

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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APPEAL FROM HORRY COUNTY
Court of Common Pleas

S.C. SUPREME COURT

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

Unpublished Opinion No. 17-UP-118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

Skydive Myrtle Beach, Inc. (f/k/a Skydive Myrtle Beach, LLC).....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. 2017-001382

RETURN OF RESPONDENTS

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STATEMENT OF THE CASE

Petitioner Skydive Myrtle Beach, Inc. (“Petitioner”) 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) The first two causes of action stated in the Complaint are *breach of contract* and *breach of contract accompanied by fraudulent act* and 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 were all employees of Horry County at the time the original Complaint was filed.

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, granting Respondents’ Motion to Dismiss pursuant to Rule 12(b)(6), S.C.R.C.P. (R.pp.5-12).

Petitioner filed its Notice of Appeal on November 10, 2014. The Court of Appeals heard arguments on November 3, 2016 and issued its ruling on March 8, 2017. (R. pp. 473-474). Petitioner has now filed a petition for certiorari seeking review of the Court of Appeals’ affirmation of the circuit court’s dismissal of the Respondents with prejudice.

ARGUMENT

Petitioner initially argued that the Complaint should be liberally interpreted and the facts viewed in the light most favorable to it. Petitioner now argues that the Court of Appeals' affirmation of the circuit court's dismissal of the individually named Defendants was based on little more than minor technical drafting deficiencies within the original Complaint and that it should be allowed to amend its Complaint to correct same.

However, a review of the specific causes of action levied against the individually named defendants in Petitioner's original Complaint 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.

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

¹ R.pp.19-34.

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 the Court of Appeals' previous decision in the case of *Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct.App.2003) wherein the 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*, the Court of Appeals 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 Court of Appeals 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. The 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, the Court of Appeals 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. The court added “that the efficacy of the Tort Claims Act is protection of governmental employees acting in the scope of official duties.” *Id.* Finally, the 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 the motion to dismiss is a determination of whether the alleged inappropriate conduct was “outside the scope of their official duties.”

Petitioner’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 Petitioner recognizes Defendant County and Defendant Airport as governmental entities of South Carolina subject to the SCTCA and that Petitioner 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, Petitioner’s Complaint, on its face, fails to properly set forth any allegations that are not subject to the limitations of the SCTCA and the individually named Defendants are entitled to the protections set forth therein, including immunity from

personal liability, and the circuit court properly relied upon *Flateau* when granting dismissal of the individuals.

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 review of the circuit court's ruling, was within the course and scope of their official duties as employees of said entities.

Petitioner argues that the circuit court should not have dismissed its Complaint against the individually named defendants *with prejudice* and the Court of Appeals abused its discretion by affirming the circuit court's ruling. In support of this argument, Petitioner offers this 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 Petitioner should be afforded an opportunity to submit an amended complaint. However, a closer review of *Spence* reveals that while 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.

Petitioner asserts that it made prior requests to the circuit court for leave to file an amended complaint and actually included a proposed amended complaint in the designated matters for consideration by the Court of Appeals. (R. pp. 56-88) Petitioner has never filed a formal motion to amend the Complaint, nor did it submit a proposed

amended complaint to the trial court for consideration of any alleged additional factual allegations or a different theory of recovery. Essentially, this argument amounts to little more than a request for a second chance to add language that can more effectively be argued as sufficient to trigger the exception to individual immunity discussed above.

Petitioner has not specifically stated the factual allegations it believes are sufficient to warrant the requested relief of filing an amended complaint. Furthermore, to the extent Petitioner asserts the proposed amended complaint included in the Record on Appeal accomplishes that mission, Petitioner's proposed amended complaint suffers from some of the same major flaw found in the original Complaint inasmuch as it is devoid of any causes of action against any of the individually named Defendants that are not also asserted against the employer of said individuals, Horry County and/or Horry County Department of Airports. Accordingly, Petitioner's proposed amended complaint, as noted by the Court of Appeals at footnote 1 of its opinion (App. Vol. II, p. 475), would be futile as it essentially seeks to include alternative allegations against individual employees within causes of action asserted primarily against their employers without ever stating any purported separate claims against any individuals for alleged conduct that, if proven true, would be outside the scope of the targeted employee's employment with Horry County and/or the Horry County Department of Airports. Therefore, the claims against the individually named defendants, as stated in the proposed amended complaint, would still be subject to dismissal pursuant to the SCTCA.

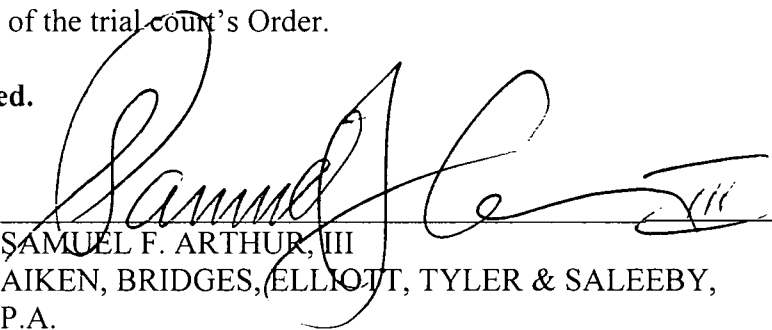
Essentially, the Court of Appeals determined that the allegations of the Complaint and the issues Petitioner is seeking to litigate relate to actions or inactions of Horry County and/or the Horry County Department of Airports through its agents. Accordingly, the Court of Appeals astutely acknowledged that the protections of the

SCTCA should shield the individual employees of Horry County and/or the Horry County Department of Airports from individual liability for any of Petitioner's asserted claims and properly determined that the trial court did not abuse its discretion by dismissing them from the action with prejudice.

CONCLUSION

For the reasons set forth more fully above and stated by the Court of Appeals in its opinion, the decision of the trial court to dismiss the individually named Defendants with prejudice was well supported in the law and the Court of Appeals was well within its discretion to affirm the Order of the trial court after thoughtful consideration of allegations stated in the original Complaint and Petitioner's argument. Furthermore, the Court of Appeals properly determined that insufficient additional factual allegations or different theories of recovery have been offered by Petitioner to warrant reversal of the trial court's dismissal with prejudice and allow Petitioner to submit an amended complaint. Therefore, this Court should deny Petitioner's petition for writ of certiorari and return this matter to the Court of Appeals with instructions to issue a Mandate consistent with its affirmation of the trial court's Order.

Respectfully submitted.



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July 18, 2017

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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

Appellate Case No. 2017-001382

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.

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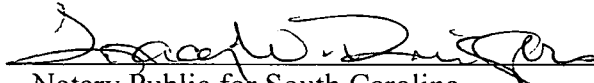
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SWORN to before me this
18th day of July, 2017.


Notary Public for South Carolina

My Commission Expires: June 2, 2019