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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Larry B. Hyman, Jr., Circuit County Judge

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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 REPLY BRIEF OF APPELLANT

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Co-Council for Appellant

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ARGUMENT

The central issues before this court are (1) whether the South Carolina Tort Claims Act ("SCTCA") immunity extends to all acts committed by governmental employees alleged to have been "acting as agents of the county" government "at all relevant times" in the pleadings pursuant to S.C. Code Ann. § 15-78-70; and (2) if so, does the failure to plead "outside the scope of official duties" in the Appellant's complaint forever bar and deny Appellant's right to seek redress against a governmental employee - without an opportunity to cure the deficient pleading through amendment as set forth in Rule 15, South Carolina Rules of Civil Procedure ("SCRCP").

I. THE TRIAL COURT INCORRECTLY DISMISSED APPELLANT'S COMPLAINT SINCE APPELLANT PLEAD EMPLOYEE CONDUCT WHICH CONSTITUTED FRAUD, ACTUAL MALICE, INTENT TO CAUSE HARM, OR A CRIME INVOLVING MORAL TURPITUDE AND WAS OUTSIDE THE SCOPE OF OFFICIAL DUTIES.

An employee of the state is entirely capable of conducting tortuous activity during working hours as Appellant alleged in its complaint. Respondent's sole contention is that the clauses employed by Appellant in its complaint, namely, "at all relevant times" were "acting as agents of the county" somehow destroy any claim to relief under alternative theories and inconsistent causes of action. Respondent posits that incorporating the same underlying facts under separate theories is a fatal flaw that forever bars Appellant from seeking relief.

Before the circuit court and in its initial brief, Respondents rely exclusively on *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003), for the proposition that all acts by government employees conducted within the scope of employment are exempt from liability under the SCTCA when "all the 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." *Initial Brief of Respondents* (Respondents' Brief) at 9; Hr'g Tr. 5:18-23, Record on Appeal page ("R. p.") 405. Correctly, the circuit court and Respondent posit that SCTCA was controlling and held "that the [SCTCA] provided the exclusive remedy for the conduct alleged by the [plaintiffs]." *Flateau,* 355 S.C. at 207, 584 S.E.2d. at 418.

Respondent posits that *Flateau* "addressed the [1] exclusivity provisions of the SCTCA, [2] the immunity afforded individual employees, [3] the exception to the immunity provision, and [4] the overall purpose of the SCTCA." Respondents' Brief at 6.

A careful reading of *Flateau* reveals that there were two issues before the court: (1) did the SCTCA apply to the conduct alleged; and (2) was the complaint timely? *Id.,* 355 S.C. at 201, 584 S.E.2d at 414.

The *Flateau* court discussed the SCTCA general immunity provision, S.C. Code Ann. § 15-78-70(a), with a complaint from government employees against their government employer containing allegations of outrage, invasion of privacy, and civil conspiracy. Their complaint only averred that each plaintiff was summoned, with other employees to attend a mandatory public statutorily approved government hearing during business hours. One employee was allowed to leave early to attend a medical appointment. The hearing was held to be an exercise of the government employers' official duties. The Court opined that the,

> pleadings clearly and unequivocally allege that the Board members were meeting and acting together as the South Carolina Commission for the Blind, discussing matters in executive session, and voting in their capacity as Commissioners to take the actions in question – all official duties and actions that are about the official business of the

Commission.

Flateau, 355 S.C. at 205, 584 S.E.2d. at 417.

Flateau holds that the SCTCA is the exclusive civil remedy for suits filed against governmental employees for conduct committed during the course of their "official duties." *Flateau* simply holds that a governmental employee alleging its governmental superiors required nothing more than mandatory attendance by a governmental employee at 10:00 a.m. and ending during business hours was covered by the SCTCA. In other words, the events alleged in the plaintiff's complaints were job requirements of a governmental employee by his governmental superiors. Nothing more. The statutory exemption to blanket immunity in S.C. Code Ann. § 15-78-70(b) was cited but not discussed.

The *Flateau* decision also holds that a two-year statute of limitations is applicable to SCTCA claims that are not "verified" pursuant to S.C. Code Ann. § 15-78-80, therefore, the plaintiff's claim was subject to the general statute of limitations iterated at S.C. Code Ann. § 15-78-110. Since the plaintiffs in *Flateau* filed their action nearly three years after the incident, the court dismissed the action without reaching the S.C. Code Ann. § 15-78-110(b) exception to immunity for acts committed "within the scope of official duties" as Respondent proffers. Rather the court held, "[w]e rule the two-year statute of limitations applies even if the Board members acted outside the scope of their official duties **or** if their actions constituted fraud, actual malice, intent to cause harm, or a crime involving moral turpitude." *Flateau,* 355 S.C. at 209, 584 S.E.2d. at 419 (emphasis supplied).

Unlike *Flateau*, Appellants are not governmental employees suing their governmental superiors acting in their official capacity. The acts complained of are also clearly not authorized by statute. For example, alleged retaliatory eviction, defamation,

misrepresentation, fraud, and civil conspiracy, are not authorized by statute or any regulatory provision.

The *Flateau* court next analyzed the statute of limitations sections of the SCTCA and held that since plaintiffs did not file a verified claim pursuant to S.C. Code Ann. § 15-78-80, their complaint should have been filed within two-years pursuant to S.C. Code Ann. § 15-78-110.

Respondent would have the Court of Appeals hold that SCTCA 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" so long as he is alleged to have "at all relevant times" been "acting as agents of the county." This position eviscerates the plain meaning of the exception prohibiting immunity for all causes of action alleging "actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." *See* S.C. Code Ann. § 15-78-70(b). When a statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory construction are not needed and the court has no right to impose another meaning. *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000).

In this appeal, unlike *Flateau*, Appellant alleges conduct by Respondents, government employees, against a private enterprise. None of Appellant's allegations can in any way be read such as to trigger SCTCA immunity. SDMB's complaint alleged an illegal retaliatory eviction scheme, defamation, fraud, and trespass, clearly conduct outside the scope of any governmental "official duties." R. Compl, ¶¶ 74-107, 137-40, R. pp. 25-29.

The conduct alleged in *Flateau* is distinguishable. In *Flateau,* the plaintiffs'

allegations were averred by government employees alleging tortious conduct from government supervisors performing statutory duties during normal work hours. The allegations simply alleged official duties, nothing more. Respondents' argue that *Flateau* grants immunity for *any* conduct for all state employees so long as "at all relevant times" he was "acting as agents of the county." This simply is not the law of this State.

II. THE TRIAL COURT INCORRECTLY DISMISSED THE COMPLAINT WITH PREJUDICE

Respondent argues that dismissal with prejudice is appropriate due to Appellant's failure to file a motion to amend with the circuit court. In this procedural posture, it is axiomatic that any attempt by Appellant to amend its complaint would have been fruitless and perhaps frivolous. The Order was signed October 13, 2014, and dismissed with prejudice. Circuit Court Order, 8 (October 13, 2014), R. p. 12. "If after a dismissal with prejudice, the plaintiff files a later suit on the same claim, the defendant in the later suit can assert the defense of res judicata." BLACK'S LAW DICTIONARY 9th ed. 537. Respondent correctly states that *Spence v. Spence,* 368 S.C. 106, 628 S.E.2d 869 (2006) requires the appellate court to "first consider if the plaintiff has submitted sufficient 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." Respondent's objections to additional facts principally rest on the fact that no amended complaint has been filed with the circuit court below. Respondent admits that *Spence,*

> acknowledged that there are circumstances under which the appellate court should consider allowing the plaintiff to submit an amended complaint, [but] the appellate court must first consider if the plaintiff has submitted additional factual allegation 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.

Respondents' Brief at 11-12.

Respondent then objects to Appellant's "attempt[] to include a litany of additional facts in its Initial Brief," failure to file a motion to amend the Complaint, and not providing Respondent a copy of an amended complaint. *Id.*, at 12. This bootstrap logic precludes any court from any consideration of Appellant's legal actions and completely eliminates the possibility of legal redress by turning a procedural defect into the functional equivalent of an order on the merits. Either the Order stands, *res judicata* attaches, or the amended complaint is considered by the appellate court *de novo* as required by *Spence*.

The Order also contravenes the clear principles of Rule 15, SCRCP. "Rule 15, as did Code Pleading in this state, strongly favors the granting of amendments." Flanagan, SOUTH CAROLINA CIVIL PROCEDURE 3RD (2010), p. 129; *see also, Armstrong v. Collins*, 366 S.C. 204, 228, 621 S.E.2d 368, 380 (Ct. App. 2005) (pleading amendments to conform to the proof should be liberally allowed when no prejudice to the opposing party will result); *Harvey v. Strickland,* 350 S.C. 303, 313, 566 S.E.2d 529, 535 (2002); *Kelly v. S.C. Farm Bureau Mut. Ins. Co.,* 316 S.C. 319, 323, 450 S.E.2d 59, 61 (Ct. App. 1994). Owing to the fact that no meaningful discovery was commenced or completed at the time of the Order, there can be no meaningful prejudice to Respondents by virtue of amendment. *See* Flanagan, at p. 130 ("[p]rejudice in these circumstances means the lack of opportunity to prepare for an issue or the inability to introduce additional evidence ... [s]ufficient opportunity to conduct discovery and prepare for the issue is relevant in determining prejudice.").

Furthermore, South Carolina recognizes a court's obligation is to provide a forum for a fair and just resolution of disputes between parties. *See Williams v. Watkins*, 380 S.C.

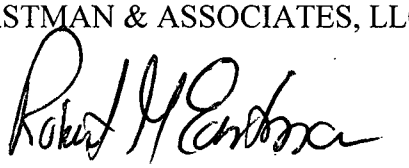
319, 327, 681 S.E.2d. 87, 96 (Ct. App. 2009) ("law favors the resolution of disputes based upon all parties having their day in court."); *Hagy v. Pruitt*, 331 S.C. 213, 221, 500 S.E.2d 168, 172 (Ct. App. 2009); *see also* Rule 8(f), SCRCP (all pleadings shall be so construed as to do substantial justice to all parties). In no way should a mere pleading defect, without opportunity to amend, result in a dismissal with finality under Rule 41(b) or Rule 56, SCRCP. Appellant filed a timely complaint alleging fifteen causes of action alleging, *inter alia,* tortious conduct that is not protected by the SCTCA. Appellant's complaint was filed timely and any technical pleading errors are easily remedied with an amended complaint. Rule 15, SCRCP.

CONCLUSION

For the reasons set forth more fully above, this court should reverse the circuit court's Order dismissing Appellant's Complaint in this matter as to the individually named Defendants Haldi, Apone, Jackson, and Teal, grant Appellant's request to amend its Complaint and order Respondents to answer the Amended Complaint within fifteen days (15) of Appellant's Amended Complaint or a remand consistent with this Honorable Court's ruling.

Respectfully submitted,

EASTMAN & ASSOCIATES, LLC



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Dated: July 20, 2015

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief and Final Reply Brief comply with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Final Brief and Final Reply Brief of Appellant on H. Randolph Haldi, Pat Apone, Tim Jackson, and Jack Teal by depositing a copy of it in the United States Mail, postage prepaid, on July 20, 2015, addressed to the attorney of record who has filed a brief, Samuel F. Arthur, III, Esquire, Aiken, Bridges, Elliott, Tyler & Saleby, PA, P.O. Box 1931, Florence, SC 29503.

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