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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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

Frank "Doc" Haynie..Appellant,

v.

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

FINAL REPLY BRIEF OF APPELLANT TO THE BRIEF OF THE RESPONDENT CITY OF FOREST ACRES

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ARGUMENT

Appellant, Frank "Doc" Haynie ("Appellant"), asserts one claim, negligence/gross negligence, against the Respondent City of Forest Acres ("Respondent City"). (R. p. 30, ¶¶ 20-22). As germane[1] to that claim, the Lower Court held that Appellant's negligence/gross negligence claim against the Defendant was precluded (1) because Respondents Mark Williams, Shaun Greenwood, and Clark Frady (Collectively "Individual Respondents") acted outside of the course and scope of their employment and off of the City' premises[2], and (2) because the Individual Respondents' conduct was not foreseeable. (R. pp. 20-22). The holding with respect to off-premise conduct was based on an incomplete citation to *Degenhart v Knights of Columbus,* 309 S.C. 116, 420 S.E.2d 495 (1992). (R. p. 21); (R. pp. 969-978); ("Employer may be liable for negligent supervision . . . if the employee is on the premises of the employer, or using a chattel of the employer. . . ") *citing*, *Degenhart*, 309 S.C. 114, 115-17, 420 S.E.2d 495, 496 (1992). The dispositive portion of *Degenhart* left out of the Respondent City's memoranda, proposed order, and the Court's order states: "An employer may be held liable for negligent supervision . . . if the employee is on the premises in possession of the [employer] *or upon which the [employee] is privileged to enter as his [employee]* . . ." *Degenhart*, 114 S.C. at 115-117. (bracket modifications original) (emphasis added). The portion left out of the Lower Court's Order brings the conduct of the Individual Respondents within the confines of actionable

[1] The Lower Court, in adopting the Respondent City's proposed order verbatim, contained several holdings which had either been conceded well in advance of its decision, regarding the statute of limitations, or were based upon a red herring equal protection clause argument about a non-existent cause of action which was never raised by Appellant nor argued to exist. (*See, e.g.*, (R. pp. 19-20, and 972-973); *see also*, (R. p. 65, and978 at fn. 2); regarding statute of limitations; *also*, (R. pp. 22-25, and 975-978); *see also*, (R. pp. 26-32, 797-808) ("Plaintiff does not claim, nor has he claimed an equal protection clause violation").

[2] As discussed in Appellants Initial Brief not all of the Individual Respondents' actions at issue took place off of City premises. (Initial Brief of Appellant fn. 4).

negligent supervision. *See*, *Id.* The Respondent City appears to have abandoned the "off-premise" argument on brief. (Brief of Respondent City, pp. 1-29). Thus, the only remaining relevant holding of the Lower Court in contention, with respect to the Respondent City, concerns foreseeability. For the reasons that follow, Appellant proffered sufficient evidence of foreseeability. (*infra*, pp. 3-4).

The Respondent City also re-raises multiple provisions of the South Carolina Tort Claims Act, which were not ruled upon below, as additional sustaining grounds. (Brief of Respondent City, pp. 19-21, 25-27). For the reasons discussed below, the cited provisions of the state Tort Claims Act are either inapplicable or the Respondent City has not met its burden of establishing them affirmatively. (*See infra*, pp. 4-9). The Respondent City last argues that the Circuit Court's two orders in this case granting summary judgment to each set of Respondents are not inconsistent. (Brief of Respondent, pp. 27-29). Those orders grant summary judgment to the Individual Respondents on the basis that they were acting inside the course and scope of their employment, and grant summary judgment to the Respondent City on the basis of *Degenhart*, which is premised upon employees acting outside of the course and scope of their employment. (Order; Individual Respondents, pp. 1, 6-7); (Order; Respondent City, pp. 6). Those orders are irreconcilable, and indicative of a fact issue as to scope. (*See*, *Infra*, pp. 9-10).

Additionally, the Respondent City appears to raise a new argument—that Appellant has not established the elements of a negligent supervision claim. Outside of the arguments discussed in the preceding paragraphs, the Respondent City did not question the elemental sufficiency of Appellant's negligence/gross negligence claim before the Lower Court. (R. pp. 43-69, 879-945). Thus, such an argument is precluded by Rule 220(c), SCACR. The Respondent City's argument on brief with respect to a non-existent and non-alleged equal protection claim is not dispositive

to the traditional elements of negligence at bar and is irrelevant for the reasons stated in footnote 1 (*supra*). (Brief of Respondent City, pp. 21-25).

Appellant respectfully requests, for the reasons stated above and elaborated upon below, that this Court reverse the Lower Court's decision and remand Appellant's negligence/gross negligence claims to trial.

I. THERE IS SUFFICIENT EVIDENCE OF FORESEEABILITY.

Negligent supervision cases "generally turn on two fundamental elements – knowledge of the employer and foreseeability of harm to third parties." *Doe v. ATC, Inc.*, 367 S.C. 199, 206, 624 S.E.2d 447, 450 (Ct. App. 2004). According to the Court's holding in *Degenhart*, an employer has a duty to reasonably control an employee acting outside the course and scope of his employment in certain circumstances. *Degenhart*, 420 S.E.2d at 496 (1992)("An employer may be held liable for negligent supervision . . . if the employee is on the premises in possession of the [employer] *or upon which the [employee] is privileged to enter as his [employee]* . . ."). The final factors of the *Degenhart* analysis concern foreseeability, and require that the employer "(i) knows or has reason to know that he has the ability to control his [employee] and (ii) knows or should know of the necessity and opportunity of the necessity and opportunity for exercising such control." *Id.* The Respondent City argues that Appellant "failed to present any evidence that the City knew or should have known of the necessity to exercise control of them . . . [and] that the risk of harm to third parties was foreseeable." (Brief of Respondent City, p. 18).

However, Appellant presented evidence that he complained about the conduct of the Individual Respondents to the Respondent City's mayor, two of its councilmen, and City Attorney. (R. pp. 134, Line 18 – 135, Line 17). The City Attorney acknowledged receipt of those complaints. (R. pp. 74-76, at ¶¶ 3, 5, 6, 8). After his complaints, the complained of conduct

continued.[3] "Legal cause is proved by establishing foreseeability." *Madison ex. Rel. Bryant v. Babcock Center Inc.*, 371 S.C. 123, 147, 638 S.E.2d 650, 662 (2006); *citing*, *Oliver v. S.C. Dept. of Highways and Pub. Transp.*, 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992); *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Legal cause is proven if the defendant should have foreseen that his negligence would probably cause injury to someone. *Hubbard v. Taylor*, 339 S.C. 582, 529 S.E.2d 549 (Ct. App. 2000). Here, Appellant told the Respondent City that its employees were harming him, and, despite being told, the harm continued; therefore, a reasonable jury could find that the harm caused to the Appellant by the Respondent City's employees was foreseeable. *See*, *Maddison Ex. Rel Bryant v. Babcock Center, Inc.*, 371 S.C. 123, 147; 638 S.E.2d 650, 662.

II. THE SOUTH CAROLINA TORT CLAIMS ACT DOES NOT GIVE RISE TO IMMUNITY OR BAR LIABILITY IN THIS CASE.

The Respondent City argues that it is immune from suit in accord with South Carolina Code section 15-78-60, subsections (1), (2), (4), (5), (12), (13), (17), and (23). This myriad of state tort claims act defenses was raised, but not ruled upon before the Circuit Court. "The South Carolina Tort Claims Act, which provides the exclusive remedy in tort against Department, is a limited waiver of governmental immunity." *Steinke v. S.C. Dept. of Labor*, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999); *citing*, *Moore v. Florence School Dist. No. 1*, 314 S.C. 335, 444 S.E.2d 498 (1994); and S.C. Code Ann. § 15-78-20(a) (Supp.1998). "The Act provides that,

[3] Such conduct, elaborated upon in Appellant's initial brief at pp. 2-6, included: excessive monitoring of the Appellant's work and property in comparison to other builders and residents in the community (R. pp. 848-849, at ¶¶ 7, 9, and 10); arbitrary stop work orders and citations (R. pp. 112, Line 4-7; 183, Line 5-8; and 187, Line 16 – 188, Line 19; 202, Line 2 – 203, Line 20; and 213, Line 2 – 214, Line 4).tampering with the objectivity of Appellant's building Code Appeal hearing (R. p. 848 ¶ 6; and 854-857); interference with Appellant's business dealings (R. pp. 134, Line 9 – 135, Line 24; and 200, Line 15 – 201 Line 12); and making disparaging remarks about Appellant to Appellant's customers and subcontractors. (R. pp. 744 Line 2 – 18; and 871, Line 22 – 872, Line 7).

subject to limitation, a governmental entity is 'liable for [its] torts in the same manner and to the same extent as a private individual under like circumstances.'" *Id.* (*citing*, *Moore*, 444 S.E.2d 498; and S.C. Code Ann. § 15-78-40 (Supp.1993)). The provisions establishing limitations on liability are construed in favor of limitation. S.C. Code Ann. § 15-78-20 (f). However, "the burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." *Steinke*, 336 S.C. at 393 (*citing*, *Strange v. South Carolina Dep't of Highways and Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994)). The eight limitations to liability cited by the Respondent City are either wholly inapplicable or have not been sufficiently established as affirmative defenses.

A. The Respondent City is not entitled to immunity in accord with State Tort Claims Act § 15-78-60(1) and (2).

Subsection (1) of S.C. Code Ann. § 15-78-60 limits liability for "legislative, judicial or quasi-judicial action or inaction." Subsection (2) limits liability for "administrative action or inaction of a legislative, judicial, or quasi-judicial nature." S.C. Code Ann. § 15-78-60(2). The Respondent City has not cited to, and cannot cite to, any precedent supporting its contention that it is a legislative, judicial, quasi-judicial, or administrative body of the sort covered by S.C. Code Ann. §§ 15-78-60(1) and (2). The Respondent asserts that because Appellant contends that Respondent Frady's interference with his Code Board of Appeals hearing was wrongful the City is entitled to liability for the quasi-judicial actions of that board.[4] (Brief of Respondent, pp. 25-

[4] The Respondent City also claims that there is no "evidence indicating . . . that any member or City employee orchestrated the loss of the appeal." (Brief of Respondent, p. 25). However, Appellant submitted the affidavit of city clerk Margo Pierce, the investigatory memorandum of an interview between Margo Pierce with the State Department of Labor, Licensing, and Regulation ("LLR"), and the interview memorandum between Respondent Frady and an LLR investigator, each corroborating the occurrence of a meeting wherein Respondent Frady

26). However, the focus of Appellant's contention on this point is with Respondent Frady's conduct, and the City's conduct in supervising Frady, not the conduct of the Forest Acres Code Board of Appeals. The Respondent City's effort to re-contextualize Appellant's dealings with the Code Board of Appeals is not supported by the law or the record evidence (see fn. 4); furthermore, even if it were the same only affects one, of several, components of the Appellant's negligence/gross negligence claim.

B. The Respondent City is not entitled to immunity under S.C. Code Ann. § 15-78-60(4), (12), (13), and (23).

The Respondent City briefly argues that it is entitled to immunity in accord with the affirmative liability limitations stated at § 15-78-60(4), (12), (13), and (23). (Brief of Respondent pp. 26-27). As enumerated those limitations concern: (4) adoption, enforcement, compliance, or failure to adopt, enforce, or comply with a law, charter, provision, ordinance, etc.; (12) licensing powers; (13) regulatory inspection powers or functions; and (23) institution or prosecution of a judicial or administrative proceeding. Undoubtedly, portions of the Appellant's negligence/gross negligence claim tangentially touch upon the provisions cited by the Respondent; however, the core of Appellant's negligence/gross negligence claim (*see*, fn. 3, *supra*; and Initial Brief of Appellant, pp. 2-6) is not subsumed by the subject provisions. Furthermore, the Respondent City bears the burden of establishing that liability, for Appellant's claim against it, is limited by S.C. Code Ann. § 15-78-60(4), (12), (13), (23). *Steinke*, 336 S.C. at 393; *citing*, *Strange v. South Carolina Dep't of Highways and Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994). The Respondent City has not cited to any law or record evidence which would place the Appellant's claim within the provisions raised.

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encouraged the Code Board members, outside of the presence of the Respondent, to rule against the Appellant before the Code Board hearing. (R. 848 ¶ 6; and 854-857).

Furthermore, even if the Respondent City had produced sufficient evidence or law to invoke the affirmative defenses it asserts, Appellant has produced sufficient evidence of gross negligence to overcome these limitations (as well as the limitations above and below) irrespective of their applicability. *See*, *Steinke*, 336 S.C. at 396 (*citing*, *Etheredge v. Richland School Dist. I*, 330 S.C. 447, 463, 499 S.E.2d 238, 246 (Ct.App.1998)) ("when an action is brought alleging gross negligence by a governmental entity pursuant to an exception contained in Section 15-78-60, all other applicable exceptions must be read in light of the exception containing the gross negligence standard"). Gross negligence is the failure to exercise a slight degree of care; it involves an intentional, conscious failure to do something which one ought to do or the doing of something one ought to not do. *See*, *Clark v. South Carolina Dep't of Safety*, 362 S.C. 377, 608 S.E.2d 573 (2005); *see also*, *Jinks v. Richland County*, 355 S.C. 341, 585 SE.2d 281 (2003). Generally, gross negligence is a factually controlled concept whose determination best rests with the jury. *Faile v. S.C. Dep't of Juvenile* Justice, 350 S.C. 315, 566 S.E.2d 536 (2002). The State Tort Claims Act, § 15-78-60 (4), (12), (13), and (23), limitations are inapplicable here, the Respondent City has not established the subject limitations as an affirmative defense, and Appellant has submitted sufficient evidence of gross negligence; for these reasons, the Respondent City's argument to the contrary should be rejected.

C. The Respondent City is not entitled to Discretionary Immunity under § 15-78-60(5).

Subsection (5) of S.C. Code Ann. § 15-78-60 is an affirmative defense which confers immunity for discretionary functions. *Duncan v. Hampton County School Dist. # 2,* 335 S.C. 535, 517 S.E.2d 449 (1999); *See also*, *Foster v. South Carolina Dep't of Highways & Public Transp.*, 306 S.C. 519, 413 S.E.2d 31 (1992) (a governmental entity bears the burden of establishing discretionary immunity as an affirmative defense). To establish discretionary

immunity a defendant must show that (1) weighed competing considerations in making the decision at issue or (2) that it utilized accepted professional standards in resolving the issue. *Sabb v. S.C. State University*, 350 S.C. 416, 567 S.E. 2d 231 (2002). That is, "to prevail under the discretionary immunity provision, the governmental entity must show that when faced with alternatives, it actually weighed competing considerations and made a conscious decision to act or not to act, and that it used accepted professional standards appropriate to resolve the issue before it." *Steinke*, 336 S.C. at 397-98 (*citing*, *Strange v. South Carolina Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 445 S.E.2d 439 (1994)); *and*, *Niver v. South Carolina Dep't of Highways & Pub.* Transp., 302 S.C. 461, 395 S.E.2d 728 (Ct.App.1990).

Here, "[t]he record contains scant evidence [the Respondent City's] officials exercised their discretion." *Id.* On this point, the Respondent City makes conclusory assertions about discretionary conduct without evidentiary support. (Brief of Respondent City, p. 20). The Respondent City has not carried its burden of establishing immunity under S.C. Code Ann. §15-78-60(5). Even if the Respondent City had met its burden, Appellant has presented sufficient evidence of gross negligence to overcome the limitation asserted. *See*, *Steinke*, 336 S.C. at 395-96; *citing*, *Duncan v. Hampton County School Dist. # 2,* 335 S.C. 535, 517 S.E.2d 449 (1999) (reading discretionary immunity exception in light of exception to immunity in which governmental entity exercises its duty in a grossly negligent manner, such that discretionary immunity will not protect the government if it exercises that discretion in a grossly negligent manner).

D. The Respondent City is not entitled to immunity under § 15-78-60(17).

Subsection (17) of § 15-78-60 provides governmental immunity for the intentional torts of its employees. The Respondent City appears to assert the limitation on liability set forth in this

subsection. (Brief of Respondent City, pp. 21-22, 27-29). Although there is an intentional tort alleged against the Individual Respondents, civil conspiracy, Appellant's negligence/gross negligence claim concerns the actions and inactions of the Respondent City in supervising and investigating the Individual Respondents where the Respondent City had reason to know the Individual Respondents were causing undue harm to Appellant. Negligence and gross negligence do not require proof of malice or intent to harm; thus, such a claim is not precluded by S.C. Code Ann. § 15-78-60(17). *See*, *Swicegood v. Lott*, 379 S.C. 346, 665 S.E.2d 211 (Ct. App. 2008) (Abuse of process claim not barred by subsection 17 where proof of intent or actual malice is not required); *see also*, *McBride v. Sch. Dist. of Greenville County*, 389 S.C. 546, 698 S.E.2d 845 (Ct. App. 2010) (Subsection 17 is no bar to malicious production claim since actual malice is not a required element); *and*, *Eldeco, Inc. v. Charleston County Sch. Dist.*, 372 S.C. 470, 642 S.E.2d 726 (2007) (tortious interference with contract not barred). Appellant's negligence/gross negligence claim is not precluded by S.C. Code Ann. § 15-78-60(17), and the Respondent City has failed to affirmatively establish otherwise.

III. THE LOWER COURT'S ORDERS CANNOT BE RECONCILED.

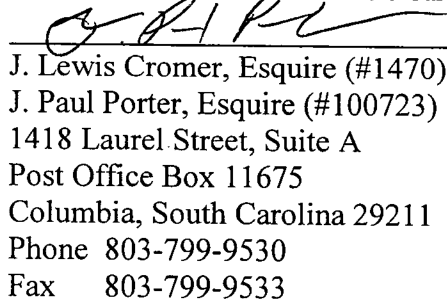
Last, the Respondent City argues that the Court's simultaneous decisions in this case (based on the separate premises that the Individual Respondents acted within and outside of the course and scope of their employment) are not self-contradicting. In so doing, the Respondent City apparently abandons the fact that the Lower Court based its holding on an incomplete citation to *Degenhart* that it, the Respondent City, proffered. *Degenhart,* 309 S.C. 114, 115-17, (R. pp. 21, 886-887, 969-978); (*See also*, pp. 1-2, *supra* – discussing *Degenhart*). The entire *Degenhart* analysis, which underpins the Lower Court's ruling as relevant to this case, is based on a finding of employee conduct outside of the course and scope of their employment.

Conversely, the Lower Court's ruling as to the civil conspiracy claim against the Individual Respondents is based on a finding that the Individual Respondents acted within the course and scope of their employment. In accord with the *Degenhart* case as cited fully, Appellant can maintain his negligence/gross negligence claim against the Respondent City as well as his civil conspiracy claim against the Individual Respondents. *See, Degenhart,* 309 S.C. 114, 115-17. Furthermore, the Circuit Court's self-contradicting holdings as to employee scope merit the reversal of both of its summary judgment decisions in this case.

CONCLUSION

For the foregoing reasons Appellant respectfully asks, in spite of the arguments raised by the Respondent City, that this Honorable Court to Reverse the holding of the Circuit Court and Remand this case for the trial.

Respectfully Submitted,



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I certify that I, undersigned employee of J. Lewis Cromer & Associates, L.L.C., have caused to be served a copy of Appellant's Final Brief and Appellant's Final Reply Brief by depositing a copy of it in the United States Mail, postage prepaid, on March 9, 2015, addressed to the following attorneys:

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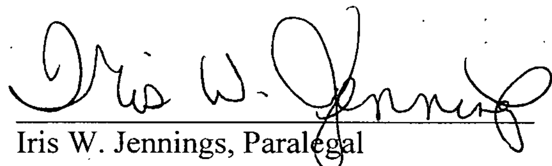

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