

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM HORRY COUNTY
COURT OF COMMON PLEAS
LARRY B. HYMAN, CIRCUIT COURT JUDGE

SC Court of Appeals

CASE NO. 2014-CP-26-1193
APPELLATE CASE NO. 2014-002491

Skydive Myrtle Beach, Inc. (f/k/a Skydive Myrtle Beach, LLC),.....Appellant,

v.

Horry County, Horry County Department of Airports, H. Randolph Haldi, Pat Apone,
Tim Jackson, and Jack Teal, Defendants,

Of whom H. Randolph Haldi, Pat Apone, Tim Jackson and Jack Teal
are.....Respondents,

FINAL BRIEF OF RESPONDENTS

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& SALEEBY, P.A.

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN DISMISSING APPELLANT'S COMPLAINT WITH PREJUDICE AGAINST THE INDIVIDUALLY NAMED RESPONDENTS PURSUANT TO THE SOUTH CAROLINA TORT CLAIMS ACT?**
- II. DID THE TRIAL COURT ERR WHEN IT INTERPRETED APPELLANT'S COMPLAINT AS NOT SUFFICIENTLY ALLEGING FACTS TO TRIGGER THE EXCEPTION SET FORTH IN THE SOUTH CAROLINA TORT CLAIMS ACT?**
- III. DID THE TRIAL COURT ERR WHEN IT DISMISSED APPELLANT'S COMPLAINT WITH PREJUDICE?**

STATEMENT OF THE CASE

Appellant Skydive Myrtle Beach, Inc. (“Appellant”) filed its Complaint in Horry County Circuit Court on February 28, 2014, alleging a total of fifteen (15) causes of action. (R.pp.19-34) Per the Complaint, the first two causes of action for breach of contract and breach of contract accompanied by fraudulent act are identified as asserted against “DEFENDANTS COUNTY AND AIRPORT” only. (R.pp.21-25) The remaining thirteen (13) causes of action all appear to be alleged against County and Airport with one or more of the individually named Respondents, H. Randolph Haldi, Pat Apone, Tim Jackson, and Jack Teal, identified as additional defendants. (R.pp.25-34) Respondents are all employees of Horry County.

Respondents filed a Motion to Dismiss on March 26, 2013. The stated grounds for said motion were that the Complaint fails to state facts sufficient to constitute a cause of action inasmuch as the individually named Defendants are not proper Defendants pursuant to S.C. Code Ann. § 15-78-70. (R.pp.123-124) The motion was argued before the Hon. Larry B. Hyman on June 2, 2014 in Conway, South Carolina. Following that hearing, Judge Hyman requested the submission of proposed Orders and ultimately issued an Order dated October 13, 2014 and filed on October 17, 2014, granting Respondents’ Motion to Dismiss pursuant to Rule 12(b)(6), S.C.R.C.P. (R.pp.5-12).

Appellant filed his Notice of Appeal on November 10, 2014. Appellant filed his Initial Brief on or about March 23, 2015. Respondents submitted a request for an extension of time to file their Initial Brief by correspondence dated April 17, 2015, and this court granted the motion by Order filed April 23, 2015, extending the time for filing Respondents’ Initial Brief to May 22, 2015.

STATEMENT OF FACTS

Appellant is a for profit skydiving business that has been operating at the Grand Strand Airport in North Myrtle Beach (CRE) for several years. At all times relevant to this appeal, Appellant was operating its skydiving business from Hanger 7 at CRE and alleges in the Complaint that it was originally provided access to Hanger 7 pursuant to a prior agreement with Ramp 66, LLC. (R.p.20)

Appellant's Complaint alleges the following facts: (1) that in or about September 2013, SDMB was issued a citation for violations to the City of North Myrtle Beach fire code, notably, electrical concerns; (2) that on or about February 5, 2014, Defendant Jack Teal entered Hanger 7 by force without notice or permission for no reasonable purpose; (3) that on or about February 7, 2014, a meeting between SDMB, the Airport, representatives of the Air Traffic Control Tower (ATC) for CRE, and Defendants Jackson and Teal (Resolution Meeting) took place in the FBO Training Room; (4) that during the Resolution Meeting, Defendant Jackson represented that he personally ensures he handles all maintenance requests for Airport tenants and that no requests from SDMB had been received; (5) that on or about February 17, 2014, SDMB requested repairs to the Hanger via email to Defendant Jackson; (6) that on or about February 19, 2014, SDMB together with Defendants Haldi, Apone, and Jackson, *inter alios*, attended a the Regional FAA Safety Day at Myrtle Beach International Airport (MYR); (7) that on or about February 19, 2014, Defendant Haldi hand delivered a self-styled "[L]etter of [E]xplanation" and new Space Use Permit; (8) that on or about February 19, 2014, Deputy County Attorney tendered a 72 hour eviction notice, *sua sponte* and without justification, to SDMB, if SDMB refused to agree to the new non-negotiable Space Use Permit, stating, "if [SDMB] declines to sign and return this Permit within [72 hours], you

will need to vacate the premises immediately, as [the Airport] will change the locks and deny access to the premises as of the close of business on Saturday, February 22[, 2014]; (9) that on or about February 23, 2014 CRE FBO denied SDMBs initial request for aviation fuel at Defendant Jackson's written instruction; (10) that on or about February 23, 2014, CRE FBO contacted Defendant Jackson via phone for explanation or reconsideration; and (11) that on or about February 23, 2014, Defendant Jackson authorized refueling for SDMB after a 30 minute delay. (R.pp.20-21)

STANDARD OF REVIEW

In reviewing a motion to dismiss, appellate courts apply the same standard of review as the trial court. *Carolina Park Associates, LLC v. Marino*, 732 S.E.2d 876, 878 (2012), *citing Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "Questions of law may be decided with no particular deference to the trial court." *Id.* (citation omitted).

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

upon allegations set forth on face of complaint); *Williams*, 347 S.C. at 233, 553 S.E.2d at 499 (trial court's ruling on 12(b)(6) motion must be bottomed and premised solely upon allegations set forth by plaintiff).

In deciding whether the trial court properly granted the motion to dismiss, an appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct.App.1999) (looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief). The trial court's grant of a motion to dismiss will be sustained if the facts alleged in the complaint do not support relief under any theory of law. *Tatum v. Medical Univ. of South Carolina*, 346 S.C. 194, 552 S.E.2d 18 (2001); *see also Gray v. State Farm Auto Ins. Co.*, 327 S.C. 646, 491 S.E.2d 272 (Ct.App.1997) (motion must be granted if facts and inferences reasonably deducible from them show that plaintiff could not prevail on any theory of the case).

ARGUMENT

I. THE TRIAL COURT PROPERLY DISMISSED THE INDIVIDUAL DEFENDANTS PURSUANT TO THE SOUTH CAROLINA TORT CLAIMS ACT.

The *South Carolina Tort Claims Act* ("SCTCA") S.C. Code Ann. § 15-78-10 et seq. (Supp. 2006) governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees. *See Murphy v. Richland Mem'l Hosp.*, 317 S.C. 560, 455 S.E.2d 688 (1995); *Wells v. City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (Ct.App.1998).

Per the circuit court's order, it was guided by this court's previous decision in the case of *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct.App.2003) wherein this

court held that the SCTCA intended to cover those actions committed by an employee within the scope of the employee's official duty. *Id.* In *Fleteau*, this court addressed the exclusivity provisions of the SCTCA, the immunity afforded individual employees, the exception to the immunity provision, and the overall purpose of the SCTCA - stating:

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

Section 15-78-70(a) provides in part that "[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b)." S.C. Code Ann. § 15-78-70(a) (Supp. 2002). Subsection (b) declares: "Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-70(b) (Supp. 2002).

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

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

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

In *Flateau*, the plaintiffs, who were employees of the state Commission for the Blind alleged that the Commission's governing board summoned them to the Commission's Board Room where members of the media were present and where the plaintiffs were forced to remain for hours for the purposes of awaiting an interview by the Board. Plaintiffs alleged that the Board would not allow plaintiffs to leave the room without a security escort and that they were not permitted to have unaccompanied access to their offices. After Plaintiffs filed a lawsuit asserting claims against members of the Board for outrage, invasion of privacy, and civil conspiracy, the Board members filed motions to dismiss pursuant to Rule 12(b)(6), *SCRCP*, arguing among other things that the plaintiffs failed to assert in their pleadings that the Board's members acted outside the scope of their duties. The trial court granted the motions to dismiss and this decision was affirmed by this court.

In *Flateau*, this court relied on the specific allegations set forth in the complaints of the plaintiffs and found that "despite the contention in the brief of Flateau and Fielding, nowhere in their complaints do Flateau and Fielding allege that the Board members' actions were outside the scope of their official duty." *Flateau*, at 204, 584 S.E.2d 417. This court further concluded that the causes of action alleged by the plaintiffs against the individually named defendants constituted conduct within the scope of the individuals'

official duties and therefore there could be no liability attached to the individuals. In so doing, this court stated: “[t]he statutory dialectic reveals that a governmental employee acting within the scope of official duty is exempt from personal liability.” *Fleteau*, at 206, 584 S.E.2d 417. This court added “that the efficacy of the Tort Claims Act is protection of governmental employees acting in the scope of official duties.” *Id.* Finally, this court noted: “The remedy mandated in the Act is legal action initiated against the governmental entity rather than the individual governmental employee.” *Id.*

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

Appellant’s Complaint, at paragraphs 2 and 3, alleges “Defendant Horry County (Defendant County) is a body politic and political subdivision of the State of South Carolina” and “Defendant Horry County Department of Airports (Defendant Airport) is a body politic and corporate and political subdivision of the State of South Carolina that owns, manages, and operates property in Horry County, South Carolina.” Paragraph 8 of the Complaint specifically states: “At all relevant times Defendants Haldi, Apone, Jackson and Teal were acting as agents of Defendants County and Airport.” This language, like that in the *Fleteau* pleadings, appears to be an unequivocal allegation that Defendants Haldi, Apone, Jackson and Teal, if they acted at all, were doing so on behalf of Defendant County and/or Defendant Airport within the scope of their official duties. Therefore, it is clear that Appellant recognizes Defendant County and Defendant Airport as governmental entities of South Carolina subject to the SCTCA and that Appellant

acknowledges that all actions of the individual defendants that are relevant to the causes of action set forth in the Complaint were taken in their capacities as officials of Defendant County and/or Defendant Airport.

Therefore, Appellant's Complaint, on its face, fails to properly set forth any allegations that are not subject to the limitations of the South Carolina Tort Claims Act and the individually named Defendants are entitled to the protections set forth therein, including immunity from personal liability, and the trial court properly relied upon *Fleteau* when granting dismissal of the individuals.

II. THE TRIAL COURT CORRECTLY DETERMINED THAT APPELLANT'S COMPLAINT DID NOT ALLEGE SUFFICIENT FACTS TO TRIGGER THE EXCEPTION SET FORTH IN THE SOUTH CAROLINA TORT CLAIMS ACT.

Appellant argues that the claims set forth in the Complaint against the individual defendants state claims of fraud, actual malice, or intent to harm and therefore qualify for the exception noted in § 15-78-70(b) of the SCTCA. Appellant argues that the Complaint should be liberally interpreted and the facts viewed in the light most favorable to the Appellant. Appellant further argues that the nature of the causes of action against the individual defendants and the elements of proof somehow suggest Appellant intended to assert that the individual defendants acted outside the scope of their duties, or fraudulently, or with malice, or intent to harm that would take their respective actions outside the scope of their official duties. The circuit court was not persuaded by such an argument and rightly so.

A review of the specific causes of action levied against the individually named defendants reveals: (1) that each cause of action contains a preamble paragraph that "reincorporates and realleges each of the foregoing allegations fully as if repeated herein verbatim," including, presumably, paragraph 8 discussed above; (2) that the allegations

relating to multiple causes of action contain specific allegations that the individually named defendant(s) at issue acted as the agent(s) of Defendant County or Defendant Airport or both¹; (3) that the Complaint contains no causes of action that are directed solely to one or more of the individually named defendants; (4) that the prayer for relief set forth in the Complaint requests the assessment of joint and several liability among the defendants identified in each cause of action without distinction between the governmental entities and the individuals; and most importantly, (5) that the entire Complaint is devoid of any allegation that any individually named defendant acted outside the scope of his or her official duties.

Appellant further argues that several of the causes of action set forth in the Complaint are sufficiently pleaded so as to trigger the second prong of the exception set forth at § 15-78-70(b) of the SCTCA for acts that are proven to constitute actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. However, the circuit court correctly found that the Complaint, on its face, fails to satisfy the requirements of such exception, finding Appellant's argument that the causes of action for constructive fraud, defamation, fraud and misrepresentation are subject to the exception of § 15-78-70(b) fatally flawed by the fact that each of these three causes of action contain a reiteration of the allegation that the individual defendants named therein were acting as agents of Defendant County and/or Defendant Airport at "all relevant times."

The circuit court's reliance upon the guidance provided by this court in *Flateau* was clearly well placed in light of the plain language of the Complaint and the circuit court properly found that the Complaint attempts to assert tort claims against individually named employees of Defendant County and/or Defendant Airport that relate to conduct performed

¹ R.pp.19-34.

by said individuals that, even if presumed true for purposes of this review of the circuit court's ruling, was within the course and scope of their official duties as employees of said entities.

III. THE TRIAL COURT CORRECTLY DISMISSED APPELLANT'S COMPLAINT WITH PREJUDICE.

On appeal, Appellant seeks to argue that the trial court should not have dismissed its Complaint against the individual Respondents with prejudice. In support of this argument, Appellant offers the South Carolina Supreme Court's opinion from the case of *Spence v. Spence*, 386 S.C. 106, 628 S.E.2d 869 (2006) for the proposition that a dismissal pursuant to a Rule 12(b)(6) motion should ordinarily be without prejudice and the plaintiff should be afforded an opportunity to submit an amended complaint. However, a closer review of *Spence* reveals that while this court acknowledged that there are circumstances under which the appellate court should consider allowing the plaintiff to submit an amended complaint, the appellate court must first consider if the plaintiff has submitted sufficient additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted. *Spence* at 881.

In its Initial Brief, Appellant asserts that it has made prior requests to Judge Hyman for leave to file an amended complaint and that it seeks to include a proposed amended complaint in the designated matters for consideration by this court. Appellant has never filed a formal motion to amend the Complaint or submitted a proposed amended complaint to the trial court for consideration. Essentially, this argument amounts to nothing more than a request for an opportunity to revise the Complaint to add language that can more effectively be argued as sufficient to trigger the exception to individual immunity discussed above.

Appellant has attempted to include a litany of additional facts in its Initial Brief that were not initially alleged in the Complaint reviewed by the trial court at the time of the issuance of the Order from which it now seeks relief. Appellant's Initial Brief does not specify exactly what factual allegations Appellant believes are sufficient to warrant the requested relief of filing an amended complaint and Appellant has never provided Respondents with a proposed amended complaint that it intends to argue contains sufficient additional factual allegations or legal theories of recovery from Respondents. Thus, Respondents are essentially arguing in the dark in response to an unsupported request for extraordinary relief and respectfully assert that this court should not consider such a request under these circumstances.

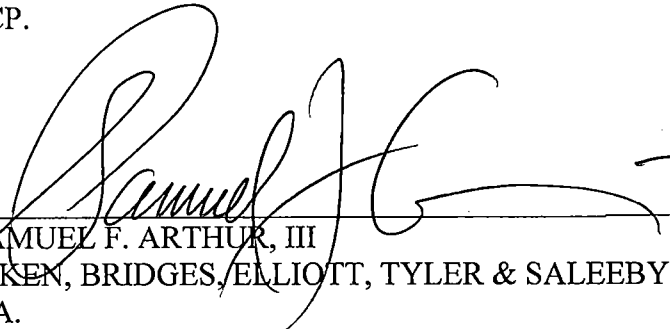
Appellant also argues that the trial court should not have dismissed the individual defendants with prejudice before the parties had an opportunity to complete and present to the court depositions, answers to interrogatories, affidavits, and admissions on file. This argument is baseless in that a motion to dismiss under Rule 12(b)(6), SCRPC--such as the one decided by Judge Hyman in this case—is ordinarily decided by the trial court solely upon the allegations set forth on the face of the complaint. *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct.App. 2003) (“Generally, in considering a 12(b)(6) motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint.”)

CONCLUSION

For the reasons set forth more fully above, this court should affirm the circuit court's Order dismissing Appellant's Complaint in this matter as to the individually named Defendants Haldi, Apone, Jackson, and Teal. The individually named Defendants are entitled to the immunity protection set forth in the SCTCA. Therefore, the circuit

court properly dismissed Plaintiff's claims against the individually named Defendants pursuant to Rule 12(b)(6), SCRCP.

Respectfully submitted.



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Of whom H. Randolph Haldi, Pat Apone, Tim Jackson
and Jack Teal are.....Respondents,

CERTIFICATE OF COMPLIANCE

I hereby certify that the enclosed **FINAL BRIEF OF RESPONDENTS** complies
with Rule 211(b), SCACR.

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Notary Public for South Carolina

My Commission Expires: June 2, 2019

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and Jack Teal are.....Respondents,

CERTIFICATE OF SERVICE

I hereby certify that I have served the document listed below in the above entitled
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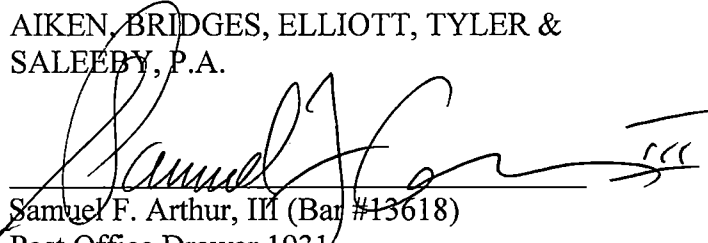
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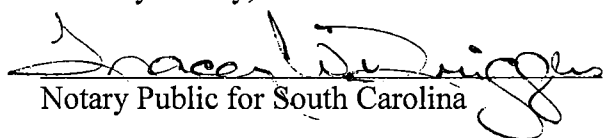
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SWORN to before me this
24th day of July, 2015.



Notary Public for South Carolina

My Commission Expires: June 2, 2019