

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Unpublished Opinion No. 17-UP-118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

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JUN 26 2017

S.C. SUPREME COURT

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

APPENDIX VOLUME II

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

v.

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Skydive Myrtle Beach, Inc. v. Horry County, et. al.
INDEX TO APPENDIX VOL. 2

Court of Appeals Order Denying Rehearing	461
Appellant's Petition for Rehearing	463
Court of Appeals Order Affirming Circuit Court	473
Final Brief of Respondents	476
Final Reply Brief of Appellant	497
Initial Brief of Respondents	508
Initial Brief of Appellant	529

The South Carolina Court of Appeals

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

v.

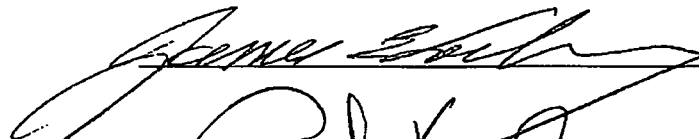
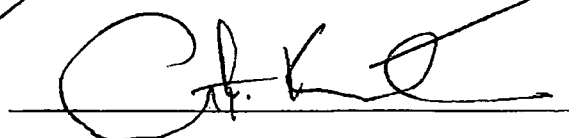
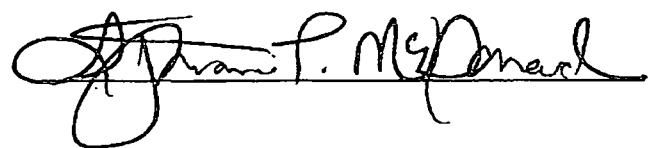
Horry County, Horry County Department of Airports, H. Randolph Haldi, Pat Apone, Tim Jackson and Jack Teal, Defendants,

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

Appellate Case No. 2014-002491

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.
 J.
 J.

Columbia, South Carolina

cc:

FILED

May 19, 2017

Samuel F. Arthur, III, Esquire
Robert Bratton Varnado, Esquire
Alexis Mills Wimberly, Esquire
The Honorable Larry B. Hyman, Jr.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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APPELLATE CASE NO. 2014-002491

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

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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) SCRCF, 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) SCRCF. Furthermore, all pleadings are to be construed to do substantial justice to all parties. Rule 8(f), SCRCF,

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, SCRCF 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 SCRCF 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.

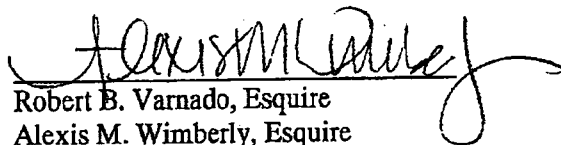
Our courts have generally been consistent in finding that intentional acts by government employees **intending to do others harm** are deemed outside the course and scope of employment and whether someone was working within the scope of their official duties is a question of fact for a jury. *Flateau 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

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

APPELLATE CASE NO. 2014-002491

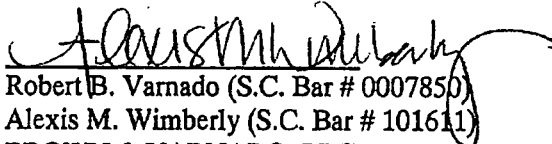
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v.

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

CERTIFICATE OF COUNSEL

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


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March 21, 2017

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Court of Common Pleas

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

APPELLATE CASE NO. 2014-002491

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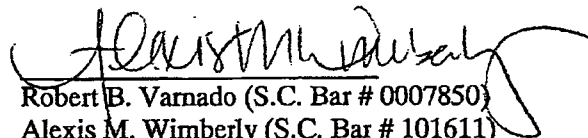
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Haldi, Pat Apone, Tim Jackson And Jack Teal, Defendants

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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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

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

v.

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Appellate Case No. 2014-002491

Appeal From Horry County
Larry B. Hyman, Jr., Circuit Court Judge

Unpublished Opinion No. 2017-UP-118
Heard November 3, 2016 – Filed March 8, 2017

AFFIRMED

Robert Bratton Varnado and Alexis Mills Wimberly,
both of Brown & Varnado, LLC, of Mount Pleasant, for
Appellant.

Samuel F. Arthur, III, of Aiken Bridges Elliott Tyler &
Saleeby, PA, of Florence, for Respondents.

PER CURIAM: Skydive Myrtle Beach, Inc. (Skydive) appeals the circuit court's order dismissing its complaint against several individual defendants, arguing the court erred in (1) dismissing the complaint pursuant to the South Carolina Tort Claims Act, (2) determining that conflicting allegations of conduct and liability were an inequitable interpretation of Skydive's complaint, and (3) dismissing the complaint with prejudice when discovery had not yet been completed and Skydive had requested leave to amend its pleadings. We affirm.

1. The circuit court properly dismissed the complaint pursuant to the South Carolina Tort Claims Act because "[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) (2005). Subsection (b) sets forth exceptions to this immunity "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) (2005). After careful review, we find Skydive's complaint failed to assert sufficient facts to show the individual defendants acted outside the scope of their official duties or fell within any of subsection (b)'s other exceptions. *See Flateau v. Harrelson*, 355 S.C. 197, 205, 584 S.E.2d 413, 417 (Ct. App. 2003) (stating board members may have exceeded their authority when they held two employees at a hearing indefinitely, but this alone did not bring their actions outside the scope of their official duties); *Crittenden v. Thompson-Walker Co.*, 288 S.C. 112, 115, 341 S.E.2d 385, 387 (Ct. App. 1986) ("If the servant is doing some act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority." (quoting *Jones v. Elbert*, 211 S.C. 553, 558, 34 S.E.2d 796, 798-99 (1945))). Further, we distinguish this case from *Pridgen v. Ward*, in which this court found evidence to infer that several government employees conspired to have a prison warden's employment terminated for purely personal reasons. 391 S.C. 238, 245, 705 S.E.2d 58, 62 (Ct. App. 2010). Here, Skydive's allegations fail to show how the defendants' actions were personal and disconnected from their employers' business such that they might forfeit the protections of the Tort Claims Act.

2. We agree with the circuit court that it would be inequitable to allow Skydive to assert conflicting theories that the individual defendants acted both inside and outside the scope of their official duties. Although we are mindful that Rule 8, SCRCP, allows a party to "set forth two or more statements of a cause of action or

defense alternatively or hypothetically," we find a plain reading of Skydive's complaint demonstrates it failed to set out alternative pleadings. Importantly, Paragraph 8 of Skydive's complaint alleged the individual defendants acted at "all relevant times" as agents of their government employers and each of the enumerated claims began with a paragraph stating, "Plaintiff reincorporates and realleges each of the foregoing allegations as fully as if repeated herein verbatim." Accordingly, Skydive cannot now argue alternative theories it failed to plead in its own complaint. *See Charleston Cty. Sch. Dist. v. Laidlaw Transit, Inc.*, 348 S.C. 420, 425, 559 S.E.2d 362, 364 (Ct. App. 2001) ("Any allegations, statements, or admissions contained in a pleading are conclusive against the pleader, and a party cannot subsequently take a contrary or inconsistent position.").

3. The circuit court did not abuse its discretion in dismissing the complaint with prejudice. Although dismissals under Rule 12(b)(6), SCRCPP, are generally without prejudice, this court is not required to modify a circuit court's order that dismisses with prejudice. *See Spence v. Spence*, 368 S.C. 106, 130, 628 S.E.2d 869, 881 (2006) ("When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal *may* modify the lower court's order to find the dismissal is without prejudice." (emphasis added)).¹ 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.

AFFIRMED.

LOCKEMY, C.J., and KONDUROS and MCDONALD, JJ., concur.

¹ As to Skydive's argument that the circuit court erred in declining to allow it to file an amended complaint, we find no error. *See Health Promotion Specialists, L.L.C. v. S.C. Bd. of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 812–13 (2013) (affirming the circuit court's denial of a party's motion to amend its complaint when amendment would be futile).

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, CIRUCIT 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,

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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, CIRUCIT COURT JUDGE

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,

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TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Statement of the Facts.....	3
Standard of Review.....	4
Arguments.....	5, 9, 11
I. THE TRIAL COURT PROPERLY DISMISSED THE INDIVIDUAL DEFENDANTS PURSUANT TO THE SOUTH CAROLINA TORT CLAIMS ACT.	
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.	
III. THE TRIAL COURT CORRECTLY DISMISSED APPELLANT'S COMPLAINT WITH PREJUDICE.	
Conclusion.....	12

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Baird v. Charleston County</i> , 333 S.C. 519, 511 S.E.2d 69 (1999).....	4
<i>Bergstrom v. Palmetto Health Alliance</i> , 352 S.C. 221, 573 S.E.2d 805 (Ct.App.2002).4, 5	5
<i>Brown v. Leverette</i> , 291 S.C. 364, 353 S.E.2d 697 (1987).....	5
<i>Carolina Park Associates, LLC v. Marino</i> , 732 S.E.2d 876, 878 (2012).....	4
<i>Cowart v. Poore</i> , 337 S.C. 359, 523 S.E.2d 182 (Ct.App.1999).....	5
<i>Doe v. Marion</i> , 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).....	4
<i>Flateau v. Harrelson</i> , 355 S.C. 197, 584 S.E.2d 413 (Ct.App.2003).....	6, 7, 8, 13
<i>Gray v. State Farm Auto Ins. Co.</i> , 327 S.C. 646, 491 S.E.2d 272 (Ct.App.1997).....	5
<i>Murphy v. Richland Mem’l Hosp.</i> , 317 S.C. 560, 455 S.E.2d 688 (1995).....	6
<i>Spence v. Spence</i> , 386 S.C. 106, 628 S.E.2d 869 (2006).....	11, 12
<i>Stiles v. Onorato</i> , 318 S.C. 297, 457 S.E.2d 601 (1995).....	5
<i>Tatum v. Medical Univ. of South Carolina</i> , 346 S.C. 194, 552 S.E.2d 18 (2001).....	5
<i>Wade v. Berkeley County</i> , 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998).....	7
<i>Wells v. City of Lynchburg</i> , 331 S.C. 296, 501 S.E.2d 746 (Ct.App.1998).....	6
<i>Williams v. Condon</i> , 347 S.C. 227, 553 S.E.2d 496 (Ct.App.2001).....	4, 5

Statutes and Rules

South Carolina Statutes:

S.C. Code § 15-78-10.....	5
S.C. Code § 15-78-20(b).....	6
S.C. Code § 15-78-20(f).....	7

S.C. Code § 15-78-30(c).....	7
S.C. Code § 15-78-30(d)	7
S.C. Code § 15-78-30(i).....	7
S.C. Code § 15-78-70.....	2
S.C. Code § 15-78-70(a).....	6
S.C. Code § 15-78-70(b).....	6, 9, 10
S.C. Code § 15-78-70(e).....	7
S.C. Code § 15-78-200.....	6
Rules of Civil Procedure:	
Rule 12(b)(6), SCRCF.....	2, 4, 7, 13

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), SCRCPP, 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 *Flateau*, 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.” *Flateau*, 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 *Flateau*, none of the parties dispute that the individually named Defendants are employees of a “governmental entity” as defined by the SCTCA. Therefore, also like *Flateau*, 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 *Flateau* 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 *Flateau* 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.

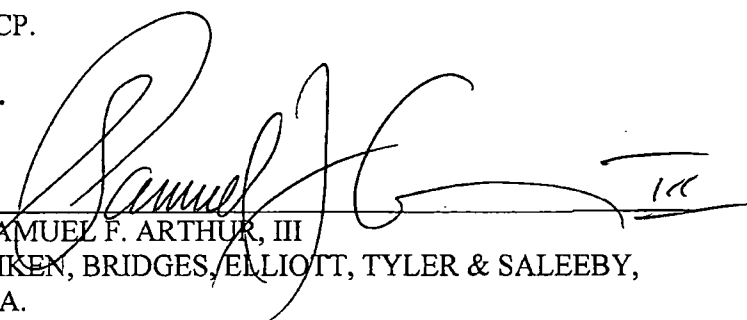
Appellant also argues that the trial court should not have dismissed the individual defendants with prejudice before the parties had an opportunity to complete and present to the court depositions, answers to interrogatories, affidavits, and admissions on file. This argument is baseless in that a motion to dismiss under Rule 12(b)(6), SCRCP--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), SCRPC.

Respectfully submitted.



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July 22, 2015

8

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

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

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

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

v.

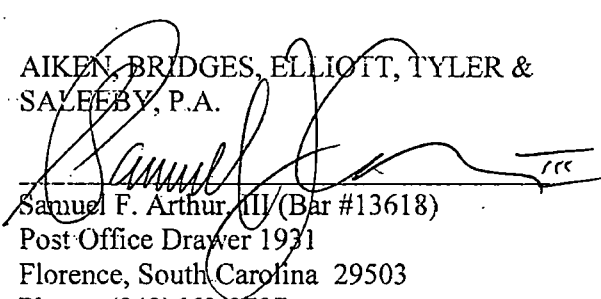
Horry County, Horry County Department of Airports,
H. Randolph Haldi, Pat Apone, Tim Jackson, and Jack Teal, Defendants

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

CERTIFICATE OF COMPLIANCE

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

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SALEEBY, P.A.


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24th day of July, 2015.


Notary Public for South Carolina

My Commission Expires: June 2, 2019

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

RECEIVED
JUL 27 2015
SC Court of Appeals

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

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

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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,

CERTIFICATE OF SERVICE

I hereby certify that I have served the document listed below in the above entitled action to the addressees below via U.S. mail on July 24, 2015 and proper postage was attached thereto.

DOCUMENTS: FINAL BRIEF OF RESPONDENT

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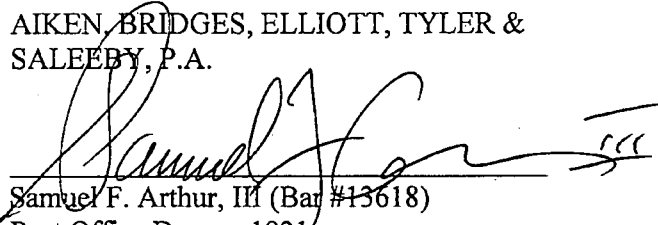
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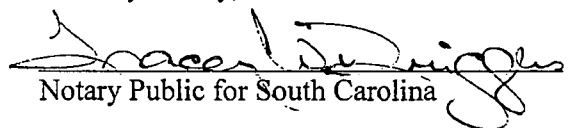
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Notary Public for South Carolina

My Commission Expires: June 2, 2019

**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

**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 areRespondents.**

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TABLE OF CONTENTS

Table of Authorities..... ii

Arguments..... 1

 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..... 1

 II. THE TRIAL COURT INCORRECTLY DISMISSED THE
 COMPLAINT WITH PREJUDICE 5

Conclusion..... 7

TABLE OF AUTHORITIES

CASES

Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005).....6
Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003)..... *passim*
Hagy v. Pruitt, 331 S.C. 213, 500 S.E.2d 168 (Ct. App. 2009).....7
Harvey v. Strickland, 350 S.C. 303, 566 S.E.2d 529 (2002)6
Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) 4
Kelly v. S.C. Farm Bureau Mut. Ins. Co., 316 S.C. 319, 450 S.E.2d 59 (Ct. App. 1994) ...6
Spence v. Spence, 368 S.C. 106, 628 S.E.2d 869 (2006).....5, 6
Williams v. Watkins, 380 S.C. 319, 681 S.E.2d 87 (Ct. App. 2009).....7

STATUTES

S.C. Code Ann. § 15-78-70 1
S.C. Code Ann. § 15-78-70(a) 2
S.C. Code Ann. § 15-78-70(b) 3, 4
S.C. Code Ann. § 15-78-80 3, 4
S.C. Code Ann. § 15-78-110 3, 4
S.C. Code Ann. § 15-78-110(b) 3

RULES

Rule 8(f), SCRCP 7
Rule 15, SCRCP 1, 6, 7
Rule 41(b), SCRCP 7
Rule 56, SCRCP 7

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY 9th ed. 5

TREATISES

Flanagan, SOUTH CAROLINA CIVIL PROCEDURE 3RD (2010) 6

PLEADINGS

Judge Larry B. Hyman, October 17, 2014 Order 5
Initial Brief of Respondents 2, 6
Appellant's Complaint 4

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, SCRPC. "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.

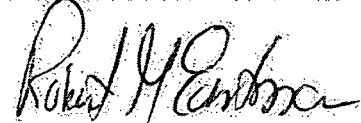
319, 327, 681 S.E.2d. 87, 96 (Ct. App. 2009) (“law favors the resolution of disputes based upon all parties having their day in court.”); *Hagy v. Pruitt*, 331 S.C. 213, 221, 500 S.E.2d 168, 172 (Ct. App. 2009); *see also* Rule 8(f), SCRCF (all pleadings shall be so construed as to do substantial justice 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, SCRCF. 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, SCRCF.

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.

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Dated: July 20, 2015

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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,

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

INITIAL BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

	Page
Table of Authorities.....	ii
Statement of Issues on Appeal.....	1
Statement of the Case.....	2
Statement of the Facts.....	3
Standard of Review.....	4
Arguments.....	5, 9, 11
I. THE TRIAL COURT PROPERLY DISMISSED THE INDIVIDUAL DEFENDANTS PURSUANT TO THE SOUTH CAROLINA TORT CLAIMS ACT.	
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.	
III. THE TRIAL COURT CORRECTLY DISMISSED APPELLANT'S COMPLAINT WITH PREJUDICE.	
Conclusion.....	13

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Baird v. Charleston County</i> , 333 S.C. 519, 511 S.E.2d 69 (1999).....	4
<i>Bergstrom v. Palmetto Health Alliance</i> , 352 S.C. 221, 573 S.E.2d 805 (Ct.App.2002).....	4, 5
<i>Brown v. Leverette</i> , 291 S.C. 364, 353 S.E.2d 697 (1987).....	5
<i>Carolina Park Associates, LLC v. Marino</i> , 732 S.E.2d 876, 878 (2012).....	4
<i>Cowart v. Poore</i> , 337 S.C. 359, 523 S.E.2d 182 (Ct.App.1999).....	5
<i>Doe v. Marion</i> , 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).....	4
<i>Flateau v. Harrelson</i> , 355 S.C. 197, 584 S.E.2d 413 (Ct.App.2003).....	6, 7, 8, 13
<i>Gray v. State Farm Auto Ins. Co.</i> , 327 S.C. 646, 491 S.E.2d 272 (Ct.App.1997).....	5
<i>Murphy v. Richland Mem'l Hosp.</i> , 317 S.C. 560, 455 S.E.2d 688 (1995).....	6
<i>Spence v. Spence</i> , 386 S.C. 106, 628 S.E.2d 869 (2006).....	11, 12
<i>Stiles v. Onorato</i> , 318 S.C. 297, 457 S.E.2d 601 (1995).....	5
<i>Tatum v. Medical Univ. of South Carolina</i> , 346 S.C. 194, 552 S.E.2d 18 (2001).....	5
<i>Wade v. Berkeley County</i> , 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998).....	7
<i>Wells v. City of Lynchburg</i> , 331 S.C. 296, 501 S.E.2d 746 (Ct.App.1998).....	6
<i>Williams v. Condon</i> , 347 S.C. 227, 553 S.E.2d 496 (Ct.App.2001).....	4, 5
 <u>Statutes and Rules</u>	
South Carolina Statutes:	
S.C. Code § 15-78-10.....	5
S.C. Code § 15-78-20(b).....	6
S.C. Code § 15-78-20(f).....	7

S.C. Code § 15-78-30(c).....	7
S.C. Code § 15-78-30(d)	7
S.C. Code § 15-78-30(i).....	7
S.C. Code § 15-78-70.....	2
S.C. Code § 15-78-70(a).....	6
S.C. Code § 15-78-70(b).....	6, 9, 10
S.C. Code § 15-78-70(e).....	7
S.C. Code § 15-78-200.....	6
Rules of Civil Procedure:	
Rule 12(b)(6), SCRCP.....	2, 4, 7, 13

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. (Complaint) 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. (Complaint) 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. (Complaint) 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. (Motion to Dismiss) 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. (Order Granting Motion to Dismiss).

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. (Complaint ¶¶ 13 – 14)

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. (Complaint ¶¶ 13 – 26)

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), SCRCF, 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 *Flateau*, 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.” *Flateau*, 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 *Flateau*, none of the parties dispute that the individually named Defendants are employees of a “governmental entity” as defined by the SCTCA. Therefore, also like *Flateau*, 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 *Flateau* 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 *Flateau* 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

¹ See Complaint at ¶¶ 70, 75, 76, 85, 118.

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 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.

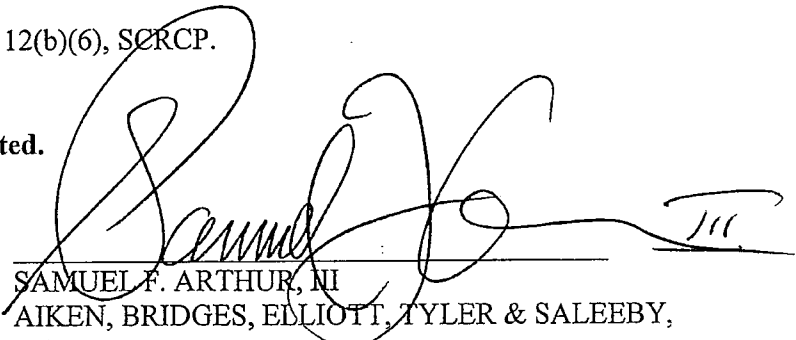
Appellant also argues that the trial court should not have dismissed the individual defendants with prejudice before the parties had an opportunity to complete and present

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), SCRCP--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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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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

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,

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

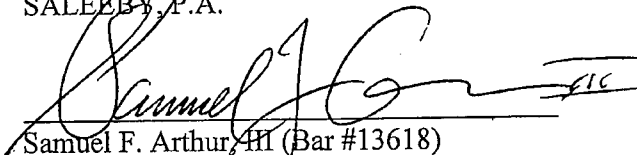
**RESPONDENTS' DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

1. Complaint;
2. Motion to Dismiss filed March 27, 2014;
3. Order of the Honorable Larry B. Hyman dated October 13, 2014.

I certify that this designation contains no matter which is irrelevant to this appeal.

Dated: May 21, 2015

AIKEN, BRIDGES, ELLIOTT, TYLER &
SALEEBY, P.A.

A handwritten signature in black ink, appearing to read "Samuel F. Arthur, III", with a horizontal line underneath it. The signature is written in a cursive style.

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IN THE COURT OF APPEALS

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

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

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

CERTIFICATE OF SERVICE

I hereby certify that I have served the document listed below in the above entitled action to the addressees below via U.S. mail on May 21, 2015 and proper postage was attached thereto.

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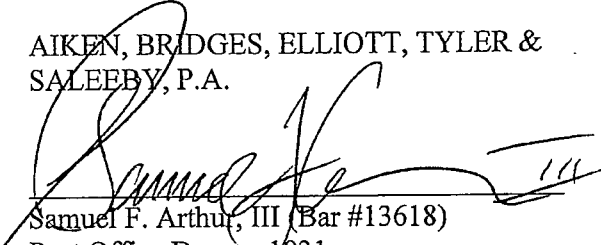
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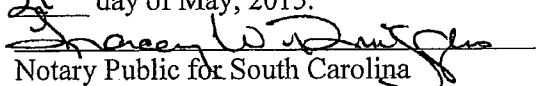
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21st day of May, 2015.


Notary Public for South Carolina

My Commission Expires: 06-02-19

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

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.

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TABLE OF CONTENTS

Table of Authorities ii

Statement of the Issues on Appeal 1

Statement of the Case 1

Statement of Facts 3

Standard of Review 9

Argument 10

I. BECAUSE APPELLANT ALLEGED RESPONDENTS’ ACTS INVOLVED CONDUCT THAT CONSTITUTED ACTUAL FRAUD, ACTUAL MALICE, INTENT TO HARM, AND CONDUCT WHICH COULD ALSO BE INFERRED TO BE OUTSIDE THE SCOPE OF OFFICIAL DUTIES, THE TRIAL COURT ERRED IN DISMISSING APPELLANT’S COMPLAINT WITH PREJUDICE AGAINST THE INDIVIDUALLY NAMED RESPONDENTS PURSUANT TO THE SOUTH CAROLINA TORT CLAIMS ACT 10

A. *Count 4, Civil Conspiracy* 11

B. *Appellant’s Claims Included Allegations of Actual Malice* 12

1. Count 5, Constructive Fraud 13

2. Count 6, Defamation 13

3. Count 7, Fraud and Misrepresentation 14

4. Count 8, Interference with Contractual Relations 14

5. Count 14, Trespass 15

6. Count 15, Unfair Trade Practices Act 15

II. BECAUSE SCRPC PERMITS CONFLICTING ALLEGATIONS AND INCONSISTENT THEORIES OF LIABILITY, THE TRIAL COURT ERRED WHEN IT DETERMINED THAT CONFLICTING ALLEGATIONS OF CONDUCT AND LIABILITY ARE AN INEQUITABLE INTERPRETATION OF APPELLANT’S COMPLAINT AND IMPERMISSIBLE 17

III. BECAUSE DISCOVERY HAD NOT BEEN COMPLETED AND APPELLANT HAD REQUESTED LEAVE TO AMEND ITS PLEADINGS TO CORRECT THE TECHNICAL DEFECTS OF ITS COMPLAINT, THE TRIAL COURT ERRED WHEN IT DISMISSED APPELLANT’S COMPLAINT AGAINST THE INDIVIDUAL RESPONDENTS WITH PREJUDICE 21

Conclusion 22

TABLE OF AUTHORITIES

CASES

Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999).....10, 22
Bessinger v Food Lion, Inc., 305 F. Supp. 2d 574 (D.S.C. 2003).....18
Brown v County of Berkley, 366 S.C. 354, 622 S.E.2d 533 (2005).....11
Burbach v Investors Management Corp Internat’l, 326 S.C. 492, 484 S.E.2d 119 (Ct. App. 1997)17
Cheney Bros , Inc v. Batesville Casket Co , Inc., 47 F.3d 111, (4th Cir. 1995)14
Chitwood v. McMillian, 189 S.C. 262, 1 S.E.2d 162 (1939).....16
City of Charleston v Hotels com, LP, 487 F.Supp. 2d 676 (D.S.C. 2007)17
Crandall Corp. v Navistar Int’l Transp. Corp., 302 S.C.265, 395 S.E.2d 179 (1990)16
DeBondt v Carlton Motorcars, Inc., 342 S.C. 254, 536 S.E.2d 399 (Ct. App. 2000).....18
Designer Showrooms, Inc. v Kelley, 304 S.C. 478, 405 S.E.2d 417 (Ct. App. 1991).....14
Eubanks v Smuth, 292 S.C. 57, 354 S.E.2d 898 (1987)13
First Union Nat’l Bank v Soden, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998).....12
Flateau v Harrelson, 355 S.C. 197, 594 S.E.2d 413 (Ct. App. 2003).....11
Future Group II v. NationsBank, 324 S.C. 89, 478 S.E.2d 45 (1995).....12
Giles v Lanfgord & Gibson, Inc , 285 S.C. 285, 328 S.E.2d 916 (Ct. App. 1985).....14
Global Protection Corp v Halbersberg, 332 S.C. 149, 503 S.E. 2d 483 (Ct. App. 1998)18
.....18
Goodwin v Kennedy, 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001).....15
Greene v Brown, 199 S.C. 218, 19 S.E.2d 114 (1942).....14
Gressett v South Carolina Electric and Gas Co , 370 S.C. 377, 635 S.E.2d 538 (2006).10
Health Promotion Specialists, LLC and Palmetto Dental Care, LLC v. South Carolina Board of Dentistry, 403 S.C. 623, 635, 743 S.E.2d 808, 814 (2013)11
Holy Loch Distributors, Inc v Hitchcock, 332 S.C 247, 503 S.E.2d 787, 790 (Ct. App. 1998)10
Hooters of Am v Phillips, 39 F. Supp. 2d 582 (D.S.C. 1998); *aff’d* 173 F.3d 933 (4th Cir. 1999)15
*Id*15, 22
Johnson v. Phillips, 315 S.C. 407, 433 S.E.2d 895 (Ct. App. 1993).....16
Kiriakides v Atlas Food Sys. & Servs , Inc , 338 S.C. 572, 527 S.E.2d 371 (Ct. App. 2000), *modified* 343 S.C. 587, 541 S.E.2d 257 (2001)15
LaMotte v Punchline of Columbia, Inc , 296 S.C. 66, 370 S.E.2d 711 (1988).....12, 13
Lee v Chesterfield General Hospital, Inc., 289 S.C. 6, 344 S.E.2d 379 (Ct. App.1986) ..12
M B Kahn Construction Co v South Carolina Nat’l Bank of Charleston, 275 S.C. 381, 271 S.E.2d 414 (1980)15
McCall v Williams, 52 F.Supp.2d 611 (D.S.C. 1999)11, 18
Mendelsohn v Whitfield, 312 S.C. 17, 430 S.E.2d 524 (Ct. App. 1993) *affirmed* 312 S.C. 226, 439 S.E.2d 845 (1994)12
Moshtaghi v The Citadel, 314 S.C. 316, 443 S.E.2d 915 (Ct. App. 1994).....15
Murray v Holnam, Inc., 344 S.C. 129, 542 S.E.2d 743 (Ct. App. 2001)13

<i>Noack Enter., Inc. v Country Corner Interiors of Hilton Head Island, Inc.</i> , 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986).....	18
<i>Overcash v S C Elect. & Gas Co</i> , 356 S.C. 165, 588 S.E.2d 116, 118 (Ct. App. 2003) 10	
<i>Pridgen v. Ward</i> , 391, S.C. 238, 705 S.E.2d 58 (Ct. App. 2011).....	12, 13, 20
<i>Ravan v Greenville County</i> , 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993).....	16
<i>Robertson v. First Union National Bank</i> , 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002), <i>cert dis.</i> , 357 S.C. 592 S.E.2d 625 (2004).....	12
<i>Sadighi v. Daghighfekr</i> , 36 F. Supp. 2d 279 (D.S.C. 1999).....	18
<i>Sanders v. Prince</i> , 304 S.C. 236, 403 S.E.2d 640 (1990).....	11
<i>Satcher v. Berry</i> , 299 S.C. 381, 385 S.E.2d 41 (Ct. App. 1989).....	14
<i>Scott v McCain</i> , 272 S.C. 198, 250 S.E.2d 118 (1998).....	14, 15
<i>Slack v. James</i> , 356 S.C. 479, 589 S.E.2d 772 (Ct. App. 2003).....	10
<i>Smith v Bradstreet Co</i> , 63 S.C. 525, 41 S.E. 763 (1902).....	14
<i>Spence v Spence</i> , 368 S.C. 106, ___, 628 S.E.2d 869, 882 (2006).....	3, 23, 24
<i>Timmons v. News & Press, Inc.</i> , 232 S.C. 639, 103 S.E.2d 277 (1958).....	14, 15
<i>Wells v City of Lynchburg</i> , 331 S.C. 296, 501 S.E.2d 746 (1998).....	11
<i>White v Wilkerson</i> , 328 S.C. 179, 493 S.E.2d 345 (1996).....	15
<i>Willhoit v WCSC, Inc</i> , 293 S.C. 397, 358 S.E.2d 397 (Ct. App. 1986).....	15
<i>Woods v State</i> , 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993).....	14
<i>Wright v Craft</i> , 372 S.C. 1, 640 S.E.2d 486 (Ct. App. 2006).....	17
<i>Yeager v. Murphy</i> , 291 S.C. 485, 354 S.E.2d 393 (Ct. App. 1987).....	12

STATUTES

S.C. Code Ann. § 14-3-330(1) (1976).....	23
S.C. Code Ann. § 14-3-330(2)(c) (1976).....	23
S.C. Code Ann. §§ 15-78-10 <i>et seq</i> (1986).....	10
S.C. Code Ann. § 15-78-40 (1986).....	11
S.C. Code Ann. § 15-78-70 (2005).....	1
S.C. Code Ann. § 15-78-70(a) (2005).....	11
S.C. Code Ann. § 15-78-70(b) (2005).....	11, 21
S.C. Code Ann. § 15-78-70(c) (2005).....	2
S.C. Code Ann. § 22-3-30 (1997).....	4
S.C. Code Ann. §§ 39-5-10, <i>et seq.</i> (1971).....	17
S.C. Code Ann. § 39-5-10(a) (1971).....	17
S.C. Code Ann. § 39-5-10(b) (1971).....	17
S.C. Code Ann. § 39-5-140(a) (1971).....	17
S.C. Code Ann. § 39-5-20(a) (1971).....	17

OTHER AUTHORITIES

Horry County Ordinance 36-14 (May 20, 2014).....	4, 7
Horry County Ordinance 115-14 (Jan. 20, 2015).....	7, 8

RULES

Rule 8, SCRCF19, 20
Rule 8(a), SCRCF19
Rule 8(b), SCRCF19
Rule 8(c), SCRCF19
Rule 8(e)(1), SCRCF19
Rule 8(e)(2) of SCRCF19
Rule 8(e)(2), SCRCF19
Rule 8(f), SCRCF19
Rule 11, SCRCF19
Rule 12(b)(6), SCRCF20, 22, 23
Rule 12(b)(8), SCRCF4
Rule 12, SCRCF23
Rule 42(a), SCRCF4
Rule 54(b), SCRCF23

TREATISES

Black's Law Dictionary 1042 (9th ed. 2009).....13
James F. Flanagan, *South Carolina Civil Procedure* (2d ed. 1996 The South Carolina Bar
– CLE Division).....20, 23
Ralph King Anderson, Jr., *South Carolina Request to Charge-Civil* (2002)16

STATEMENT OF THE 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 WHEN APPELLANT ALLEGED RESPONDENTS' ACTS INVOLVED CONDUCT THAT CONSTITUTED ACTUAL FRAUD, ACTUAL MALICE, INTENT TO HARM, AND ALSO CONDUCT WHICH COULD BE INFERRED TO BE OUTSIDE THE SCOPE OF OFFICIAL DUTIES?
- II. DID THE TRIAL COURT ERR WHEN IT DETERMINED THAT CONFLICTING ALLEGATIONS OF CONDUCT AND LIABILITY ARE AN INEQUITABLE INTERPRETATION OF APPELLANT'S COMPLAINT?
- III. DID THE TRIAL COURT ERR WHEN IT DISMISSED APPELLANT'S COMPLAINT AGAINST THE INDIVIDUAL RESPONDENTS WITH PREJUDICE WHEN DISCOVERY HAD NOT BEEN COMPLETED AND APPELLANT HAD REQUESTED LEAVE TO AMEND ITS PLEADINGS?

STATEMENT OF THE CASE

On February 28, 2014, Skydive Myrtle Beach, Inc. (SDMB) brought this action alleging *inter alia*, fraud, civil conspiracy, defamation, and trespass against H. Randolph Haldi, Pat Apone, Tim Jackson, and Jack Teal (Individual Respondents) as part of its action against Horry County and Horry County Department of Airports (HCDA).

On March 26, 2013, the Individual Respondents filed a Motion to Dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure (SCRCPP) "on the grounds that Plaintiff's 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 [of the South Carolina Tort Claims Act (SCTCA)]." Resp't Mot. to Dismiss.

On May 23, 2014, SDMB sent a memorandum of law in opposition to Individual Respondents' motion to dismiss. SDMB argued that tortious conduct of state employees

is outside the scope of employment as defined in S.C. Code Ann. § 15-78-70(c) and immunity was unwarranted under the SCTCA. Appellant's Mem. of Law, May 23, 2014.

On June 2, 2014, a hearing on the matter was held and opposing Orders were requested from opposing counsel. Court Order, June 3, 2014.

On July 9, 2014, proposed Orders were solicited from the parties by Hon. J. Larry B. Hyman's law clerk specifically addressing actual malice, fraud, and intent to do harm. SDMB submitted its proposed Order to the court and requested leave to amend the pleadings if the motion was granted. Email dated July 9, 2014.

On August 15, 2014, SDMB submitted proposed Orders to the court and requested leave to amend the pleadings if Respondents' motion to dismiss was granted. Ltr. to Judge Hyman, August 15, 2014.

On October 13, 2014, SDMB's Complaint was dismissed with prejudice against the Individual Respondents. Order, October 13, 2014.

On October 16, 2014, counsel for the Individual Respondents sent the signed Order to the clerk of court for filing. Ltr. from Resp't's counsel, Oct. 16, 2014.

On October 27, 2014, a date stamped copy of the Order (October 17, 2014) was received from opposing counsel. Ltr. from Resp't's counsel, Oct. 27, 2014.

On November 10, 2014, SDMB served the Notice of Appeal on Horry County, Horry County Department of Airports, H. Randolph Haldi, Pat Apone, Tim Jackson, and Jack Teal. Notice of Appeal.

Plaintiff asserts that discovery is ongoing,¹ the circuit court narrowly construed the language of the Complaint, improperly applied a Code Pleading standard of review,

¹ Appellant's case was initiated after receiving an unduly restrictive lease in a letter from the Horry County Attorney's Office citing "significant concerns" with alleged rule violations. Appellant has requested

improperly interpreted the SCTCA, and improperly dismissed the its claims against the Individual Respondents by denying Plaintiff's request to correct any "technical" defect in the complaint by filing an amended pleading.

STATEMENT OF FACTS

Appellant's Complaint alleged that Respondents' conduct amounted to an illegal strong-arm attempt at lease negotiations and retaliatory eviction. Compl. ¶ 54, *see generally*, ¶¶ 27-59. Since the underlying action was filed on February 28, 2014, additional relevant facts not before the circuit court but relevant to this appeal have occurred. Each of these facts is included in the Amended Complaint as part of Appellant's Designation of Matter to be Included in the Record on Appeal.²

On March 18, 2014, the Horry County Airport Advisory Committee passed newly drafted regulations (Illegal Regulations) governing conduct at the Grand Strand Airport (GSA) in North Myrtle Beach, South Carolina. The Illegal Regulations included formal rules which supported the "serious concerns" Respondent Haldi raised in his letter to Appellant dated February 19, 2014, and denial of a long-term lease. Am. Compl. ¶ 30.

On April 3, 2014, Respondent County, thorough its attorney, presented the Illegal Regulations to Horry County Administrative Committee stating on the record that no rules existed and needed because HCDA "was now involved in litigation." Am. Compl. ¶ 31.

copies of the rules from all Defendants under the South Carolina Freedom of Information Act (FOIA) and in discovery On November 13, 2014, through its Boston attorneys and as part of *HCDA's Rebuttal in Support of its Answer and Affirmative Defenses to Complainant Skydive Myrtle Beach, Inc 's Part 16 Formal [FAA] Complaint and Statement of Material Facts*, Appellant learned of the enactment of the Illegal Regulations (effective May 20, 2014) by the Horry County A motion to compel and for declaratory judgment against the newly promulgated rules is scheduled to be heard on April 22, 2015

² An Appellant must "present additional factual allegations or a different theory of recovery upon which relief may be granted, [or] the appellate court may in its discretion affirm the complaint with prejudice" *Spence v Spence*, 368 S C 106, ___, 628 S E 2d 869, 882 (2006).

On April 28, 2014, after successfully arguing that Appellant's lack "good faith" in negotiating a new lease before the FAA³, HCDA, through its Boston attorneys, issued a "Notice of Termination" and threatened removal procedures if Appellant did not agree to HCDA's newly minted "standard lease." Am. Compl. ¶ 32.

On May 15, 2014, HCDA initiated a new unpublished reporting system that recorded violations of unpublished rules styled as "Unusual Incidents." Am. Compl. ¶ 33.

On May 20, 2014, Horry County passed Horry County Ordinance 36-14, enacting the Illegal Regulations, effective immediately. Horry County, South Carolina, Ordinance to Add Minimum Standards and Requirements for Aeronautical Activities at Grand Strand Airport, Conway-Horry County Airport, and Twin City Airport (May 20, 2014). Am. Compl. ¶34.

On June 5, 2014, Horry County filed a Writ of Ejectment against Appellant in the Myrtle Beach Magistrate's Court, styled *Horry County v Skydive Myrtle Beach*, CA No. 2014CV261092444. Am. Compl. ¶ 35.

On June 13, 2014, in lieu of a responsive pleading, Appellant contested the jurisdiction of the magistrate's court to determine the Writ of Ejectment and filed a Motion to Remove the action per Rule 12(b)(8), SCRCF and S.C. Code Ann. § 22-3-30 (1997) in the magistrate's court and a Motion to Consolidate in the circuit court pursuant to Rules 12(b)(8) and 42(a), SCRCF and S.C. Code Ann. § 22-3-30 in the primary action styled *Skydive Myrtle Beach, Inc v Horry County, et al*, CA 2014-CP-1193. Am. Compl. ¶ 36.

³ FAA initially dismissed Appellant's federal complaint for failure to properly plead and document good faith efforts to resolve its Title 14, Part 16 FAA Complaint without prejudice on March 18, 2014. On July 1, 2014, Appellant resubmitted its Part 16 Complaint. On July 28, 2014, FAA docket Appellant's Part 16 Complaint, styled *Skydive Myrtle Beach, Inc v Horry County Department of Airports*, FAA Docket No. 16-14-05. FAA has denied Respondent's attempt to have the Complaint dismissed and the matter is pending.

On July 2, 2014, the Myrtle Beach Magistrate's Court denied SDMB's motion to remove Horry County's Application for Ejectment to the Circuit Court and consolidate the matter with this action. Am. Compl. ¶ 37.

On July 8, 2014, SDMB requested production of documents to HCDA including, *inter alia*, rules and regulations pertaining to GSA. Am. Compl. ¶ 38.

In early July 2014, Horry County zoning officials entered SDMB's private pilot lounge (located atop of a warehouse directly across the street from GSA) and took pictures of the lounge. Am. Compl. ¶ 39.

On July 18, 2014, SDMB requested reconsideration of its denial and thirty days to file an answer, counter-claim, conduct discovery and to have a jury trial should the Magistrate's court deny its request for reconsideration. Am. Compl. ¶ 40.

On July 23, 2014, the Myrtle Beach Magistrate's Court denied: SDMB's motion to remove; request to answer the complaint, conduct discovery; and have a jury trial. SDMB was subsequently issued a Writ of Ejectment following a Bench Trial. Am. Compl. ¶ 41.

On July 25 2014, SDMB appealed the Myrtle Beach Magistrate's Court decision and filed a date-stamped copy of the Appeal with the Myrtle Beach Magistrate's Court. Am. Compl. ¶ 42.

On July 29, 2014, the Myrtle Beach Magistrate's Court denied counsel's request for rescheduling or telephonic appearance for an August 1, 2014, Bond Hearing (counsel for SDMB was in Florida and unavailable). Am. Compl. ¶ 43.

On August 1, 2014, SDMB appeared *pro se* before the Myrtle Beach Magistrate's Court, which issued a Bond to Stay Execution on Appeal authorizing SDMB to remain in

Hangar 7 pending the decision on appeal provided SDMB continues monthly payments of \$1,200.00 on the first of each month. Am. Compl. ¶ 44.

On August 16, 2014, the North Myrtle Beach Police department generated a police report about skydiver beach landings in response to an anonymous complaint. No arrests were made. Am. Compl. ¶ 45.

On September 1, 2014, SDMB was required to vacate its pilot lounge after receipt of a zoning violation. Am. Compl. ¶ 46.

On September 30, 2014, a hearing before the circuit court on SDMB's motion to consolidate was denied as moot since the matter had been litigated in the Magistrate's Court and appealed to the circuit court. SDMB's request for injunctive relief relating to its allegations of HCDA harassment was also denied. Am. Compl. ¶ 47.

On October 7, 2014, HCDA advised SDMB that it would not be able to utilize Hangar 7 during its Rehabilitation Project and would be required to execute a "Space Use Permit" in order to operate and park its aircraft at GSA. Am. Compl. ¶ 48.

On October 8, 2014, SDMB advised HCDA that it had authorization to use Hangar 7 to store its aircraft per the Stay Order, advised HCDA that it was required to hangar its aircraft under a lease agreement, and could store its aircraft in Hangar 1, provided HCDA consent. Although Hangar 1 was available for immediate occupancy, HCDA rejected this request and advised SDMB that hangaring its aircraft was "not HCDA's responsibility." Am. Compl. ¶ 49.

On October 14, 2014, SDMB filed a Request for Emergency Hearing, Motion to Compel and Injunctive relief with the CCP. Am. Compl. ¶ 50.

On October 25, 2014, SDMB's leased aircraft was removed by the owner due to anticipated loss of use of Hangar 7. Am. Compl. ¶ 51.

On October 28, 2014, HCDA sent SDMB a copy of "proposed" Illegal Regulations and invited SDMB to a "town hall" meeting to discuss the proposed rules. Am. Compl. ¶ 52.

On October 30, 2014, HCDA reiterated in a "Town Hall Meeting" with SDMB that GSA had no effective regulations or rules in effect and "noted" SDMB's objections to penalties and Illegal Regulations proposed by HCDA at the meeting. Am. Compl. ¶ 53.

On November 3, 2014, SDMB sent HCDA its comments and objections to the "proposed" Illegal Regulations as related to skydiving. Am. Compl. ¶ 54.

On November 13, 2014, HCDA's Boston attorneys provided "Minutes" from the County Council and for the first time identified County Ordinance 36-14 enacting the Illegal Regulations for GSA. Am. Compl. ¶ 55.

On December 5, 2014, Horry County Administration Committee approved an ordinance amending the Illegal Regulations. Am. Compl ¶ 56.

On December 8, 2014, Horry County Council, at its Regular Council Meeting, unanimously adopted Horry County Ordinance 115-14 (first reading) revising the Illegal Regulations passed in May. Am. Compl ¶ 57.

On Christmas week, Horry County and HCDA's first submission of requested documents were produced. The bulk of documents requested including regulations or other rules relating to conduct and operations at GSA was not produced. Am. Compl. ¶ 58.

On December 30, 2014, SDMB's independent investigation revealed Horry County Council's official online minutes and agenda containing the Illegal Regulations.⁴ Am. Compl. ¶ 59.

On January 6, 2015, Horry County Council held a "public review" of County Ordinance 115-14 amending the Illegal Regulations and passed the second reading. No public input relating to the Illegal Regulations was received. Am. Compl. ¶ 60.

On January 9, 2015, through its Boston attorneys, HCDA objected to SDMB's supplementation of the record (inclusion of County Council minutes). Am. Compl. ¶ 61.

On January 20, 2014, Horry County Council enacted an amendment to the Illegal Regulations (effective immediately) to include selective and discretionary power to enforce the Illegal Regulations at GSA together with the power to fine and ban violators from operating at any Horry County Airport (any law enforcement officer has authority to enforce the rules). Am. Compl. ¶ 62; Horry County Ordinance 115-14, Ordinance Amending the County Code by Revising the Minimum Standards and Requirements for Aeronautical Activities at Grand Strand Airport; Conway-Horry County Airport, & Twin City Airport (Jan. 20, 2015).

On January 30, 2015, CCP Motions Calendar scheduled a hearing on SDMB's Motion to Compel and Injunctive Relief for March 2, 2015. Am. Compl. ¶ 63.

On February 3, 2015, the County filed a motion to increase the appeal bond by \$358,000.00 – nearly six (6) months after Horry County Magistrate issued the Stay –

⁴ On July 8, 2014, SDMB requested HCDA to "[l]ist all policies, rules, memoranda, or procedures relating to tenant conduct and training on all Horry County airport property for the last seven (7) years (including but not limited to all operational activity at Conway, Loris, CRE and MYR airports)" PI Interrog No. 14 On Oct 16, 2014, Respondents' response to Appellants Interrogatory No 14 was, "[t]he answers will be provided in accordance with Rule 33 (c) SCRCF Option to Produce Business records" To date, no documents have been produced. A hearing on Appellant's Motion to Compel is scheduled on Apr 22, 2015.

erroneously claiming that the CRE Ramp Renovation project requires work in front of Hangar 7 to commence on February 16, 2015. Contrary to the County's unsupported assertions, this was the first written notice of the start date for Phase 2 Ramp Rehabilitation received by SDMB. Am. Compl. ¶ 64.

On February 10, 2015, the Horry County Magistrate denied County's motion on the grounds that it lacked jurisdiction to make an adjustment to a Bond determination of an appealed matter. That same day, counsel for the County filed a Motion for Temporary Restraining Order and Temporary Injunction. On February 11, 2015, counsel for the County filed a Motion for Modification of Bond Amount. Both were filed in Horry County Circuit Court. Am. Compl. ¶ 65.

On February 17, 2015, the Circuit Court denied Horry County's request for bond increase, Temporary Restraining Order and Injunctive Relief holding that the *status quo ante* should be preserved, SDMB should execute a Space Use Permit (without affecting its legal objections), be permitted to use Hangar 7 during the rehabilitation period, and keep its aircraft on the tarmac during the construction period. Am. Compl. ¶ 66.

On Mar. 14, 2015, HCDA instructed Greenwald Construction to stop any effort to allow Hangar 7 aircraft access (by building a temporary bridge) since SDMB was illegally occupying Hangar 7. Am. Compl. ¶ 67.

On Mar. 30, 2015, HCDA attempted to prevent a mechanic from performing routine maintenance in Hangar 7 pursuant to the Illegal Regulations. Am. Compl. ¶ 68..

STANDARD OF REVIEW

A 12(b)(6) motion must be based solely on the allegations set forth in the complaint and all well-pled facts are presumed to be true. *Gressett v South Carolina Electric and*

Gas Co , 370 S.C. 377, 635 S.E.2d 538 (2006). “The 12(b)(6) motion may not be sustained if the facts alleged and the inferences therefrom would entitle the plaintiff to any relief on any theory.” *Baird v Charleston County*, 333 S.C. 519, 527, 511 S.E.2d 69, 74 (1999). A motion to dismiss “should not be granted if ‘facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.’” *Slack v. James*, 356 S.C. 479, 589 S.E.2d 772 (Ct. App. 2003); *accord*, *Overcash v S.C. Elect. & Gas Co.*, 356 S.C. 165, 588 S.E.2d 116, 118 (Ct. App. 2003) “Therefore, pleadings in a case should be construed liberally and the trial court and this Court must presume all well pled facts to be true so that substantial justice is done between the parties.” *Overcash*, at 118. “The [12(b)(6)] motion may not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. The question to be considered is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any claim for relief.” *Holy Loch Distributors, Inc v. Hitchcock*, 332 S.C. 247, 503 S.E.2d 787, 790 (Ct. App. 1998).

ARGUMENT

- I. BECAUSE APPELLANT ALLEGED RESPONDENTS’ ACTS INVOLVED CONDUCT THAT CONSTITUTED ACTUAL FRAUD, ACTUAL MALICE, INTENT TO HARM, AND CONDUCT WHICH COULD ALSO BE INFERRED TO BE OUTSIDE THE SCOPE OF OFFICIAL DUTIES, THE TRIAL COURT ERRED IN DISMISSING APPELLANT’S COMPLAINT WITH PREJUDICE AGAINST THE INDIVIDUALLY NAMED RESPONDENTS PURSUANT TO THE SOUTH CAROLINA TORT CLAIMS ACT.

The SCTCA⁵ provides personal immunity upon any governmental employee “who commits a tort while acting within the scope of his official duty” S.C. Code Ann. §

⁵ S.C. Code Ann §§ 15-78-10 *et seq*

15-78-70(a) (2005). SCTCA “is the exclusive civil remedy available for any tort committed by a government entity, its employees, or its agents except as provided in § 15-78-70(b)”. *Health Promotion Specialists, LLC and Palmetto Dental Care, LLC v. South Carolina Board of Dentistry*, 403 S.C. 623, 635, 743 S.E.2d 808, 814 (2013) citing *Wells v City of Lynchburg*, 331 S.C. 296, 501 S.E.2d 746 (1998) and S.C. Code Ann. § 15-78-40 (1986) (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.”); *Flateau v Harrelson*, 355 S.C. 197, 594 S.E.2d 413 (Ct. App. 2003).

Exceptions to SCTCA immunity attach when a governmental employee’s conduct is “not within the scope of his official duties or it is proved that it constituted actual fraud, actual malice, intent to harm, or a crime of moral turpitude.” S.C. Code Ann. § 15-78-70(b) (2005). The South Carolina Supreme Court has stated, “[the SCTCA] does not grant an employee ‘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.’” *Sanders v Prince*, 304 S.C. 236, 403 S.E.2d 640, 643 (1990) quoting S.C. Code Ann. § 15-78-70(b); see also *McCall v Williams*, 52 F.Supp.2d 611, 615 (D.S.C. 1999) (same). In *Brown v County of Berkley*, the Supreme Court elaborated:

Were we to recognize that the individual members of the county council enjoyed absolute immunity from suit, [§ 15-78-70(b) of the SCTCA] would be meaningless. Additionally, the individual council members will be free to raise such issues as qualified immunity, qualified privilege, and the provisions of the Tort Claims Act, at later stages of this case.

Brown v County of Berkley, 366 S.C. 354, 362, 622 S.E.2d 533, 538 (2005).

A. Count 4, Civil Conspiracy.

In a civil conspiracy claim, Government employees that intended to harm the plaintiff acted outside the scope of official duties and were afforded no SCTCA immunity. *Pridgen v Ward* 391 S.C. 238, 248, 705 S.E.2d 58, 64 (Ct. App. 2011). In *Pridgen*, the government employees were found to have made false statements, an unfriendly relationship, and a plan to have the plaintiff fired. The court opined that this constituted evidence where a jury could infer motive of an intent to harm and attach individual liability despite the SCTCA. *Pridgen*, 91 S.C.at 248, 705 S.E.2d at 64.

Civil Conspiracy is recognized in South Carolina, and the elements for this cause of action are: (1) Combination of two or more persons; (2) for the purpose of injuring the plaintiff; and (3) special damages. *Future Group II v NationsBank*, 324 S.C. 89, 478 S.E.2d 45 (1995); *LaMotte v Punchline of Columbia, Inc* , 296 S.C. 66, 370 S.E.2d 711 (1988); *Robertson v First Union National Bank*, 350 S.C. 339, 565 S.E.2d 309 (Ct. App. 2002), *cert dis* , 357 S.C. 592 S.E.2d 625 (2004); *First Union Nat'l Bank v Soden*, 333 S.C. 554, 511 S.E.2d 372 (Ct. App. 1998); *Mendelsohn v Whitfield*, 312 S.C. 17, 430 S.E.2d 524 (Ct. App. 1993) *affirmed* 312 S.C. 226, 439 S.E.2d 845 (1994); *Yeager v Murphy*, 291 S.C. 485, 354 S.E.2d 393 (Ct. App. 1987); *Lee v Chesterfield General Hospital, Inc* , 289 S.C. 6, 344 S.E.2d 379 (Ct. App.1986). In its complaint, Appellant alleged the requisite elements for civil conspiracy. Appellant alleged (1) Respondents Haldi, Apone, Jackson and Teal “collectively acted” (Compl. ¶ 77); (2) actions were “designed to ruin or damage the business of SDMB” (Compl. ¶ 80); and (3) caused special damages (Compl. ¶ 81). Allegations that a plan’s “object is to ruin or damage the business of another” are the basis for civil conspiracy. *LaMotte v Punchline of Columbia, Inc* , 296

S.C. 66, 370 S.E.2d 711, 713 (1988) (allegation that defendants combined to prevent opening a restaurant survives summary judgment motion).

In the Complaint and at the hearing, Appellants have maintained that the complaint “alleged conduct that constituted a fraudulent act and that together that constituted a civil conspiracy . . . [and made] false representations under color of state authority that . . . if [SDMB] knew what was good for them, they would leave.” Hr’g Tr. 10:11-25; Compl. ¶ 77-81. Similar to *Pridgen*, false statements, an unfriendly relationship and plan to have the victim fired demonstrated sufficient motive of an intent to harm for individual liability despite SCTCA immunity. *Pridgen*, 91 S.C.at 248, 705 S.E.2d at 64. SDMB’s allegations of a plan designed to “ruin or damage the business of SDMB” unequivocally state a cause of action that is outside the scope of the employees’ official duties. Compl. ¶ 80. Therefore, under South Carolina law, the civil conspiracy allegations in Appellant’s Complaint state an actionable claim upon which relief can be granted against the Individual Respondents.

B. Appellant’s Claims Included Allegations of Actual Malice

“Actual malice is ill will, recklessness, wantonness, or conscious indifference to the plaintiff’s rights.” *Eubanks v Smith*, 292 S.C. 57, 354 S.E.2d 898, 902 (1987). The Court of Appeals states “[c]ommon law actual malice means the defendant acted with ill will toward the plaintiff or acted recklessly or wantonly, meaning with conscious indifference toward the plaintiff’s rights.” *Murray v. Holnam, Inc.*, 344 S.C. 129, 142, 542 S.E.2d 743, 750 (Ct. App. 2001). Actual malice is also defined as “[t]he deliberate intent to commit an injury, as evidenced by external circumstances.” *Black’s Law Dictionary* 1042 (9th ed. 2009).

1. *Count 5, Constructive Fraud*

Constructive Fraud is a valid cause of action in South Carolina. *Greene v Brown*, 199 S.C. 218, 19 S.E.2d 114 (1942); *Woods v. State*, 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993); *Designer Showrooms, Inc v Kelley*, 304 S.C. 478, 405 S.E.2d 417 (Ct. App. 1991); *Giles v Lanfgord & Gibson, Inc* , 285 S.C.285, 328 S.E.2d 916 (Ct. App. 1985); *see also, Cheney Bros , Inc. v Batesville Casket Co , Inc* , 47 F.3d 111, (4th Cir. 1995). It is a breach of a legal or equitable duty that the law defines as fraudulent because it tends to deceive, violate public policy or private confidence, or injure public interest. *Greene v Brown*, 199 S.C. 218, 19 S.E.2d 114 (1942); *Woods v State*, 314 S.C. 501, 431 S.E.2d 260 (Ct. App. 1993); *Giles v. Lanfgord & Gibson, Inc* , 285 S.C. 285, 328 S.E.2d 916 (Ct. App. 1985). “[M]isrepresentations by conduct, as well as by express words, will support an action for fraud.” *Satcher v Berry*, 299 S.C. 381, 385 S.E.2d 41 (Ct. App. 1989). As representatives of the Horry County and HCDA, Respondent’s Haldi, Apone, and Jackson are required to act in good faith and fair dealing to SDMB. Appellant’s complaint alleges that the combined actions of Respondents amounted to actionable constructive fraud. Compl. ¶¶ 82-91.

2 *Count 6, Defamation*

Defamation is a communication which tends to impeach a plaintiff’s honesty, integrity, virtue, or reputation and expose him or her to public hatred, contempt, ridicule, or obloquy, or to cause the individual to be shunned or avoided, or to be injured in his or her business or occupation. *Scott v McCain*, 272 S.C. 198, 250 S.E.2d 118, 120 (1998); *Timmons v News & Press, Inc.*, 232 S.C. 639, 103 S.E.2d 277, 281 (1958); *Smith v Bradstreet Co* , 63 S.C. 525, 41 S.E. 763 (1902). Defamation is actionable in South

Carolina. *Id.* It may be spoken, written, or in broadcast media. *Willhoit v WCSC, Inc.*, 293 S.C. 397, 358 S.E.2d 397 (Ct. App. 1986). In Appellant's Complaint, it alleged Respondents Haldi and Jackson each made written and spoken statements that are arguably defamatory *per se* as they imputed Appellant's impropriety or inadequacy in performing its trade or profession. Compl. ¶¶ 92-96. See *White v Wilkerson*, 328 S.C. 179, 493 S.E.2d 345 (1996); *Goodwin v Kennedy*, 347 S.C. 30, 552 S.E.2d 319 (Ct. App. 2001); *Moshtaghi v. The Citadel*, 314 S.C. 316, 443 S.E.2d 915 (Ct. App. 1994).

3 Count 7, Fraud and Misrepresentation

It is well settled that an action for fraud or misrepresentation exists when a plaintiff alleges: (1) a false material representation; (2) that the statement(s) was (were) made with either knowledge or reckless disregard of truth or falsity; (3) that the statement(s) was (were) made with the intent of plaintiff's reliance on the statement(s); (4) that plaintiff was ignorant of the statement(s) falsity; (5) plaintiff's reliance on the statement(s) truth; (6) that plaintiff's reliance was reasonable; and (7) that plaintiff was injured thereby. *MB Kahn Construction Co v South Carolina Nat'l Bank of Charleston*, 275 S.C. 381, 271 S.E.2d 414 (1980); *Kiriakides v Atlas Food Sys & Servs., Inc*, 338 S.C. 572, 527 S.E.2d 371 (Ct. App. 2000), modified 343 S.C. 587, 541 S.E.2d 257 (2001); *Hooters of Am v Phillips*, 39 F. Supp. 2d 582 (D.S.C. 1998); *aff'd* 173 F.3d 933 (4th Cir. 1999). Appellant alleged Respondent Jackson's conduct amounted to fraud in its complaint. Compl. ¶¶ 97-100.

4 Count 8, Interference with Contractual Relations

Interference with contractual relations is the interference with a contract by on a defendant with knowledge of the contract by the tortfeasor, an intentional procurement of a breach by tortfeasor of the contracts breach without justification and actual damages.

Chitwood v. McMillian, 189 S.C. 262, 1 S.E.2d 162 (1939). Additionally, there is a cause of action for intentional interference with prospective contracts. *Crandall Corp. v Navistar Int'l Transp. Corp.*, 302 S.C.265, 395 S.E.2d 179 (1990). In its Letter of Agreement (LOA) between SDMB, FAA, Robinson Aviation, and HCDA, SDMB is obligated to follow applicable rules and regulations relating to skydiving operations and airport procedures. In its Complaint, SDMB articulated facts demonstrating intentional concealment of unpublished rules (LOA between HCDA and Robinson Aviation) and regulations by HCDA. Further, HCDA's concealment was the proximate cause of SDMB's alleged conduct; although following published regulations in Part 105, Title 14 of the Code of Federal Regulations (CFR) authorized SDMB's conduct, the failure to follow the terms of an LOA violates Part 139, Title 14 CFR. Compl. ¶¶ 101-107.

5 *Count 14, Trespass*

Trespass is the interference with plaintiff's exclusive, peaceable possession by the defendant without plaintiff's permission. *Ravan v Greenville County*, 315 S.C. 447, 434 S.E.2d 296 (Ct. App. 1993); *Johnson v Phillips*, 315 S.C. 407, 433 S.E.2d 895 (Ct. App. 1993); *see also* Ralph King Anderson, Jr., *South Carolina Request to Charge-Civil* § 4-43 (2002). Appellant alleged that Respondent Jack Teal did unlawfully enter Appellant's premises without Appellant's permission causing damages, thus stating a permissible claim for trespass and damages to Appellant's property against Respondent Teal under South Carolina State Law. Compl. ¶¶ 137-140.

6. *Count 15, Unfair Trade Practices Act*

Under the South Carolina Unfair Trade Practices Act (SCUTPA),⁶ “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” S.C. Code Ann. § 39-5-20(a) (1971). A case may be filed by “[a]ny person who suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by Section 35-5-20 may bring an action. . . .” S.C. Code Ann. § 39-5-140(a) (1971). “‘Person’ shall include natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity.” S.C. Code Ann. § 39-5-10(a) (1971). “‘Trade’ and ‘commerce’ shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.” S.C. Code Ann. § 39-5-10(b) (1971). Leases are defined as “a thing of value” under the SCUTPA *Burbach v Investors Management Corp Internat’l*, 326 S.C. 492, 484 S.E.2d 119 (Ct. App. 1997). Local governments are “persons” and may be sued. *City of Charleston v. Hotels com, LP*, 487 F.Supp. 2d 676 (D.S.C. 2007).

A SCUTPA action requires allegations of: (1) an unfair or deceptive act; (2) defendant’s actions affecting the public interest or are capable of repetition; and (3) that defendant’s actions caused plaintiff monetary or property loss. *Wright v Craft*, 372 S.C. 1, 640 S.E 2d 486 (Ct. App. 2006). “Unfair acts” under SCUTPA actions include acts or

⁶ S C Code Ann. §§ 39-5-10, *et seq*

conduct that “offends public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.” See *Bessinger v. Food Lion, Inc.*, 305 F. Supp. 2d 574 (D.S.C. 2003) (interpreting “unfair acts” under the SCUTPA under a federal 12(b)(6) motion). SC Courts have defined “affecting the public” to not restrict allegations to adverse impact on the public, it is sufficient to allege conduct that is “capable of repetition.” *DeBondt v Carlton Motorcars, Inc.*, 342 S.C. 254, 536 S.E.2d 399 (Ct. App. 2000); *Global Protection Corp v Halbersberg*, 332 S.C. 149, 503 S.E. 2d 483 (Ct. App. 1998); *Noack Enter , Inc. v. Country Corner Interiors of Hilton Head Island, Inc.*, 290 S.C. 475, 351 S.E.2d 347 (Ct. App. 1986); *Sadighi v Daghighfekr*, 36 F. Supp. 2d 279 (D.S.C. 1999). Appellant alleged that the actions and conduct of each defendant when taken together were unethical, unscrupulous, and capable of repetition. Compl. ¶¶141-143.

Appellant’s claims for breach of fiduciary duty, negligence, negligent supervision, negligent misrepresentation, trespass and Unfair Trade Practices Act each included elements of Respondent’s intention to harm Appellant in its ability to operate a legitimate aeronautical activity as defined by the federal Department of Transportation’s Federal Aviation Administration. Each of the Appellant’s allegations are capable of repetition and, as Appellant’s Complaint makes clear, are ongoing. Finally, Appellant’s allegations of fraud, defamation, and constructive fraud include allegations of malice and are specifically excluded from the SCTCA individual immunity provisions. See *McCall v. Williams*, 52 F. Supp. 2d 611, 615 (D.S.C. 1999). In the light most favorable to the Appellant, and in compliance with the SCRCF, it was improper to dismiss the Individual Respondents.

II. BECAUSE SCRPC PERMITS CONFLICTING ALLEGATIONS AND INCONSISTENT THEORIES OF LIABILITY, THE TRIAL COURT ERRED WHEN IT DETERMINED THAT CONFLICTING ALLEGATIONS OF CONDUCT AND LIABILITY ARE AN INEQUITABLE INTERPRETATION OF APPELLANT'S COMPLAINT AND IMPERMISSIBLE.

A 12(b)(6) motion must also consider Rule 8, SCRPC. Rule 8(e)(2), SCRPC permits inconsistent pleadings and that "a party may state as many separate causes of action or defenses as he has regardless of consistency and whether based on legal or equitable grounds or both." Rule 8(f), SCRPC states that "All pleadings shall be so construed as to do substantial justice to all parties." Discussing the rejection of Code Pleading by the legislature, Professor Flanagan states:

Although South Carolina retained the Code Pleading requirement that factual detail is necessary to state a claim or defense, Rule 8 rejects other aspects of Code Pleading. Rule 8(e)(1) specifically states that the technical forms of pleading found in Code Pleading or at common law are not required. The allegations are to be "simple, concise and direct." This admonition reiterates the language of Rule 8(a) and (b) that claims and defenses are "short and plain statement."

Rule 8(e)(2) rejects the Code Pleading Requirement that allegations are to be consistent with each other. Formerly a party could not allege fraud to disavow a transaction, and in another count affirm the transaction to obtain its benefits. Each alternate theory in the pleading had to be sufficient, and if one was not, both failed under Code Pleading. The second sentence of this rule reverses this harsh result. The third sentence of 8(e)(2) permits all causes of action or defenses to be pleaded regardless of their consistency, or whether they were legal or equitable claims. In addition, the pleader may assert claims alternately, or hypothetically. All allegations, however, are subject to Rule 11 which makes the attorney's signature a certificate that "to the best of his knowledge, information and belief thee is good ground to support it." Plaintiffs no longer may be forced to elect which remedy or legal theory will be pursued at the pleading stage. An election may be compelled before the case is submitted to the jury when the causes of action are mutually repugnant, or when they require different modes of trial.

8(f) contains a fundamental principle of the rules: the substance of the pleading govern rather than its technical form. This principle is reemphasized by the language of 8(e)(1) that no technical forms of pleading are required, and Rule 8(c) that states that if affirmative defenses or counter claims are misnamed, the court should treat them as if correctly identified. Thus, the court should not seek out pleading defects when the parties are on

notice of the issues. The rule, however, is not a license because it demands that substantial justice be accorded to all parties. An improper denial, or failure to plead an affirmative defense or all the elements of a cause of action still forecloses the pleader. Nor will allegations that contained certain required disclosures were not made be construed to raise the issues of erroneous disclosures. Likewise, a party may not raise an unpleaded issue when it would substantially prejudice the other party.

James F. Flanagan, *South Carolina Civil Procedure*, Ch. 8 § F, page 64-6 (2d ed. 1996 The South Carolina Bar – CLE Division)(footnotes omitted).

Despite the plain language of the complaint, the plain language of the SCTCA and the precedent interpreting the SCTCA and the allegations contained in the Appellant's Complaint, and Rule 8, SCRCF, the court accepted Respondent's argument *in toto* and dismissed the complaint with prejudice. Although not specifically plead, each of the counts identified each Respondent individually, by entity or both. The circuit court admitted that allegations of fraud, defamation, civil conspiracy, and trespass can be exceptions to immunity under the SCTCA but apparently only if the conduct plead is outside the scope of employment. This is contrary to the plain language of the statute and although Appellant's Complaint is arguably unartful, this alone should not support a 12(b)(6) motion to dismiss. As plead, a jury could infer that the conduct complained of was either with malice, fraud, or an intent to harm while acting within the course of his official duties or outside the scope of duties sufficient to find individual liability under the SCTCA. *See Pridgen v Ward*, 391, S.C. 238, 705 S.E.2d 58 (Ct. App. 2011) (government employees are not protected by SCTCA if jury could infer intent to harm).

In dismissing the complaint with prejudice, it appears that the circuit court improperly accepted Respondent's arguments that the Individual Respondents were entitled to intercorporate immunity and were included simply to cause an undue burden and harass. In defense of the civil conspiracy claim, counsel for Respondent argued:

Your Honor, essentially it's our position that the plaintiff is trying to have his cake and eat it too, here. He wants to allege that they're acting as agents of the county, if it serves his purposes, and then he wants to act -- he wants to try to persuade you that if you read the Complaint in the light most favorable to the plaintiff, you have to say that -- you have to take his civil conspiracy cause of action to mean that they were acting outside the scope of their employment. We take the position that he can't have it both ways.

The defendants, all of the defendants, would be entitled to the defense of intercorporate immunity for civil conspiracy. These individuals are employees of the entity.

And as you correctly stated, they can't conspire within themselves. As long as they're doing -- taking actions that falls within their authority as employees of the entity, there is no conspiracy.

Hr'g Tr. 11:19-52, 12:1-11.

* * *

Your Honor, we certainly acknowledge the existence of the exceptions set forth in Subsection (b) of 15-78-70; however, our position is that the Complaint as stated does not satisfy that exception by containing allegations of intentional conduct or actual fraud or actual malice on the part of these individual defendants. It's simply an effort to keep them in the lawsuit to harass them personally for the actions that they have done as agents of the airport. And it's not permitted by the Tort Claims Act.

Hr'g Tr. 16:10-19.

The court was persuaded by Respondents' arguments that Appellant can't plead inconsistent allegations or have it "both ways" in a pleading, intercorporate immunity, and personal harassment to the Individual Respondents. The court decided:

This court acknowledges that Plaintiff's Complaint contains causes of action for constructive fraud, fraud, defamation, and misrepresentation. . . . The cause of action for "constructive" clearly does not satisfy the *actual* fraud requirement. The cause of action for defamation can be interpreted to contain an allegation that Defendant Jackson's statements were made "with actual or implied malice;" . . . The cause of action for fraud and misrepresentation appears to relate to alleged representations of Defendant Airport made by Defendant Jackson as an agent for Defendant Airport. Therefore, none of the allegations set forth in [the complaint] . . . appear to suggest that the individually named Defendants acted on their own with sufficient intent to take their actions outside the protections afforded by the [South Carolina Tort Claims Act] SCTCA

* * *

For these reasons, and following the guidance provided by the South Carolina Court of Appeals in *Flateau*, this court finds that the Plaintiff's Complaint clearly attempts to assert tort claims against individually named employees of Defendant County and/or Defendant Airport that relate to conduct performed by said individuals that, even if presumed true for purposes of this motion only, was within the course and scope of their official duties of said entities. Furthermore, it is simply an inequitable interpretation of the allegations of the Complaint to allow Plaintiff to assert responsibility on the part of Defendants County and Airport for the actions of the individually named Defendants to the extent it serves Plaintiff's interests – and then accept Plaintiff's argument at the hearing that the causes of action set forth in the Complaint somehow suggest alternate allegations that Defendants Haldi, Apone, Jackson, and Teal acted outside the scope of their official duties for the sake of conveniently exposing said individuals to personal liability. Therefore, this court finds that the 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 protection set forth therein, including immunity from personal liability.

* * *

[F]or all the foregoing reasons, Plaintiff's Complaint in this matter is hereby dismissed with prejudice as to all claims alleged against Defendants Haldi, Apone, Jackson, and Teal.

Circuit Court Order, 7-8 (October 13, 2014)(emphasis supplied).

Clearly, the circuit court rejected the plain meaning of Rule 12(b)(6), SCRPC and the standards of review set forth by precedent. It is not necessary that the only interpretation of Appellant's allegations include conduct outside the scope of official duties or conduct with actual fraud, actual malice or intent to harm to set forth a claim or legal or equitable theory in lieu of the SCTCA. Here, all that is required to withstand a Rule 12(b)(6) motion to dismiss is to allege facts that place a defendant on notice and entitle a plaintiff to relief on any theory. *See Baird v Charleston County*, 333 S.C. at 527, 511 S.E.2d at 74. The Individual Respondents have been placed on notice and the Appellant has stated multiple, albeit at times conflicting, theories for relief. As such, the trial court erred in dismissing the Individual Respondents from the Complaint.

III. BECAUSE DISCOVERY HAD NOT BEEN COMPLETED AND APPELLANT HAD REQUESTED LEAVE TO AMEND ITS PLEADINGS TO CORRECT THE TECHNICAL DEFECTS OF ITS COMPLAINT, THE TRIAL COURT ERRED WHEN IT DISMISSED APPELLANT'S COMPLAINT AGAINST THE INDIVIDUAL RESPONDENTS WITH PREJUDICE

In South Carolina, generally, when a complaint dismissed for failure to state a claim under Rule 12(b)(6), SCRCP, it is without prejudice. *Spence v Spence*, 368 S.C. 106, 129, 628 S.E.2d 869, 881 (2006). "The plaintiff in most cases should be given an opportunity to file and serve an amended complaint." *Id* (citations omitted). Professor Flanagan, states:

The [12(b)(6)] motion must be denied if the facts and the inferences reasonably deducible from them show that the plaintiff could prevail on any theory of the case. Likewise, when the allegations of the complaint give rise to competing inferences on a material issue, the motion is to be denied. For example, the motion is generally not successful when a lack of proximate cause is asserted. That issue is reserved for the jury. The motion should not be granted merely because the plaintiff is not likely to prevail at trial. There is older authority that the demurrer should not be used to resolve novel issues, and some suggestion that the same result applies with Rule 12 motions. However, there is also authority that delaying a Rule 12(b)(6) order because the facts were not "ripe" was inappropriate.

The granting of a motion to dismiss may terminate the case. However, the losing party is normally given the right to amend the complaint to cure the defect. In one case the Court of Appeals reversed a dismissal with prejudice so the matter could be repleaded under the appropriate federal cause of action. The dismissal has preclusive effect only on matters actually decided in the dismissal. The granting of a motion to dismiss is appealable under SC Code Ann. § 14-3-330(2)(c) (1976) because it strikes out a pleading. It is also appealable under § 14-3-330(1) because it involves the merits, and under this section it may be raised after the final judgment. There is no need for a certification under Rule 54(b) when the dismissal is less than all of the claims or parties.

Flanagan, *supra*, Ch. 12 § 5.d., pages 94-5 (footnotes omitted, emphasis supplied).

On June 9, 2014, Appellant sent a proposed order to the trial court with a request for leave to file an amended Complaint if Respondent's motion to dismiss was granted. On August 15, 2014, in response to a request from the court, Appellant sent a second proposed

order and another request for leave to file an amended Complaint if Respondent's motion to dismiss was granted. The trial court did not discuss Appellant's requests to amend the complaint in its order and dismissed the complaint with prejudice in error.

"[W]hen a complaint is dismissed with prejudice and the plaintiff erroneously is denied the opportunity to file and serve an amended complaint, but the plaintiff fails to present additional factual allegations or a different theory of recovery which may give rise to a claim upon which relief may be granted, the appellate court may in its discretion affirm the dismissal of the complaint with prejudice." *Spence v Spence*, 368 S.C. 106, 130-31, 628 S.E.2d 869, 882 (2006) (*rehearing denied*, original majority and dissenting opinions withdrawn and replaced)

Appellant has rephrased the offensive language of its Complaint and included, inconsistent allegations of the Individual Respondents acting outside the scope of their official duties and alternatively with actual malice, actual fraud, or intent to harm sufficient to withstand a Rule 12(b)(6) motion to dismiss and has included a copy of the proposed Amended Complaint in its Designation of the Matter to be Included in the Appeal.

The Amended Complaint includes new facts and additional parties that were unknown to the Appellant when the Complaint was originally drafted. Appellant has also included clauses to its allegations rectifying the offensive omissions identified by Respondents at the hearing and by the court in its order. Appellant has not been afforded full discovery as it has a motion to compel against Horry County and HCDA and its Complaint against the Individual Respondents was dismissed before discovery was fully conducted with depositions, answers to interrogatories, and requests for production pending or contemplated.

CONCLUSION

For the reasons stated, Appellant asks this Court to reverse the circuit court's dismissal of the Individual Respondents, grant Appellants request to amend its Complaint and Order Respondent's to answer the Amended Complaint within fifteen (15) days of this Honorable Court's Order or a remand consistent with this Honorable Court's ruling.

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Merritt Island, Florida

Dated: March 23, 2015

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

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
and Jack Teal are Respondents.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal 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 March 23, 2015, addressed to the attorneys of record, Samuel F. Arthur, III, Esquire, Aiken, Bridges, Elliott, Tyler & Saleby, PA, P.O. Box 1931, Florence, SC 29503, and Michael W. Battle, Esquire, Battle Law Firm, LLC, P.O. Box 530, Conway, SC 29529.



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March 23, 2015

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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
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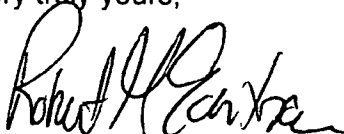
**Re: Skydive Myrtle Beach, Inc. v. Horry County,
Appellate Case No. 2014-002491**

Dear Ms Kitchings.

Enclosed for filing are the original and one copy of Appellant's Initial Brief, Designation of Matter to be Included on Appeal, and Proof of Service in the above referenced appeal. Please file the original with the court and return a date-stamped copy of each in the enclosed stamped self-addressed envelope.

Thank you for your attention to this matter. Should you have any questions, please do not hesitate to contact me.

Very truly yours,



Robert G. Eastman

Encl (7)
cc Aaron Holly
Robert Varnado, Esq
Samuel F Arthur, III, Esq
Michael W Battle, Esq
RGE/fub



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