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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Unpublished Opinion No. 17-UP-118
Heard November 3, 2016 – Filed March 8, 2017
Petition for Rehearing Denied May 19, 2017

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

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.

Appellate Case No. 2014-002491

PETITION FOR WRIT OF *CERTIORARI*

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CERTIFICATE OF COUNSEL

Pursuant to Rule 242(d)(1) of the South Carolina Appellate Court Rules, the undersigned counsel for Petitioner certifies that a Motion for Rehearing was made and ruled upon by the South Carolina Court of Appeals.

QUESTION FOR REVIEW

Did the Court of Appeals err in affirming the Circuit Court's dismissal of claims against the Individual Defendants with prejudice?

STATEMENT OF THE CASE

On February 28, 2014, Skydive Myrtle Beach, Inc ("Petitioner") brought this action alleging *inter alia* fraud, civil conspiracy, defamation and trespass against H. Randoph Haldi, Pat Apone, Tim Jackson and Jack Teal ("Individual Defendants"), as well as Horry County and the Horry County Department of Airports ("HCDA"). The Individual Defendants were employed by either Horry County or the HCDA. The original Complaint stated in paragraph 8 that the Individual Defendants acted at "all relevant times" as agents of their governmental employers, and the each of the claims against them states at the beginning: "Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim."

On March 26, 2014, the Individual Defendants moved to dismiss the Complaint under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure on the grounds that they were not proper parties under S.C. Code Ann. §15-78-70 of the South Carolina Tort Claims Act ("SCTCA"). Prior to the hearing, Petitioner submitted a Memorandum of Law on May 23, 2014. A hearing was held on June 2, 2014. Petitioner submitted a Proposed Order on July 9, 2014 and again on August 15, 2014; on both occasions, the Petitioner asked the Court for leave to amend the Complaint if the motion to dismiss was granted.

The Court granted the Individual Defendants' motion to dismiss with prejudice on October 13, 2014. Counsel for the Individual Defendants sent the Order to the Clerk of Court on October 16, 2014. On October 27, 2014, Petitioner received a file-stamped copy from the Individual Defendants' counsel and this appeal followed on November 10, 2014.

As part of the Record on Appeal, Petitioner filed an Amended Complaint correcting the pleading errors of the first. (R. p. 55-109). Appellant argued in its brief that discovery was incomplete and the Individual Defendants were dismissed before discovery was fully conducted. (R. pp. 556-557).

The Court of Appeals heard argument on November 3, 2016. It issued its ruling on March 8, 2017. (R. pp. 473-474). Petitioner filed a timely motion for rehearing which was denied May 19, 2015. (R. p. 461). The instant petition for certiorari only goes to the Court of Appeals' affirmation of the circuit court's dismissal of the Individual Defendants with prejudice.

ARGUMENT

This case boils down to whether the Supreme Court wants to protect government workers from suit and if it will join the trial court and the Court of Appeals in shielding them from potential liability in this case, using "discretion" to do so. If this Court agrees, then *certiorari* will be denied. If it does not agree, however, and finds that a manifest injustice has occurred – which Petitioner believes has – then it must grant *certiorari* and remand the case to the trial court allowing the plaintiff to file and serve an amended complaint.

General Rule Allows the Petitioner to File and Serve an Amended Complaint.

The primary authority is *Spence v. Spence*, 368 S.C. 106, 628 S.E.2d 869 (2006). *Spence* stands for the general proposition that "[t]he plaintiff in most cases should be given an opportunity to file and serve an amended complaint" when a complaint is dismissed for failure to state a cause

of action under Rule 12(b)(6), SCRCP. *Spence*, 388 S.C. at 129, 628 S.E.2d at 881 (citations omitted). In fact, in the case at bar, the Court of Appeals acknowledges this fact. *Skydive Myrtle Beach, Inc. v. Horry County*, 2017 WL 922465, at *2 (Ct. App. 2017). It is the general rule articulated by the United States Supreme Court and the courts of this jurisdiction in other decisions as well. *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); James F. Flanagan, *South Carolina Civil Procedure* 95 (2d ed. 1996) (party who loses a motion to dismiss normally is given the right to amend the complaint to cure the defect).

Scenarios in* Spence v. Spence *Allowing Affirmation with Prejudice.

Spence then examines several grounds in which the Appellate Court has a right to affirm a dismissal with prejudice. The first is when a complaint is dismissed without prejudice, and the plaintiff is given the right to file and serve an amended complaint, but appeals first anyway. *Id.*, 388 S.C. at 130, 628 S.E.2d at 881. In that scenario, the appellant waives the right to amend and

the Court may affirm the dismissal with prejudice if it determines the lower court properly dismissed the complaint. *Id.* This scenario is not impacted in the case at bar.

The second is when the plaintiff's complaint is dismissed, but he is not given the opportunity to file and serve an amended complaint (i.e., the dismissal is with prejudice). *Id.*, 388 S.C. at 130, 628 S.E.2d at 881-882. In this scenario, the appellate court may modify the lower court's order to find the dismissal is without prejudice – even in its discretion imposing a reasonable time to file and serve an amended complaint after the statute has run. *Id.* Importantly, *Spence* goes on to hold that "an appellate court *should* follow this rule when the plaintiff presents additional factual allegations or different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted (emphasis added)." *Id.*

The third is like the second, except in it the complainant does not present alternative factual allegations or a different theory of recovery to the trial court which may give rise to a claim upon which relief may be granted. *Id.* Once again, the appellate court may in its discretion affirm the dismissal with prejudice. *Id.*; *see Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 153, 723 S.E.2d 835, 8400841 (Ct. App. 2012).

***Analyzing the* Spence *Grounds*.**

In this case, the second scenario from *Spence* is most applicable. Here, the Petitioner's Complaint against the Individual Defendants was dismissed ***with prejudice*** on a technical defect (the problem paragraph 8) prior to Petitioner being able to move to amend. Petitioner filed a memorandum and argued at the hearing that the technical pleading errors should be overlooked; it also asked for permission to file and serve an amended complaint listing additional factual allegations, asserting different theories of recovery and correcting deficiencies in the original complaint. The trial court refused to allow the amended pleading. The Petitioner's brief raised the

same arguments and argued that discovery was incomplete. Petitioner submitted an amended complaint with its record on appeal correcting the technical problems. Consequently, Petitioner has met the second scenario in *Spence*. *Spence*, 388 S.C. at 130, 628 S.E.2d at 881-882.

From a plain reading of the case law, the second scenario favors allowing the filing and service of an amended complaint unless "if it appears to a certainty that no relief can be granted under any set of facts that can be proven in support of its allegations." *Spence*, 398 S.C. at 129, 628 S.E.2d at 881; *see also, Blackwell v. Burkett*, 2010 WL 10080068 at * 6 (in case involving two of the panel members, explaining that typically a plaintiff is given an opportunity to file and serve an amended complaint; however, "if it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations" the complaint may be dismissed with prejudice).

This is consistent with the holdings of the cases cited in *Spence*. *Giuliani v. Chuck,* 620 P.2d 733, 737 (Hawaii Ct. App. 1980) (complaint is not subject to dismissal with prejudice unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations); *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell,* 708 A.2d 283, 286–87 (Me. 1998) (trial court acted within its discretion in dismissing case with prejudice pursuant to Rule 12(b)(6) where plaintiff was unable to show how he would cure defects in his complaint if granted leave to amend it); *Barkley v. Good Will Home Assn.*, 495 A.2d 1238 (Me. 1985) (in absence of bad or dilatory motives on the part of plaintiff or undue prejudice to defendant, the trial court abused its discretion by denying the plaintiff an opportunity to amend her complaint after it was dismissed pursuant to Rule 12(b)(6)); *Baker v. Town of Middlebury,* 753 N.E.2d 67, 74 (Ind. Ct. App. 2001) (dismissal of complaint pursuant to Rule 12(b)(6) with

prejudice was harmless error because plaintiff failed to show how he would have amended his complaint to avoid dismissal).

It is also consistent with the law cited in the standard for review for Rule 12(b)(6) appeals. *See Wilkinson v. East Cooper Community Hosp.*, 410 S.C. 163, 169-170, 763 S.E.2d 426, 430 (2014) ("On appeal from the dismissal of a case … an appellate court applies the same standard of review as the trial court … which requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case."). Finally, it is consistent with 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).

Following *Spence*, therefore, the Court of Appeals ***should*** have applied the rule allowing the service of an amended summons and complaint because the plaintiff presented "additional factual allegations or different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted." *Spence*, 388 S.C. at 130, 628 S.E.2d at 881-882. The Court of Appeals should not have affirmed the trial court just because the Plaintiff could proceed against the remaining Defendants – Horry County and the Horry County Department of Airports. *Skydive Myrtle Beach, Inc.*, 2017 WL 922465, at *2 ("Here, we note the circuit court's dismissal with prejudice did not end the case in its entirety. It only ended the case as to the individual defendants—the case will proceed against Horry County and the Horry County Department of Airports.").

At a minimum, the Court of Appeals had to follow *Spence*. Moreover, its discretion under these facts was not absolute. *Spence*, 388 S.C. at 130, 628 S.E.2d at 881-882; *see Davis v. Lunceford*, 279 S.C. at 507, 309 S.E.2d at 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).

It was just as arbitrary and capricious for the Court of Appeals to favor the governmental employees – by affirming their dismissal with prejudice simply because the Plaintiff could still proceed against the County and HCDA – as it was for the trial court to dismiss with prejudice when the Plaintiff had made suitable arguments setting forth grounds that would have allowed a well-pleaded complaint to proceed.

While reasonable minds can differ over whether the original complaint was properly dismissed under the SCTCA, the entire basis for the ruling is that Plaintiff's original complaint was based on a technical defect – in other words, a pleading error. A technical defect in the original Complaint did not and cannot equate "to a certainty that no relief can be granted under any set of facts that can be proven in support of its allegations." *Spence*, 398 S.C. at 129, 628 S.E.2d at 881; *Blackwell*, 2010 WL 10080068 at * 6. Moreover, this pleading error could have been corrected by amended pleading which the circuit court refused to accept.

The Court of Appeals cited *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.*

Finally, the Court of Appeals did not say why the Circuit Court's dismissal of the Individual Defendants was not prejudicial – conferring on the trial court ***its*** direction under *Spence*. *Skydive Myrtle Beach, Inc*, 2017 WL 922465, at *2 ("The circuit court did not abuse its discretion in dismissing the complaint with prejudice. Although dismissals under Rule 12(b)(6), SCRCP, are generally without prejudice, this court is not required to modify a circuit court's order that dismisses with prejudice."). This error alone militates in favor of certiorari.

Here, the case has now completely been dismissed against the Individual Defendants. While the case does continue against the County and the HCDA, 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* or collateral estoppel. Nothing other than poor pleading and/or technical errors in the original complaint was sufficient to grant dismissal with prejudice as to the Individual Defendants despite the fact that the case was in its infancy. It is miscarriage of justice for Petitioner not to be able to test its case against them.

CONCLUSION

The circuit court's dismissal of the Complaint against the Individual Defendants with prejudice was arbitrary and capricious. So was the Court of Appeals' affirmation of that decision, which was based on *Spence*, but which completely failed to state why the circuit court's ruling was not an abuse of discretion; which failed to apply the general rule of *Spence*; which failed to articulate which of *Spence's* exceptions was applicable; and applied an unbridled discretion in the

face of an amended complaint. It is manifestly unfair that the circuit court dismissed the Individual Defendants with prejudice when there are worthy grounds against them that comply with the SCTA.

For these reasons, this Court should take *certiorari* of this manifestly unjust situation and modify the Court of Appeals ruling to allow the amended complaint against the Individual Defendants to proceed.

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Appellate Case No. 2014-002491

CERTIFICATE OF SERVICE

The undersigned attorney for Appellant hereby certifies that a true copy of the ***Petition for Writ of Certiorari and a copy of the Appendix*** in the above-referenced matter has been served on all counsel of record by sending a copy via U.S. Mail on this the 19th day of June to the following:

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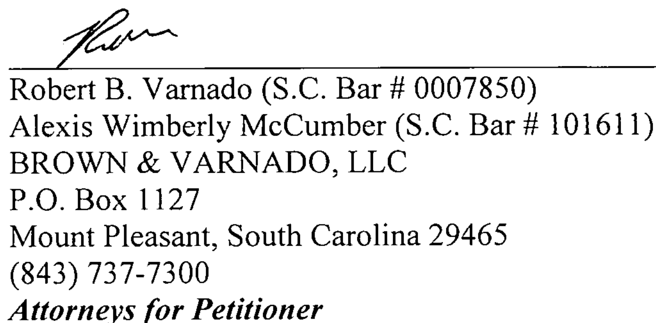

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