17 right to demand payment for services. That's where he
18 donated his construction services to the church. He wasn't
19 paid any wages nor did he have any right to demand payment
20 for wages. He volunteered. Here in the Lauren Kyle sense,
21 she in a compulsory way was doing work for the SPCA as part
22 of her community service.

23 The third way that the Court's order deemed that
24 employment relationship, I don't guess, so much existed, but
25 was saying it should be considered that it existed was based

1 on a public policy statement that it would harm the criminal
2 justice in general and chill employers from participating in
3 the community service program that's administered by the
4 South Carolina Pardon and Parole.

5 But -- proper policy and what is proper policy is
6 ordinarily and most appropriately decided in the General
7 Assembly. Here what's even more important if we want to
8 talk about public policy, long established, going back to
9 English Common Law, the Tort law where by negligent
10 individuals or entities can and should be held accountable
11 for the harm they caused others.

12 This young lady, Lauren Kyle, when she was about 17
13 years old was not told, was not given any warning whatsoever
14 on about her second or third day of doing community service
15 work at the SPCA that the cat, whose cage she was assigned
16 to clean, had already attacked and injured somebody. But
17 there she goes back to that section of the animal cages and
18 that cat, as soon as she pulls it out attacks her, bites
19 her, scratches her, causes her to have \$25,000 in medical
20 expenses, has to have the skin taken off of her hand and
21 then an infection underneath scraped off. And some of the
22 most excruciating kind of skin treatment and operative
23 procedure and then the physical therapy that involves some
24 of the same kind of chemicals hitting the most sensitive
25 area underneath her original skin on her hand. The SPCA was

1 clearly -- I'm going to contend grossly negligent because
2 they didn't give her any word whatsoever or any help or
3 supervision, and as I said, no warning about -- not just the
4 potentialities of that cat, but the known propensities, the
5 record of its dangerous status.

6 So based on those three points, to sum up. Ms. Kyle
7 could not be considered a statutory employee because then
8 that would make the SPCA a statutory employer and -- the
9 kind of work that Lauren Kyle, the compulsory work at the
10 animal shelter at the SPCA had nothing to do with the trade
11 and occupation of the Department of Parole and Pardons which
12 would have to be considered, if anything is considered, as
13 the, quote, owner of the statute.

14 Again, let me repeat that when it comes to the
15 application of the statute the statutory employer is never
16 -- let me say in bold print, never -- the entity for whom
17 the person is working directly. Secondly, there has -- for
18 an employment relationship to exist, thus for her to have
19 the right to make a workers' comp claim and for her -- and
20 for there to be no subject matter jurisdiction, for an
21 employment relationship to exist you have to either have
22 received compensation in the usual way or, quote, have the
23 right to demand payment for her work. And then thirdly, the
24 public policy position, we believe, is mis-applied, that
25 holding people accountable for the harm that's sustained by

1 others would supersede the ability of the Department of
2 Pardon and Paroles to have entities be available for people
3 who do community service work.

4 For all of those considerations, Your Honor, we would
5 respectfully request that this matter in terms of the Motion
6 to Dismiss having be granted, be reconsidered, be rescinded,
7 and that we have a new order denying the Motion to Dismiss
8 and reinstating the plaintiff's Summons and Complaint.

9 Thank you for your time.

10 THE COURT: Okay.

11 MR. DAIGLE: Your Honor, Jason Daigle for the Dorchester
12 County SPCA.

13 By and large, I want to rely on my brief that I filled
14 in support of my Motion to Dismiss, as well as, the
15 arguments we had back in November.

16 I think you got it right the first time, but there are
17 some things that I want to address from Mr. Howe's argument
18 here today.

19 I'm taking them a little bit out of order. I'm taking
20 the easy ones first.

21 The employment relationship that he was talking about,
22 the right to demand payment or the right to receive
23 compensation, that has to do only with direct employee
24 employer relationships. That has nothing to do with the
25 statutory employee employment relationship. I agree that

1 him, that Ms. Kyle had no right to demand payment because
2 she was there for her community -- she was with the
3 Department for her community service. But we have a
4 statute. We have a statute that is 42-1-505, I believe,
5 that states -- Yes. 42-1-505. It says Ms. Kyle is the
6 employee of the Department. So we know who her direct
7 employer is. There's no question about that. The right to
8 demand payment has no currency or no effect on this case
9 whatsoever, because we know who her direct employer is, it's
10 created by statute.

11 Now, going to the statutory employee issue, which is
12 42-1-400. The plaintiff has it exactly backwards. These
13 cases, specifically the Bailey case and Bailey verses Owens
14 case and the Olmstead verses Shakespear case. Both are set
15 forth in my original memo in support of dismissal.

16 The Department in this case is analogous to the
17 subcontractor. Mr. Howe is right, these issues come up a
18 lot with the subcontractor, general contractor in
19 construction cases and the reason, I believe, is because
20 that's where a lot of people get hurt and there's a lot of
21 construction in South Carolina. These cases also come up a
22 lot in temp agencies or staffing agencies, where the temp
23 agencies or staffing agency has direct employees. They
24 provide labor to their customer to -- to the company who
25 would be considered the general contractor. So it's the

1 company providing the labor to someone else who is
2 considered the subcontractor. The person receiving that
3 labor is the general contractor.

4 So in this case, the SPCA would be the general
5 contractor because the Department provided that labor to the
6 SPCA. Ms. Kyle was there performing work at the behest of
7 the SPCA for the benefit of the SPCA doing the exact type of
8 job functions that their direct employees do. And that's
9 all you need to establish a statutory employee and the
10 Bailey case lays it out. And there's three prongs, and if
11 you can get any one of those prongs they are considered a
12 statutory employee. Whether the activity is an important
13 part of the trade or business, whether the activity is a
14 necessary or essential or integral part of the trade or
15 business and whether the identical activity has been
16 performed by the employees of the principle employer. Those
17 three prongs are supported by an affidavit in my original
18 memorandum in support of the dismissal.

19 Now, the plaintiff also argues that it would actually
20 be the Department that paid the workers' comp benefits if
21 she were hurt and not the SPCA. Well, it's not this Court's
22 position to determine who would and wouldn't pay the
23 workers' comp benefits. In fact, this happens all the time.
24 It's the reason we have workers' comp attorneys and the
25 Workers' Comp Administration to determine which workers'

1 comp carrier would have paid benefits in a case just like
 2 this where the subcontractor has workers' comp insurance and
 3 the general contractor has workers' comp insurance. Those
 4 kind of cases go to the Workers' Comp Commissions all the
 5 time to determine who actually has to pay. That is a red
 6 herring, as well, to distract the Court from what actually
 7 is going on here, which is that the Department provided the
 8 labor to the SPCA. That makes the Department the
 9 subcontractor or the staffing agency and it makes the SPCA
 10 the general contractor or the owner, as the statute puts it.

11 In fact, in Mr. Howe's argument he said that the
 12 plaintiff did work directly for the SPCA. That makes the
 13 SPCA Ms. Kyle's statutory employer. So she is bound by the
 14 workers' comp statutes, that is her only avenue for
 15 compensation for an injury while she was working.

16 Now, going to the public policy issue. No one is
 17 allowed to sue their employer, period. The tort law
 18 argument is also misplaced because I'm not allowed to sue my
 19 employer, no one in this room is allowed to sue their
 20 employer because that -- the right to sue under tort has
 21 been replaced by the workers' comp statutes. Ms. Kyle had
 22 very bad injuries. They were very expensive, they were very
 23 painful. We're not denying that. But the fact is that she
 24 could have recovered through workers' comp. She could have
 25 had all her medical bills paid and she could have received a

1 payment on top of that for scaring, pain and suffering,
2 things like that for any permanent impairment. But, again,
3 we're not here to argue workers' comp claim, we're just here
4 to reiterate the point that she was bound by the workers'
5 comp statutes for any recovery while she was working for the
6 SPCA.

7 Besides that, I'm going to rely on my brief that I
8 already filed and the arguments we made back in November.

9 Thank you, Your Honor.

10 THE COURT: Thank you.

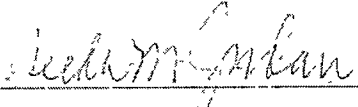
11 Thank you, gentlemen. I'll review the record and
12 notify you with a ruling.

13 (This proceeding was concluded.)
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C-E-R-T-I-F-I-C-A-T-E

I, THE UNDERSIGNED HILDA M. JORDAN, CVR-M, OFFICIAL COURT
REPORTER FOR THE FIRST JUDICIAL CIRCUIT OF THE STATE OF
SOUTH CAROLINA, DO HEREBY CERTIFY THAT THE FOREGOING IS A
TRUE, ACCURATE AND COMPLETE TRANSCRIPT OF RECORD OF THE
HEARING IN THE ABOVE CAPTIONED CAUSE, IN THE COURT OF COMMON
PLEAS FOR DORCHESTER COUNTY, SOUTH CAROLINA, ON THE 8 DAY OF
FEBRUARY, 2013.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN, COUNSEL,
NOR INTEREST IN ANY PARTY HERETO.


Hilda M. Jordan, CVR-M

June 12, 2013

- 5 As Assistant Chief Legal Counsel of the Department I have personal knowledge of the circumstances surrounding how offenders are allowed to perform public service employment at organizations such as the Dorchester County Chapter SPCA
- 6 On November 20, 2007 Lauren J. Kyle was under the Department's supervision on probation and was performing public service employment at the Dorchester County Chapter SPCA as required by her probation
- 7 As Assistant Chief Legal Counsel of the Department I have personal knowledge of how offenders such as Ms. Kyle are covered for any injuries they incur while performing their public service employment.
- 8 The Department provides all offenders under its supervision, working in the public service employment program, with workers' compensation coverage
- 9 The Department is considered the employer of the offender for the purposes of workers' compensation benefits
- 10 The State Accident Fund affords offenders workers' compensation insurance for any injuries they incur while performing their public service employment
- 11 Lauren J. Kyle was covered by workers' compensation insurance on November 20 2007 and would have been entitled to workers' compensation benefits for any injuries she sustained while performing her public service employment at the Dorchester County SPCA.
12. As Assistant Chief Legal Counsel of the Department I rely on S C Code Ann §§42-1-310, 42-1-400 42-1-505, and 42-1-540 concerning workers'

J.B.

compensation rights and benefits afforded to offenders for injuries incurred while performing their public service employment under the supervision of the Department

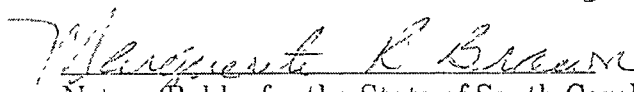
13 An offender such as Ms. Kyle who is injured at the Dorchester County SPCA while performing his or her public service employment is limited to recover solely from workers' compensation

AS TO ANYTHING FURTHER, THE AFFLIANT SAITH NOT.


J. Benjamin Aplin

SWORN TO AND SUBSCRIBED

before me this 15th day of January, 2011


Notary Public for the State of South Carolina

My Commission Expires

8/8/11

SOUTH CAROLINA
STATE ACCIDENT FUND

HARRY B. GREGORY, JR., Director

December 2, 2010

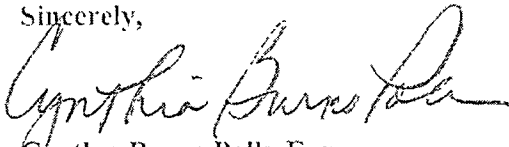
Jason A. Daigle, Esquire
MAYBANK LAW FIRM, LLC
P.O. Box 12579
Charleston, South Carolina 29422

RE: Lauren L. Kyle vs. Dorchester Chapter SPCS a/k/a Frances R. Willis, SPCA
Case No.. 2010-CP-18-28

Dear Mr. Daigle:

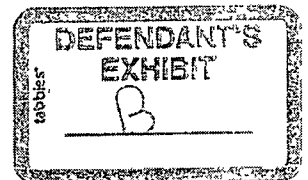
Pursuant to your Subpoena, please find enclosed a Certification Letter from Karen H. Russo, Premium Accounts Receivable. Probation, Parole & Pardon Board has had workers' compensation coverage with our agency from July 1, 1985 to present.

Sincerely,


Cynthia Burns Polk, Esq.
Attorney

CBP/jcm

Enclosure



Post Office Box 102100 Columbia, South Carolina 29221-5000 (803) 896-5800 FAX (803) 896-5828

www.mysegov.com/saf

SOUTH CAROLINA STATE ACCIDENT FUND

HARRY B. GREGORY, JR. Director

DECEMBER 02, 2010

Attn: Jason Daigle
Maybank Law Firm
PO Box 12579
Charleston, SC 29422

RE: Certification Letter

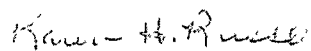
Dear Policyholder:

This certifies that the, *PROBATION, PAROLE & PARDON BOARD*, of South Carolina, covers their employees with workers' compensation coverage through the State Accident Fund.

Their coverage runs continuously from 07/01/1985 to present. This is to certify that *PROBATION, PAROLE & PARDON BOARD* is in compliance with Article 1, Chapter 7, Title 42 (Workers' Compensation Law) of South Carolina Code of Laws.

Policy # 30-064115-6

Respectfully,



Karen H. Russo

Premium Accounts Receivable

South Carolina Department of Probation, Parole and Pardon Services
Public Service Employment- Contractual Agreement and Worksite Referral

Upon being ordered to perform public service employment as a condition of my supervision, I Volunteer, in consideration of the opportunity to perform public service employment as a condition of my supervision, do hereby agree to the following conditions of my participation in the Public Service Employment Program (PSEP)

- 1 I will be required to perform a minimum of eight (8) or more hours per week. These hours are to be performed at the assigned certified work-site. Failure to contact my supervisor could result in my termination from the program.
- 2 Once accepted for employment, I must report promptly to work as scheduled by my worksite supervisor and comply with the work schedule and time period required for completion of my sentence. If I am ill or faced with an emergency situation or find I am unable to report to work on time, I must telephone my worksite supervisor immediately to report the problem. The worksite supervisor or SCDPPPS office may require written justification of my absence.
- 3 I am subject to supervision by the county DPPPS office and my Agent will be notified of my compliance or noncompliance with the public service work contract.
- 4 I understand that if I am hurt at a public service job that I may be entitled to workers compensation benefits. Since my services are not compensated, I agree that any work compensation benefits I may be entitled to will be based upon the laws and regulations applicable to inmates of the South Carolina Department of Corrections and that any income I may earn elsewhere will not be used to compute such benefits.
- 5 I will not be paid any compensation for the public service employment work I perform and I may be required by the worksite to submit to a physical exam or fill out forms prior to beginning work.
- 6 I must report to work in appropriate clothing, provide my own transportation to and from the worksite, and provide my own lunch. I further understand I will wear appropriate safety equipment as instructed by the worksite supervisor.
- 7 My worksite supervisor will grade the quality of my performance, my attitude, and my attendance record. If my public service work is unsatisfactory, the worksite supervisor may cancel my participation at the worksite, and I may be terminated from the PSEP and presented to the Court or Board for revocation.
- 8 It is my responsibility to discuss any problems I have at the worksite with my worksite supervisor in a mature manner. If the problem cannot be solved or if I am terminated or laid off from public service employment, it is my responsibility to discuss the problems immediately with the PSE Coordinator or PSE Liaison.
- 9 When my hours of public service employment are completed, it is my responsibility to make sure an authorized copy of my time log is submitted to my PSE Coordinator or PSE Liaison.

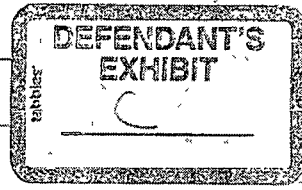
Please Print

Offender's Name		Phone No.		PSE Hours Ordered			
List Occupational Skills							
List For Each Day Of The Week, The Hours You Are Available For PSE Work							
	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
From (Time)	☐ AM ☐ PM	☐ AM ☐ PM	☐ AM ☐ PM	☐ AM ☐ PM	☐ AM ☐ PM	☐ AM ☐ PM	☐ AM ☐ PM
To (Time)	☐ AM ☐ PM	☐ AM ☐ PM	☐ AM ☐ PM	☐ AM ☐ PM	☐ AM ☐ PM	☐ AM ☐ PM	☐ AM ☐ PM
Offender's Health							
☐ Good ☐ Other -- Explain							

Referred To	
Worksite Name	Address
Supervisor's Name	
Start Date	Expected Completion Date
Phone No.	Hours to be completed at this Site

This is to acknowledge that I have read a copy of the Public Service Contractual Agreement, and agree to comply with the conditions herein. I further agree and understand that the health information provided can be furnished to the worksite agree and understand the above worksite assignment.

Offender's Signature	Date
Witness's Signature	Date



South Carolina Department of Probation, Parole, and Pardon Services
Public Service Agreement Between Worksite/Public Service Employment Program

The PSEP Agrees To

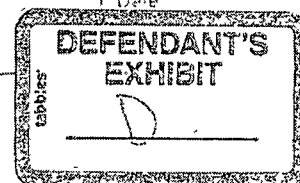
1. Screen all offenders prior to referring them to worksites and make determinations as to their suitability for fulfilling particular job description
2. Provide pertinent information regarding each offender to the worksite to assist in matching the offender to the placement
3. Provide worker's compensation insurance coverage for on-the-job injuries to the PSEP offender
4. Assist the worksite supervisor in dealing with any problems experienced by the offender during his work placement
5. Maintain steady contact with the worksite supervisor to promote open communication regarding offender or worksite needs
6. Notify the worksite supervisor of any verified changes in the offender's life circumstances which impact upon his performance of public service-work (i.e., change of address, change in employment, transportation issues, etc.)
7. Provide consultation and training opportunities to worksites
8. Investigate any insurance claims for on-site injuries
9. Visit worksites to address issues and consult with the worksite supervisor regarding any problems experienced by the worksite or offender
10. Refer all offenders terminated by the worksite supervisor to the Court or board for final disposition
11. Maintain contact with worksite supervisor to verify reasons for any offender's absences or tardies from public service work
12. Maintain accurate records of each offender's referral, participation, and termination from public service employment

The Worksite Agrees To

1. Supply the PSEP with accurate job descriptions for offenders which clearly state the tasks offenders will be asked to perform, including special eligibility requirements
2. Keep the PSEP informed of any alterations in the original job description
3. Place offenders in jobs which do not involve solicitation or money, overt political work, religious, promotion or proselytizing
4. Interview each prospective offender to outline worksite expectations as to job performance and develop with the offender a work schedule which can accommodate successful completion of work hours
5. Report the initial contact of the offender with the worksite to the PSEP, as well as notify the PSEP of any inability to place an offender at the worksite
6. Assign a worksite supervisor who will be responsible for providing guidance and supervision, recognizing good performance, maintaining open communication, and providing recognition and incentive to the offender
7. Provide and require the usage of personal protective equipment (i.e. safety glasses, ear protection, and gloves)
8. Review time logs with the offender periodically to assure accuracy of the time logs
9. Maintain confidentiality of any records kept on offenders and background information regarding offender's history
10. Provide appropriate medical treatment for any offenders on-site injury by having the offender taken to the nearest emergency treatment facility and reporting the injury to the PSE coordinator or supervising agent as soon as possible.
11. Assume all risks involved in requiring PSEP offenders to operate agency vehicles, automobiles, or road equipment
12. Notify the PSE coordinator or supervising agent whenever problems occur with the offender's work so that steps may be taken by the PSEP to address the problems, if necessary
13. Contact the PSE coordinator or supervising agent upon the offender's successful or unsuccessful completion of the work contract, furnish the offender with an authorized time log for submission to the Court or Board

The undersigned representatives agree to the provisions as listed above.		
Worksite Representative's Signature	Worksite Name	Date
PSE Coordinator/PSE Liaison's Signature		Date

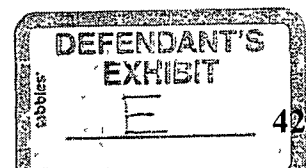
Ply 1 - Agent, Ply 2 - Worksite



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CASE NO 2009-CP-18-28
	)	
LAUREN L KYLE	)	
	)	
	)	
Plaintiff,	)	
	)	AFFIDAVIT OF WENDY SEAY
v	)	
	)	
DORCHESTER COUNTY CHAPTER	)	
SPCA a/k/a FRANCES R. WILLIS	)	
SPCA	)	
	)	
Defendants	)	

COMES NOW THE AFFIANT, who being duly sworn deposes and says the following

- 1 I am a citizen and resident of Berkeley County South Carolina and I am over the age of 18 years.
- 2 I am employed as the general manager of the Dorchester County Chapter SPCA, a/k/a Frances R. Willis SPCA ("SPCA"), the Defendant in this action
- 3 As general manager of the SPCA I am responsible for day-to-day operations of the shelter facility including without limitation the care and safety of the animals housed in the facility. I also supervise the employees
- 4 The SPCA has a history of allowing convicted offenders to perform their community service at its facility through the South Carolina Department of Probation, Parole and Pardon Services (the "Department")
- 5 As general manager of the SPCA I have personal knowledge of the circumstances surrounding how offenders are allowed to perform their



community service at organizations such as the SPCA and the duties and responsibilities of such offenders when they join the staff of the SPCA

6. The Department assigned the Plaintiff in this action, Lauren L. Kyle to the SPCA to perform her community service and she was performing her community service at the SPCA in November of 2007.

7 It was the SPCA's responsibility to control manage and supervise Ms Kyle's work - her duties included caring for the animals, feeding the animals and cleaning the kennels

8 The SPCA controlled not only the work Ms Kyle was to do, but also the manner in which she was to perform it.

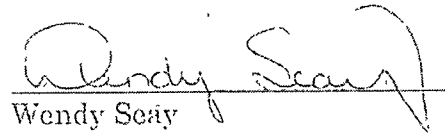
9 The duties Ms. Kyle performed at the SPCA were important, necessary, essential and integral parts of the SPCA's business. These identical duties have been, and continue to be, performed by SPCA employees.

10 As general manager I relied on S.C. Code Ann §§42-1-310, 42-1-400, 42-1-505, and 42-1-540 when making the decision to allow offenders such as Ms Kyle perform their community service at the SPCA.

11 It is my understanding that offenders such as Ms Kyle were covered by workers' compensation insurance through the Department by the South Carolina State Accident Fund

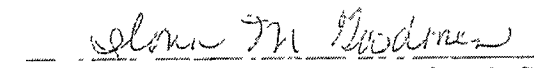
12 It is my understanding that an offender such as Ms Kyle who is injured at the SPCA while performing his or her community service is limited to recover solely from workers' compensation.

AS TO ANYTHING FURTHER, THE AFFIANT SAITH NOT


Wendy Seay

SWORN TO AND SUBSCRIBED

before me this 11th day of January, 2011.


Notary Public for the State of South Carolina

My Commission Expires. March 12th, 2010

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF DORCHESTER	)	CASE NO 2009-CP-18-28
	)	
LAUREN L KYLE,	)	
	)	
Plaintiff,	)	
	)	DORCHESTER COUNTY CHAPTER
	)	SPCA'S NOTICE OF MOTION AND
	)	MOTION TO DISMISS OR, IN THE
	)	ALTERNATIVE, NOTICE OF MOTION
	)	AND MOTION FOR SUMMARY
	)	JUDGMENT
DORCHESTER COUNTY CHAPTER	)	
SPCA, a/k/a FRANCES R. WILLIS SPCA.	)	
	)	
Defendants.	)	
	)	

TO WARING HOWE ATTORNEY FOR PLAINTIFF, LAUREN L KYLE

PLEASE TAKE NOTICE THAT the Defendant, Dorchester County Chapter SPCA a/k/a Frances R Willis SPCA, by and through its undersigned attorneys hereby moves to dismiss this action pursuant to Rules 12 (b)(1), 12(b)(2) and 12(b)(6) of the South Carolina Rules of Civil Procedure. Defendant is entitled to dismissal on the following grounds:

- 1) This court lacks subject matter jurisdiction over the matters contained in Plaintiff's complaint,
- 2) This court lacks jurisdiction over the Defendant related to the matters contained in the Plaintiff's complaint, and
- 3) The Plaintiff's complaint fails to state facts sufficient to constitute a cause of action against the Defendant.

The Court can consider evidence outside of the pleadings in a motion to dismiss for lack of jurisdiction. Bard v Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). However,

should the Court elect to treat this motion as a Motion for Summary Judgment pursuant to Rules 12(b) and 56 of the South Carolina Rules of Civil Procedure Defendant hereby moves for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure in that there is no genuine issue of material fact and that Defendant is entitled to judgment as a matter of law on the following issues:

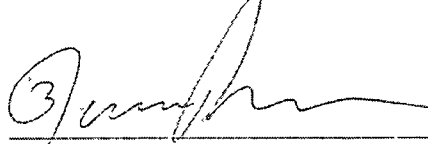
1) This court lacks subject matter jurisdiction over the matters contained in Plaintiff's complaint

2) This court lacks jurisdiction over the Defendant related to the matters contained in the Plaintiff's complaint, and,

3) The Plaintiff's complaint fails to state facts sufficient to constitute a cause of action against the Defendant.

Defendant may present additional grounds for dismissal and/or summary judgment at or before the hearing on this matter and will provide a memorandum in support this Motion.

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Roy P. Maybank (S.C. #69643)
Jason A. Daigle (S.C. #73308)
Attorney for Defendant
Dorchester County Chapter SPCA

Charleston, South Carolina
11/22, 2010

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF DORCHESTER) NINTH JUDICIAL CIRCUIT
CASE NO. 2012-CP-18-393

LAUREN L. KYLE,

Plaintiff,)

v.)

) DORCHESTER COUNTY CHAPTER
) SPCA'S MEMORANDUM IN
) SUPPORT OF MOTION TO DISMISS
) OR, IN THE ALTERNATIVE FOR
) SUMMARY JUDGMENT
)

DORCHESTER COUNTY CHAPTER)
SPCA a/k/a FRANCES R. WILLIS)
SPCA.)

Defendants)

Defendant, Dorchester County Chapter SPCA a/k/a Frances R. Willis SPCA,
by and through its undersigned attorneys hereby submits this Memorandum of Law
in support of its Motion to Dismiss, or in the alternative, for Summary Judgment

STATEMENT OF FACTS

The Plaintiff, Lauren Kyle, was arrested June 16, 2006 in connection with
the robbery of a home. On or about January 25, 2007, Ms. Kyle pleaded to a lesser
offense and received probation, a fine, and public service employment. Ms. Kyle
performed her public service employment through the South Carolina Department
of Probation, Parole and Pardon Services (the "Department"). Ms. Kyle performed
the first portion of her public service employment at the Dorchester County Chapter
SPCA (the "SPCA"). On or about November 20, 2007, while Ms. Kyle was
performing her public service employment at the SPCA, she was bitten by a cat and
suffered personal injuries. On or about December 29, 2009 Ms. Kyle filed a

negligence law suit against the SPCA in the Court of Common Pleas for Dorchester County. Ms. Kyle never filed a workers compensation claim for the injuries

ARGUMENT

It is well-settled that a party without standing is subject to immediate dismissal. Brock v. Bennett, 313 S.C. 513, 443 S.E.2d 409, 412-13 (Ct.App. 1994). The Court can consider evidence outside of the pleadings in a motion to dismiss for lack of jurisdiction. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999). The existence of an employer-employee relationship is a jurisdictional question which the court must determine on its review of all evidence in the record. Posey v. Proper Mold & Engineering, Inc., 378 S.C. 210, 216, 661 S.E.2d 395, 398 (Ct. App. 2008). The proper procedure for raising lack of subject matter jurisdiction before trial is to file a motion to dismiss pursuant to Rule 12(b)(1) SCRCP. Id. at 217, 661 S.E.2d at 399. Additionally, the Court may consider affidavits on a question of law in a jurisdictional motion without converting the motion into one for summary judgment. Id. (citing Baird at 528, 511 S.E.2d at 74).

Under the South Carolina Workers Compensation Act (the "Act"), an employer and an employee are presumed to have accepted the provisions of the Act to pay and accept compensation for personal injuries arising out of and in the course of employment, and are bound by the Provisions of the Act. S.C. Code Ann. § 42-1-310. The undisputed law of South Carolina is that when an employer and its employee have accepted the provisions of the Act, it shall exclude all other rights and remedies of such employee. S.C. Code Ann. § 42-1-540. Any doubts as to a

worker's status should be resolved in favor of finding her covered by the Act. Posay, 378 S.C. at 218-19, 661 S.E.2d at 400.

The Department is considered the employer of any convicted person performing public service employment. S.C. Code Ann. § 42-1-505. In fact, the Department recognizes this issue and provides convicted persons with workers' compensation insurance through the State Accident Fund. See Aplin Affidavit attached hereto as Exhibit "A". See State Accident Fund Letter attached hereto as Exhibit "B". Additionally, the Department has forms that specifically notify the convicted person that they are covered by workers' compensation and must proceed through the Act in the event of an injury while performing public service employment. See Forms attached as Exhibits "C" and "D". These standard forms evidence the fact that the Department and the Plaintiff have accepted the provisions of the Act to pay and accept compensation for personal injuries arising out of and in the course of employment. Further, the Department concedes that a convicted person's sole remedy for injury while performing public service employment is through the Act. Exhibit "A".

PLAINTIFF WAS THE STATUTORY EMPLOYEE OF THE SPCA

The Act provides at S.C. Code Ann. § 42-1-400 that.

When any person, .. referred to as "owner," undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person for the execution or performance by [that other person] of the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under

[the Act] which he would have been liable to pay if the workman had been immediately employed by him

The South Carolina Supreme Court has interpreted this statute to mean that the exclusivity provision applies both to direct and "statutory employees." Carter v. Florentine Corp. Inc. 310 S.C. 228, 230-1, 423 S.E.2d 112 (1992). In fact, section 42-1-400 has been extended to specifically cover an injured worker of a subcontractor performing work which is part of the owner's trade, business, occupation. Voss v. Ramco, Inc. 325 S.C. 560, 566, 482 S.E.2d 582, 585 (Ct. App. 1997).

The Court of Appeals recognized that South Carolina jurisprudence requires the consideration of three factors in determining if an individual is a statutory employee under the Act: "(1) Whether the activity is an important part of the trade or business, (2) whether the activity is a necessary, essential and integral part of the trade or business, and (3) whether the identical activity has been performed by employees of the principal employer." Bailey v. Owens, 298 S.C. 36, 39, 378 S.E.2d 63, 64 (Ct. App. 1989). If the work in which an individual was engaged meets even one of these tests, the worker qualifies as a statutory employee. Olmstead v. Shakespearie, 354 S.C. 421, 424, 581 S.E.2d 483, 485 (2003).

It is undisputed that the SPCA was not the Plaintiff's direct employer at the time of the injury. However, the SPCA had an agreement with the Department to take on its employees to perform their public service employment. At the time of the accident the Plaintiff was cleaning out the animals' cages. See Kyle Deposition Pages 37-38 attached hereto as Exhibit "F". This duty is important to the SPCA's

business it is necessary to the SPCA's business, and this identical activity is often performed by SPCA direct employees. See Seay Affidavit attached hereto as Exhibit "E". As such, the SPCA has established all three factors compelling the conclusion that the Plaintiff was a statutory employee of the SPCA whose exclusive remedy is a workers' compensation claim.

PLAINTIFF WAS THE SPCA'S LENT EMPLOYEE

The South Carolina Court of Appeals held in Nix v. Columbia Staffing, Inc., 322 S.C. 271, 471 S.E.2d 718 (Ct. App. 1996) that S.C. Code Ann. § 42-1-540, commonly called the exclusivity provision of the Act, applies to "lent employees" as well as direct employees. Id. at 281-82, 471 S.E.2d at 720. In Nix, the Court of Appeals held that the test for determining "whether an employee furnished by one person to another becomes a 'lent employee' is whether the person passes under the latter's right of control with regard not only to the work to be done, but also to the manner of performing it." Id. at 281, 471 S.E.2d at 720.

The SPCA was responsible for controlling, managing and supervising the work of the convicted persons assigned to it by the Department, including the Plaintiff. Exhibit "E". In short, the Department delegated to the SPCA the supervisory duties of an employer as it concerned the Plaintiff while she remained at the SPCA. Exhibit "E". The Plaintiff was under the SPCA's control in terms of what work she would be performing and the manner in which she would perform that work. Exhibit "E".

PUBLIC POLICY

There is a compelling public policy issue at work here. In order for the criminal justice system to work properly and efficiently, businesses, such as the SPCA, need to be willing to take on convicted persons for their public service employment. These businesses would be significantly less likely to participate in the Department's program if there is a chance that convicted persons will sue them for injuries incurred while completing their public service employment. In fact, the Department has seemingly tackled this very problem by providing convicted persons workers' compensation insurance through the State Accident Fund. Allowing convicted person to sue their public service employers will do irreparable harm to the Department's public service employment program, the criminal justice system in general, and the workers' compensation bar. As such, public policy dictates that the Plaintiff's negligence claim against the SPCA be dismissed.

CONCLUSION

The Plaintiff was an employee of the Department at the time of the injury covered by workers' compensation insurance through the State Accident Fund. The Plaintiff was also a statutory employee and/or lent employee of the SPCA. The Plaintiff's sole remedy for an on the job injury while performing public service employment at the SPCA is through the Act. Accordingly, this court has no jurisdiction over the subject matter and the case should be dismissed.

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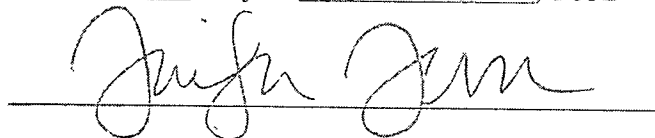
Roy P. Maybank (S.C. #69643)
Jason A. Daigle (S.C. #72308)
Attorney for Defendant
Dorchester County Chapter SPCA

Charleston South Carolina
6/21, 2012

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing
was served on each party or counsel of record by ☒
mailing, ☐ e-mailing, ☐ facsimile, or ☐ hand delivery in
the manner prescribed by the applicable Rule of Civil
Procedure

This 22 day of June, 2012



STATE OF SOUTH CAROLINA)
COUNTY OF DORCHESTER)
LAUREN L KYLE,)
Plaintiff,)
vs.)
DORCHESTER COUNTY CHAPTER)
SPCA, a/k/a FRANCES R WILLIS)
SPCA,)
Defendant.)

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Clerk of Court
DORCHESTER COUNTY

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
CASE NO 2012-CP-18-393

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT
DORCHESTER COUNTY CHAPTER
SPCA'S MOTION TO DISMISS OR,
IN THE ALTERNATIVE, FOR
SUMMARY JUDGMENT**

The Plaintiff in this case was sentenced to one year probation which included the requirement of performing twenty (20) hours of community service. She was given the choice of doing it either at the city dump in Summerville or at the Defendant, the Dorchester County Chapter SPCA. She chose to do this compulsory work at the latter facility.

On November 20, 2007, she was seriously injured by a cat which was known to be dangerous. Her medical expenses associated with the cat attack came to a total of \$24,299.73. The pain associated with the injuries themselves and the treatment was beyond excruciating. And, Ms. Kyle has been left permanently impaired and disfigured as a result.

The Defendant's present motion contends that the Plaintiff's exclusive remedy under South Carolina law is a workers' compensation claim, i.e., that this court does not have subject matter jurisdiction in this matter. They are wrong.

For an injured employee to be within the S.C. Workers' Compensation Act, i.e., be in a position to be covered and thus entitled to receive benefits in the usual and general sense, an employment relationship must exist between the employee and employer in question. In a very basic sense, because of the very compulsory nature of the arrangement between the Plaintiff and the SPCA, the Plaintiff could not be regarded as an employee. Even Exhibit D which is attached to the Defendant's memorandum refers to Ms. Kyle as to actually what she was, an "offender", and not as an employee.

In Shuler v. Tri-County Elec. CO-OP, Inc., 374 S.C. 516, 520, 649 S.E.2d 98, 100 (Ct. App. 2007) aff'd 385 S.C. 470, 684 S.E.2d 765 (2009), it states.

In construing the Workers' Compensation Act to define an employee, our court has held that coverage depends on the existence of an employment relationship. Edens v. Bellini, 359 S.C. 433, 439, 597 S.E.2d 863, 866 (Ct. App. 2004). The "contract of employment" is the jurisdictional factor used to determine if an employment relationship exists. Alewine v. Tobin Quarries, 206 S.C. 103, 109, 33 S.E.2d 81, 83 (1945). Although no formality is required, the contract is established if the parties recognize each other as employer and employee. Id. Furthermore, an employee's right to demand payment for his services from the employer is essential to the establishment of an employment relationship. Kirksey v. Assurance Tire Co., 311 S.C. 255, 257, 428 S.E.2d 721, 723 (Ct. App. 1993), aff'd, 314 S.C. 43, 443 S.E.2d 803 (1994). For example, in Doe v. Greenville Hosp. Sys., 323 S.C. 33, 39-40, 448 S.E.2d 564, 567-68 (Ct. App. 1994), this court held an unpaid volunteer candy striper was not the employee of a hospital. Likewise, in McCreery v. Covenant Presbyterian, this court found an unpaid church volunteer not an employee of the church for workers' compensation purposes. 299 S.C. 218, 383 S.E.2d 264 (1989), rev'd on other grounds, 303 S.C. 271, 400 S.E.2d 130 (1990). See also Kirksey, 311 S.C. at 257, 428 S.E.2d at 723 (finding unpaid daughter of store owner not an employee). See generally 3 Lairson's Workers' Compensation Law § 65.01 (2006).

Clearly, in the subject arrangement, Ms. Kyle was not paid for the chores she performed at the SPCA and was in no position to demand payment for doing those chores.

As a person who was on probation and having to do community service, the Plaintiff was supervised and under the custody of the S.C. Department of Probation, Parole, and Pardon Services (hereinafter referred to as the "Department"). And, as discussed and cited above the Plaintiff cannot in any reasonable context be considered to have had an employment relationship. For the sole purpose of receiving workers' compensation benefits her employer was deemed by statute to be the Department; not the SPCA but the Department. S.C. Code Ann. § 42-1-505 states, "[f]or purposes of this section, [providing workers' compensation benefits] the Department is considered the employer for those persons under its custody or supervision performing public service employment." And, inasmuch as the Defendant here would like to have it that they, the SPCA, was Ms. Kyle's employer and thus shielded in a suit for negligence in tort, there can be only one master, i.e., only one employer, and that is only if any workers' compensation benefits were sought, and none were.

The Defendant argued in their Memorandum in support of their motion to dismiss that the

Plaintiff was the statutory employee of the SPCA. In doing so, the Defendant engaged in a serious misapplication of the statutory employer statute, S.C. Code Ann. § 42-1-400, and the cases it cited which refer to it. The statutory employer statute was created to offer protection, in the form of making workers' compensation benefits available to injured employees, in situations where their direct employers, usually subcontractors, did not offer such protection/coverage. Should the particular circumstances exist to allow it to apply, an injured employee can go to, i.e., seek to claim against, an entity positioned on a higher rung of the ladder, some say "go upstream", in order to obtain workers' compensation benefits. This higher positioned entity, very often includes general contractors and owners of plants and businesses. It was noted in Marchbanks v. Duke Power Co., 190 S.C. 336, 343-44 2 S.E.2d 825, 828 (1939), that regarding those on lower rungs of the ladder oftentimes greater financial irresponsibility exists or those lower entities employ so few employees that they are not required under the Workers' Compensation Act to carry compensation insurance. So, even if the Defendant, the SPCA, was attempting to apply the statutory employer statute it would be to try to tag the Department with having to pay workers' compensation benefits and not the entity for which the Plaintiff did chores directly, the SPCA. To analogize, the Department is positioned like the general contractor, the SPCA is the subcontractor, and the Plaintiff did chores directly for the subcontractor whose work benefited the general contractor.

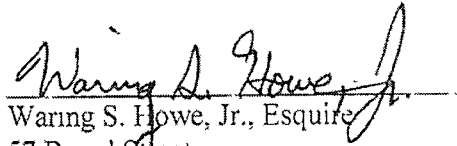
It should be recalled from a point made earlier herein that under § 42-1-505 the Department is deemed to be the employer for the purpose of coverage under the S.C. Workers' Compensation Act. Therefore, the SPCA had no workers' compensation liability to the Plaintiff. And, in Boone v. Huntington & Guerrv Elec. Co., 307 S.C. 529, 416 S.E.2d (Ct. App. 1992) aff'd 311 S.C. 550, 430 S.E.2d 507 (1993), it was held that if the an entity had no workers' compensation liability to an injured person then it had no tort immunity regarding lawsuits. Here, the Plaintiff is not suing the Department in a torts action who had the workers' compensation liability, she is suing the SPCA. However, Shuler, which was cited and quoted earlier, very strongly and clearly established that the Plaintiff was not and could not have been an employee. 374 S.C. at 520, 649 S.E.2d at 100. She was made to do the chores at the SPCA, because that is what judge-ordered community service is. She was in a sense a forced volunteer. In no way was she in a position to demand payment for her services to the SPCA which as Shuler stated, "is essential to the establishment of an employment relationship." 374 S.C. at 520, 649 S.E.2d. at 100 (citing Kirksey, 311 S.C. at 257, 428 S.E.2d. at

723).

In the Conclusion of their memorandum, the Defendant takes the position that the Plaintiff was an employee of the Department and a statutory employee and also and/or lent employee of the SPCA. That seems to be a confusing and rather unreal situation which *prima facie* makes the position difficult to accept. Since she had no employment relationship with the Defendant, the SPCA, she had and has a right to sue them for negligence, thus this Court has subject matter jurisdiction.

Therefore, the Plaintiff respectfully requests that the Defendant's Motion to Dismiss be denied.

Respectfully submitted,

A handwritten signature in cursive script, reading "Waring S. Howe, Jr.", is written over a horizontal line.

Waring S. Howe, Jr., Esquire
57 Broad Street
Charleston, SC 29401-2994
Telephone: (843)722-8269

ATTORNEY FOR THE PLAINTIFF

Charleston, South Carolina
August 29, 2012.

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)
)
LAUREN L. KYLE,)
)
Plaintiff,)
)
vs.)
)
DORCHESTER COUNTY CHAPTER)
SPCA, a/k/a FRANCES R. WILLIS)
SPCA.)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLFAS
FOR THE FIRST JUDICIAL CIRCUIT
CASE NO.: 2012-CP-18-393

**PLAINTIFF'S NOTICE OF MOTION
AND
MOTION FOR RECONSIDERATION**

FILED
2012 NOV 19 PM 2:14
CLERK OF COURT
DORCHESTER COUNTY

TO: JASON A DAIGLE, ATTORNEY FOR DEFENDANT:

YOU WILL PLEASE TAKE NOTICE that ten (10) days after service hereof, or as soon thereafter as counsel may be heard, the Plaintiff, Lauren L. Kyle, by and through her undersigned counsel, will move for relief pursuant to Rules 52 and/or 59 of the South Carolina Rules of Civil Procedure (including all subparts) for an Order Reconsidering and/or Altering or Amending the Order, in the above-captioned matter, granting the Defendant's Motion to Dismiss entered on November 7, 2012, and received by Plaintiff's counsel on November 9, 2012.

This Motion is based upon the grounds that the Court's Order misapplied the evidence and facts presented to the Court, fails to do substantial justice, and is affected by material errors of law and/or fact including, but not limited, to the following:

1) In having found that an employment relationship existed between the Plaintiff and Defendant by offering as a key basis for that finding that the Plaintiff was a "statutory employee" of the Defendant during her required community service.

2) By having found that the Plaintiff was not a volunteer but instead an employee of the Defendant, whereby consideration, in effect compensation, was received on her part in the form of credit towards satisfaction of her community service requirement.

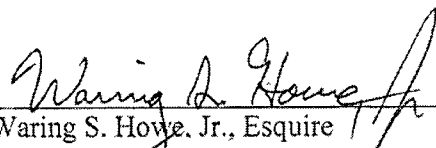
3) In having found that it is better public policy to not allow community service

participants to sue the workplaces to which they have been assigned to do community service work, because, as the finding in the Order states, it would serve to chill workplaces from participating in the public community service program generally. This public policy position stands in clear and direct opposition to long-established torts law principles which make individuals and other entities accountable for the harm they cause to others.

4) In having ultimately ruled that the Plaintiff is barred from bringing a third-party liability claim against the Defendant, because, in the words of the subject Order, her injuries arose out of and in the course and scope of her public service employment with the Defendant and is thereby bound by the exclusivity provision of the South Carolina Workers' Compensation Act thus allowing this action to be dismissed on the basis of the Court's failing to have subject matter jurisdiction over this matter.

For the foregoing reasons the Plaintiff respectfully requests that this Court reconsider its order of November 7, 2012, and deny Defendant's Motion to Dismiss.

Respectfully submitted,


Waring S. Howe, Jr., Esquire
57 Broad Street
Charleston, SC 29401-2994
Telephone: (843)722-8269

ATTORNEY FOR THE PLAINTIFF

Charleston, South Carolina
November 16, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF DORCHESTER)
)
LAUREN L. KYLE,)
)
Plaintiff,)
)
vs)
)
DORCHESTER COUNTY CHAPTER)
SPCA, a/k/a FRANCES R. WILLIS)
SPCA,)
)
Defendant.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE FIRST JUDICIAL CIRCUIT
CASE NO : 2012-CP-18-393

**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF PLAINTIFF'S
MOTION FOR RECONSIDERATION**

TO: THE COURT

Plaintiff, through her undersigned attorney, hereby offers the following in support of her Motion for Reconsideration of the Court's Order issued on November 7, 2012 granting Defendant's Motion to Dismiss.

BACKGROUND AND PROCEDURAL HISTORY

The Plaintiff in this case was sentenced to one year probation which included the requirement of performing twenty (20) hours of community service. She chose to do this compulsory work at the Dorchester County Chapter SPCA.

On November 20, 2007, she was seriously injured while at the Dorchester County Chapter SPCA by a cat which was known to be dangerous.

On January 6, 2010, this action was filed. On January 12, 2010, service of process of the Summons and Complaint was accepted by an authorized agent and officer of the Dorchester County Chapter SPCA.

On November 7, 2012, this action was dismissed by Order of the Court pursuant to the Court's hearing on the Defendant's Motion to Dismiss. The Plaintiff received notice of the Court's Order on November 9, 2012. The Plaintiff filed this Motion to Reconsider on November 19, 2012.

ARGUMENT

Plaintiff respectfully requests reconsideration of this Court's Order granting Defendant's Motion to Dismiss based upon the grounds that the Court misapplied the law in finding that the Plaintiff received compensation for her community service thus establishing an employment relationship between the Plaintiff and the Defendant; that the Plaintiff was a statutory employee of the Defendant; and, that public policy supports shielding community service worksites from tort liability for injuries sustained by community service participants.

A. Kyle Was Not Compensated for Her Community Service Performed at the SPCA and No Employment Relationship Existed Between Kyle and the SPCA.

The "contract of employment" is the jurisdictional factor used to determine if an employment relationship exists. Alewine v. Tobin Quarries, 206 S.C. 103, 109, 33 S.F.2d 81, 83 (1945). Furthermore, the *most essential component* of an employment relationship is the employee's right to demand payment from the employer for work the employee has performed for the employer. Kirksey v. Assurance Tire Co., 311 S.C. 255, 257, 428 S.E.2d 721, 723 (Ct. App. 1993), aff'd, 314 S.C. 43, 443 S.E.2d 803 (1994). The South Carolina Court of Appeals held in Doe v. Greenville Hospital Systems, that a candy striper, who received classroom credit, job training, and free lunches and uniforms, was an unpaid volunteer. 323 S.C. 33, 39-40, 448 S.E.2d 564, 567-68 (Ct. App. 1994). Even though she received credits and other benefits for her service as a candy striper, the Court found that the classroom credits, job training, and other items received by the candy striper did not constitute the payment for services or compensation required to establish an employment relationship. Similarly, in McCreery v. Covenant Presbyterian Church, the Court held that an employee is one who works for wages or salary and has the right to demand payment for services. 299 S.C. 218, 383 S.E.2d 264 (1989), rev'd on other grounds, 303 S.C. 271, 400 S.E. 2d 130 (1990). See also Kirksey, 311 S.C. at 257, 428 S.E.2d at 723 (finding unpaid daughter of store owner not an employee). See generally 3 Larson's Workers' Compensation Law § 65.01 (2006). In that case, the Plaintiff donated his construction services to the church. Id. at 267. He was not paid any wages nor did he have any right to demand payment of any wages. Id. The Court found that there was no evidence of a tithing agreement whereby the Plaintiff in that case would provide work in exchange for, or in lieu of, a reduction in, or payment towards, the monetary tithe obligation that he owed to the

Church. Id. The Court found that the Plaintiff was not hired by the church and there was no evidence of employment. Id. The Plaintiff was found to be a volunteer. Id.

This Court erred in finding that Ms. Kyle was compensated or was paid for the services she performed, because Ms. Kyle was given "credit to satisfy her probationary sentence." In McCreery, the Court contemplated a scenario by which an individual might be considered an employee where that individual provided services in order to pay off a monetary obligation that was owed to the Church. Here, in this case, the Plaintiff owed no such debt or obligation to the Defendant SPCA and thus cannot be considered an employee. Further, in Doe v. Greenville Hospital Systems, the Plaintiff received credits and training while performing services at the hospital, but the Court held that those items did not constitute payment of wages that would invoke an employment relationship. Here Ms. Kyle's "credit", that was found by this Court to be the equivalent of paid wages was in reality time served towards her probationary sentence. The Plaintiff's credit towards time served does not constitute the monetary compensation required by South Carolina law and statute to establish an employment relationship.

Finally, each and every case cited by this Court in support of its finding that Ms. Kyle was an employee of the Defendant is significantly different in that every Plaintiff in those cases received wages or monetary compensation for the services rendered by that individual. Ms. Kyle was not paid for the chores she performed at the SPCA and was in no position to demand payment for doing those chores. Therefore, no employment relationship existed between Ms. Kyle and the SPCA at the time of her injury.

B. Kyle Was Not the Statutory Employee of the Defendant.

Statutory employment exists where an "owner undertakes to perform or execute any work which is a part of his trade, business or occupation and contracts with any other person for the execution or performance by or under such subcontractor or the whole or any part of the work undertaken by such owner, the owner shall be liable to pay to any workman employed in the work any compensation under this Title which he would have been liable to pay if the workman had been immediately employed by him." S.C. Code Ann. § 42-1-400. The Court in this case supports its finding that Ms. Kyle was the statutory employee of the SPCA with a series of cases that apply South Carolina's commonly accepted tests for determining whether an employee is engaged in an activity that was part of the owner's trade, business, or occupation as required by the statutory employee statute. In each and every case offered, the "owner" is an entity that has

contracted with a second entity for that second entity to provide services to the owner. Those second entities are in essence subcontractors, and they provide services to the "owner" via the work performed by their paid employees. The owner is not the direct employer but is rendered the statutory employer of the subcontractor's employees. This is so in Bailey v. Owens, Carter v. Florentine Corp., Inc., Voss v. Ramco, Inc., and Olinstead v. Shakespeare (as cited in this Court's Order dated November 7, 2012). By finding that Ms. Kyle was a statutory employee of the SPCA, the Court has also deemed the SPCA to be the "owner" as set forth in § 42-1-400. This is an incorrect application of the statute and the facts of this case. If it were correct, according to the case law cited by the Court, the SPCA would have to have contracted with the S.C. Department of Probation, Parole, and Pardon Services (hereinafter referred to as the "Department") for the Department to provide services to the SPCA. There were no facts or evidence presented that indicates the SPCA contracted with the Department for the Department to provide services to the SPCA. On the contrary, the contractual relationship that existed, as evidenced by the Exhibits C and D of the Defendant's Memorandum in Support of Motion to Dismiss, is one based upon the Department contracting with the SPCA to place certain qualifying offenders in the SPCA's facilities, so that those offenders can perform their court-ordered community service. Based upon the facts of this case, the Department, *not the SPCA*, would be the "owner" and thus the statutory employer as contemplated by the statutory employee statute and the supporting case law. However, the entire analysis is unnecessary. S.C. Code Ann. § 42-1-505 states, "[f]or purposes of this section, [providing workers' compensation benefits] the Department is considered the employer for those persons under its custody or supervision performing public service employment." For the sole purpose of receiving workers' compensation benefits Ms. Kyle's employer was deemed by statute to be the Department; not the SPCA.

Furthermore, because the Department is deemed to be the Ms. Kyle's employer for the purpose of coverage under the S.C. Workers' Compensation Act, the SPCA had no workers' compensation liability to the Plaintiff. In cases where an entity has no workers' compensation liability to an injured person, it has no tort immunity regarding lawsuits for those injuries. Boone v. Huntington & Guerry Elec. Co., 307 S.C. 529, 416 S.E.2d (Ct. App. 1992) *aff'd* 311 S.C. 550, 430 S.E.2d 507 (1993).

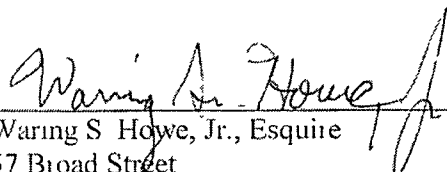
C. **Sound Public Policy Demands That the SPCA Not Be Shielded from Responsibility for the Injuries Suffered by Ms. Kyle.**

The Court offers no legal foundation for its finding that public policy supports shielding the SPCA from responsibility for the injuries suffered by Ms. Kyle. The Court states that failure to shield the SPCA would "harm the criminal justice system in general." The public policy position of the Court directly contradicts long-established principles of tort law whereby negligent individuals or entities can and should be held accountable for the harm they cause to others. In this case, because no employment relationship existed between Ms. Kyle and the SPCA, Ms. Kyle is not bound by the exclusivity provision of the South Carolina Workers' Compensation Act. Ms. Kyle has the right to hold the SPCA accountable for her injuries and sue them for negligence.

Conclusion

The Plaintiff respectfully requests this Court to reconsider its November 7, 2012. Order and issue a new Order correctly denying the Defendant's Motion to Dismiss and reinstating the Plaintiff's Summons and Complaint.

Respectfully submitted,


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ATTORNEY FOR THE PLAINTIFF

Charleston, South Carolina
February 8, 2013.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

SC Court of Appeals

Maite D. Murphy, Circuit Court Judge

Case No. 2013-000820

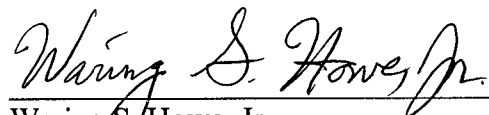
Lauren L. Kyle, ...Appellant,

v.

Dorchester County Chapter SPCA,
a/k/a Francis R. Willis SPCA, ...Respondent,

CERTIFICATE OF COUNSEL

I certify that to the best of my knowledge I have included in this Record on
Appeal contains all material proposed to be included by the parties and not any other
material.



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THE STATE OF SOUTH CAROLINA
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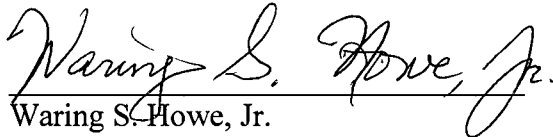
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a/k/a Francis R. Willis SPCA, ...Respondent,

PROOF OF SERVICE

I certify that I have served the Record on Appeal and the Motion for Extension of time by depositing a copy in the U.S. Mail, postage paid, on March 9, 2015 addressed to Respondent's attorney as set forth below:

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