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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM HORRY COUNTY  
Court of Common Pleas

**RECEIVED**

The Honorable Larry B. Hyman, Jr.  
Circuit Court Judge

MAR 22 2017

SC Court of Appeals

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

**PETITION FOR REHEARING**

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*Attorney for Respondent*

## ARGUMENT FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellant Skydive Myrtle Beach (f/k/a Skydive Myrtle Beach, LLC) (hereinafter “Appellant” or “Skydive”) hereby petitions for a rehearing of this Court’s March 8, 2017 Opinion No. 2017-UP-118 (“Opinion”) affirming the Circuit Court’s Order dismissing Appellant’s Complaint against certain Respondents with prejudice. The Appellate Court overlooked or misapprehended several key points which are discussed below.

### **I. Appellant’s Complaint Alleged Sufficient Facts to Trigger the Exception to South Carolina Tort Claims Act Immunity from Liability for Individual Employees.**

In this appeal, Appellant alleged conduct by the individual Respondents - Haldi, Apone, Jackson, and Teal – that constituted fraud, intentional interference with contractual relations, an illegal collaboration to conceal a long-term lease to extract an adhesion contract, and trespass. Allegations set forth in Appellant’s Complaint, when read in the light most favorable to the Appellant, show a scheme of behavior by the individual Respondents that was clearly an attempt to harm Skydive and place it out of business. None of these allegations can in any way be read such as to trigger the protections envisioned by the SCTCA. However, the Circuit Court found that these actions were protected under SCTCA and the Appellate Court affirmed the same.

The Court relies heavily on Paragraph 8 of Appellant’s Complaint which reads: “[a]t all relevant times, Respondents Haldi, Apone, Jackson and Teal were acting as *agents* of Respondents County and Airport.” (emphasis added). This was not meant to constitute an admission that Respondents were acting in the course and scope of their employment. Agency and course and scope of employment are not one in the same.

One can be entirely capable of committing tortious activity while on the job. If this were not the case, then S.C. Code Ann. §15-78-70(b) would be completely meaningless. One can be

acting as the agent of his employer, yet not be acting in the scope of his official duties. S.C. Code Ann. § 15-78-30 (i) defines “scope of state employment/scope of official duty” as acting in and about the official business of the government entity and performing official duties.” An “agent” is a person authorized by another (principal) to act for or in place of him; one instructed with another’s business. Black’s Law Dictionary, 6th ed., p. 63. In other words, an agent is someone who has authority; someone acting in the course and scope of their employment is exercising that authority in furtherance of the master’s business.

The Respondents actions described above – and as stated in Appellant’s Complaint – on their face show an intent to harm Appellant. The question of whether the Respondents had a personal, non-employment related reason for their actions is an issue for a jury. *Pridgen v. Ward*, 391 S.C. 238, 245, 705 S.E.2d 58, 62 (Ct. App. 2010) (“The jury could infer from the evidence presented that the Appellants' actions were personally, not professionally, motivated, and were wholly disconnected from the business of [their employer]”).

As such, the Appellate Court erred when it found that “Skydive’s allegations fail to show how the defendant’s actions were personal and disconnected from their employer’s business.” [Opinion at 1]. The question of whether those actions were personally or professionally motivated is one more appropriate for a jury. *Id.*

## **II. Original Complaint Sufficient Under Rule 8, SCRPC.**

Respondents asserted in their brief and oral argument that Skydive is trying to “have its cake and eat it too” by alleging alternative theories of liability under the same set of facts. The Appellate Court agreed with Respondent when it stated “it would be inequitable to allow Skydive to assert conflicting theories that the individual defendants acted both inside and outside the course and scope of their official duties.” [Opinion at 1].

Under Rule 8(e)(2) SCRCPP, Appellants are permitted to state as many separate causes of action as it has regardless of consistency. This rejects the code pleading requirement that all allegations be consistent. Substance of pleadings governs rather than the technical form. Rule 8(e)(1) SCRCPP. Furthermore, all pleadings are to be construed to do substantial justice to all parties. Rule 8(f), SCRCPP,

Here, Appellant filed a timely complaint alleging fifteen causes of action alleging, *inter alia*, tortious conduct that is not protected by the SCTCA. While the original Complaint was sufficient under the Rules of Civil Procedure, a more appropriate remedy would have been to allow Appellant to amend its Complaint under Rule 15, SCRCPP to correct any technical pleading errors the Circuit Court noted. As such the Appellate Court erred in affirming the Circuit Court's dismissal with prejudice.

### **III. Appellant Should Have Been Freely Granted Leave to Amend its Complaint Under Rule 15 SCRCPP and South Carolina Jurisprudence.**

While the Appellate Court is not *required* to modify a circuit court's order that dismisses a complaint with prejudice, the Appellant, in most cases *should* be able to amend their complaint. *Spence v. Spence*, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006); See *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (rules of civil procedure should be liberally construed to do substantial justice and lower court erred in denying motion to amend complaint where amendment would have stated alternative theory of recovery).

An Appellate Court should allow amendments when the Appellant presents 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 v. Spence*, 368 S.C. 106, 130, 628 S.E.2d 869, 881–82 (2006). The plaintiff in most cases should be given an opportunity to file and serve an amended complaint. See *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9

L.Ed.2d 222 (1962) (rules of civil procedure should be liberally construed to do substantial justice and lower court erred in denying motion to amend complaint where amendment would have stated alternative theory of recovery); *Small v. Mungo*, 254 S.C. 438, 442–44, 175 S.E.2d 802, 804 (1970) (affirming dismissal of complaint for failure to proceed, but finding it should have been dismissed without prejudice); *Dockside Assn., Inc. v. Detyens, Simmons & Carlisle*, 297 S.C. 91, 374 S.E.2d 907 (Ct.App.1988) (citing Rule 15(a), SCRCP, that plaintiff generally is allowed to amend a complaint to correct deficiencies which resulted in dismissal; *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct.App.1983) (trial court properly dismissed action in which plaintiff served summons but failed to timely serve complaint, but dismissal with prejudice was improper because such a dismissal is in nature of discontinuance of action and is not an adjudication on the merits; action should have been dismissed without prejudice).

Here, Appellant’s Complaint was dismissed with prejudice prior to Appellant being able to move to amend – even though Appellant submitted an amended complaint listing additional factual allegations, asserting different theories of recovery and correcting deficiencies in the original complaint. Notably, the Appellate Court’s Opinion is silent on this Amended Complaint and merely finds that an amendment would be futile. [Opinion at 2, fn.1].

The court cites *Health Promotion Specialists, LLC v. S.C. Board of Dentistry* to support its finding that an amendment would be futile. 403 SC 623, 723 S.E.2d 808 (2013). This case is distinguishable from the instant case as there were seven years between the filing of the original complaint and the oral motion to amend in *Health Promotion Specialists. Id.* at 632. Furthermore, in that case “extensive discovery had been conducted” and there were no significant factual developments that warranted an untimely amendment. *Id.*

Here, while the case does continue against the Airport and County, the case has now completely been dismissed against the individual Respondents. Appellant essentially has no redress against these individual defendants for the intentional torts committed against it. Furthermore, what would stop the remaining Defendants from asserting later that their employees were acting outside the course and scope of employment? Appellant would be denied any opportunity for redress against these very employees under *res judicata*.

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, have resulted in a dismissal with finality. The Appellate Court erred in affirming the Circuit Court's dismissal with prejudice.

**IV. Language of S.C. Code Ann. § 15-78-70(b) helpful regarding discovery and actions protected by SCTCA.**

S.C. Code Ann. § 15-78-70(b) states: "[n]othing 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." (*emphasis added*).

"If it is proved" suggests that Appellant should have had a full and fair opportunity to conduct the discovery to meet this burden. Further, the "or" in the statute indicates that our legislature has carved out not one, but two exceptions to immunity: (1) conduct outside the course

and scope of employment **or** (2) conduct that constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann. § 15-78-70(b).

In *Flateau v. Harrelson*, employers\supervisors were performing their statutory duties during work hours, however, the Plaintiff failed to plead how the actions of the individual employees were outside the course and scope of their employment. 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003). Unlike *Flateau*, Skydive's Complaint alleges reprehensible conduct by County and Airport employees including fraud, intentional interference with contractual relations, an illegal collaboration to conceal a long-term lease to extract an adhesion contract, and trespass.

In *Pridgen v. Ward*, the Court found that there was a scheme, plan and conspiracy to take down a fellow government employee. 391 S.C. 238, 705 S.E.2d 58 (Ct. App. 2010). Specifically, there was an agenda to purposely harm him and cause him to be terminated. *Id.* The Court found that the employee's actions were not within the course and scope of their employment. *Id.* Here, Skydive's plead facts alleging similar conduct – acts **intentionally meant to harm** and cause a business to be shut down.

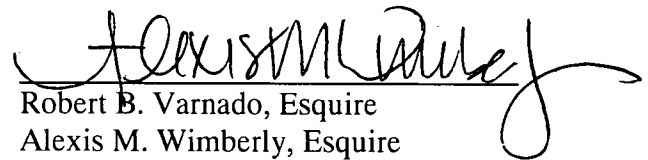
Our courts have generally been consistent in finding that intentional acts by government employees **intending to do others harm** are deemed outside the course and scope of employment and whether someone was working within the scope of their official duties is a question of fact for a jury. *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003). As such, the Appellate Court erred when it found that “Skydive’s allegations fail to show how the defendant’s actions were personal and disconnected from their employer’s business.” [Opinion at 1]. First, Skydive alleged reprehensible conduct that, on its face, shows Respondents’ actions were personal, not professional. Furthermore, whether these actions were for a particular purpose is a determination

more appropriate for a jury after Appellant is afforded a full and fair opportunity to complete discovery.

**CONCLUSION**

For the argument set forth above, Appellant respectfully requests this Court grant its Petition for Rehearing.

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March 21, 2017  
Mount Pleasant, South Carolina

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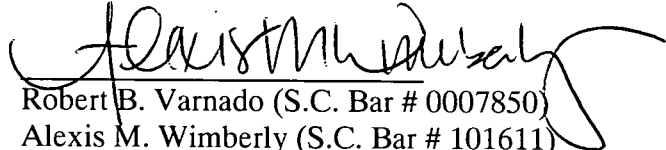
Horry County, Horry County Department of Airports, H. Randolph  
Haldi, Pat Apone, Tim Jackson And Jack Teal, Defendants

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

**PROOF OF SERVICE – PETITION FOR REHEARING**

The undersigned attorney for Appellants hereby certify that a true copy of the *Petition for Rehearing* in the above-referenced matter has been served on all counsel of record by sending a copy via U.S. Mail on this the 21st day of March, 2017 to the following:

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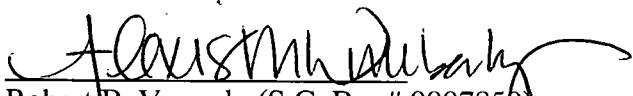
Of whom, H. Randolph Haldi, Pat Apone, Tim  
Jackson And Jack Teal are ..... Respondents

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CERTIFICATE OF COUNSEL

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The undersigned certified that this *Petition for Rehearing* complies with Rule 211(b), SCACR.

  
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March 21, 2017

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March 21, 2017

**Via Fedex**

The Honorable Jenny Abbott Kitchings  
Clerk of Court  
South Carolina Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

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MAR 22 2017

SC Court of Appeals

**RE: Skydive Myrtle Beach, Inc. v. Horry County et. al.**  
Appellate Case No.: 2014-002491  
Our File No.: 6247

Dear Ms. Abbott Kitchings:

The Appellant Skydive Myrtle Beach respectfully submits its *Petition for Rehearing* in the above-captioned matter. My firm's check in the amount of \$25.00 for the petition fee is attached herewith.

Of course, should there be any questions or concerns, please do not hesitate to contact my office.

With kindest regards, I remain,

Very truly yours,

BROWN & VARNADO LLC

  
Alexis M. Wimberly

AMW/

Enclosure(s): as stated

cc: Samuel F. Arthur, III, Esquire (*via U.S. Mail*)