THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

R. Knox McMahon, Fifth Judicial Circuit

Case No. 2015-CP-40-06551

Chad Crosby d/b/a Low Country Tree Service.....Appellant

v.

South Carolina Department of Transportation .....Respondents

NOTICE OF APPEAL

Chad Crosby d/b/a Low Country Tree Service appeals the order of the Honorable R. Knox McMahon dated February 14, 2018. Appellant received written notice of entry of this order on February 20, 2018.

Columbia, South Carolina
March 21, 2018

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND Chad Crosby d/b/a Low Country Tree Service, Plaintiff, v. South Carolina Department of Transportation, Defendant.	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No.: 2015-CP-40-06551 ORDER

This matter came before the Court on Defendant's Motion for Summary Judgment. Representing the parties were: Mark W. Hardee for the Plaintiff; and Evan M. Gessner for Defendant ("SCDOT").

FACTS/PROCEDURAL BACKGROUND

Plaintiff brought this suit against the South Carolina Department of Transportation alleging causes of action for the Tortious Interference with an Existing Contractual Relationship and the Tortious Interference with Prospective Contractual Relationships.

A hearing was held on September 20, 2017 at which time the Court heard arguments from counsel for both parties. In support of Defendant's Motion, counsel for Defendant submitted a Memorandum of Law in Support of Summary Judgment with Exhibits. Counsel for Plaintiff submitted copies of deposition testimony of Chad Crosby, Dorothy Erwin, and Jennifer Gruber. A full recitation of the facts, with references to deposition testimony and other exhibits, is contained in Defendant's Memorandum. As a result, a restatement of the pertinent facts within this Order is not necessary and the Court craves reference to Defendant's Memorandum.

STANDARD OF REVIEW

Summary Judgment is appropriate and should be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See, e.g., Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 329, 673 S.E.2d 801, 802 (2009); *Lanier Construction Company, Inc. v. Bailey & Yobs, Inc.*, 384 S.C. 275, 278, 681 S.E.2d 909, 911 (Ct. App. 2009). Summary Judgment is appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *Lanier*, 384 S.C. at 278, 681 S.E.2d at 911. However, a moving party need not submit any evidence but can simply "point out to the trial court that there is an absence of evidence to support the nonmoving party's case." *Baughman v. AT&T*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (*quoting Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)) (internal quotations removed). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Hancock*, 381 S.C. at 329-330, 673 S.E.2d at 802.

In cases applying the preponderance of the evidence burden of proof, the non-moving party is required only to submit a *mere scintilla* of evidence in order to withstand a motion for summary judgment. *Id.* at 330, 673 S.E.2d at 803. "A *scintilla* of evidence is any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror." *Taylor v. Railway Co.*, 78 S.C. 552, 556, 59 S.E. 641, 643 (1907). The "*scintilla* of evidence rule" does not require that *any* relevant testimony opposing summary judgment be left to the jury to determine its force and effect; rather, "[t]he meaning of the rule is that there must be some

evidence arising out of the testimony which elucidates the issues of fact, and which enables the jury to form an intelligent conclusion. It does not authorize the admission of speculative, theoretical, and hypothetical views." *Crawford v. Town of Winnsboro*, 205 S.C. 72, 30 S.E.2d 841, 849 (1944) (emphasis in original). In other words, "when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury." *Radcliffe v. Southern Aviation School*, 209 S.C. 411, 420, 40 S.E.2d 626, 630 (1946).

DISCUSSION/ANALYSIS

As an initial matter, it appears that Plaintiff himself has admitted to a fatal flaw in his First Cause of Action alleging the Tortious Interference with an Existing Contractual Relationship. The elements for a cause of action for tortious interference with an existing contractual relationship are: (1) a contract; (2) knowledge of the contract by the tortfeasor; (3) intentional procurement by the tortfeasor of the contract's breach; (4) absence of justification; and (5) damages. *See DeBerry* at 574, 274 S.E.2d 293, 296 (1981); *see also Kinard v. Crosby*, 315 S.C. 237, 433 S.E.2d 835 (1993). First, there must be a valid and enforceable contract for a cause of action for tortious interference with an existing contractual relationship to exist. *See Columbia Management Corp. v. Resort Prop., Inc.*, 279 S.C. 370, 307 S.E.2d 228 (1983). If there is no contract, there is no cause of action. *Id.* Then, there must actually be a breach of the underlying contract before there can be an interference with an existing contractual relationship. *First Union Mortgage Corp. v. Thomas*, 317 S.C. 63, 73, 451 S.E.2d 907 (Ct. App. 1994).

Plaintiff himself testified at deposition that the only outdoor advertiser he did business with was Grace Outdoor, that Grace Outdoor offered contracts on a job by job basis, and that Grace did not breach or otherwise terminate any contract with Plaintiff. Essentially, Plaintiff's

testimony was that Grace stopped offering him new contracts. Consequently, based on Plaintiff's admission, and further based on the fact that there is no evidence submitted to this Court showing the breach of any contract, Plaintiff has failed to present any evidence suitable for submission to a jury prove the third element of his First Cause of Action. As a result, this Court grants Defendant's Motion for Summary Judgment as to Plaintiff's First Cause of Action alleging the Tortious Interference with an Existing Contractual Relationship.

In his Second Cause of Action, Plaintiff alleges the Tortious Interference with Prospective Contractual Relationships. The elements a cause of action for Tortious Interference with Prospective Contractual Relations are: "(1) intentional interference with the plaintiff's potential contractual relations, (2) an improper purpose or improper methods, and (3) injury to the plaintiff." *Brown v. Stewart*, 348 S.C. 33, 55, 557 S.E.2d 676 (Ct. App. 2001) (citing *Crandall Corp. v. Navistar Int'l Transp. Corp.*, 302 S.C. 265, 266, 395 S.E.2d 179, 180 (1990)). However, "a party's exercise of a legal right does not constitute an improper motive or an improper purpose." *Id.* at 56, *see also Webb v. Elrod*, 308 S.C. 445, 448, 418 S.E.2d 559, 561 (Ct. App. 1992) ("The exercise in good faith of a legal right by a party to a contract affords no basis for an action by the second party for intentional interference with a contract even though the consequence of the exercise of the legal right by the first party is to cause a third party not to perform another contract with the second party.").

The admissible evidence in the record indicates that Mr. Melvin, SCDOT Director of Outdoor Advertising, was enforcing SCDOT guidelines. Even when giving Plaintiff every reasonable inference and assuming that outdoor advertisers were aware of Mr. Melvin's alleged communications, and further assuming that these alleged communications influenced any outdoor advertiser to decline to do business with Plaintiff, this cannot satisfy the second element

of Plaintiff's Second Cause of Action. The only evidence submitted by Plaintiff that he contends shows an improper purpose is hearsay testimony about a statement allegedly made by SCDOT employee Dorothy Erwin. Essentially, Mr. Crosby testified at deposition that another SCDOT employee, Jennifer Gruber, told him that Mr. Melvin was undermining his business. (Deposition of Chad Crosby, 55:8-20.) Ms. Gruber testified that she heard this information from Dorothy Erwin. (Deposition of Jennifer Gruber, 7:16-8:6.) However, Ms. Erwin's deposition testimony does not support the testimony of Mr. Crosby or Ms. Gruber. Ms. Erwin's actual testimony was that Mr. Melvin was enforcing SCDOT guidelines by having Mr. Crosby finish one job site before starting another. (Deposition of Dorothy Erwin, 7:3-8:1.) Additionally, as Exhibits to its Memorandum of Law in Support of Summary Judgment, Defendant included copies of emails from Mr. Melvin that support Ms. Erwin's testimony regarding Mr. Melvin's enforcement of SCDOT guidelines only, and not attempting to influence any outdoor advertisers.

While credibility determinations and other determinations of fact are to be left to the jury as trier of fact, to survive summary judgment, an opposing party must show material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror. *See Taylor*, at 556, 59 S.E.2d at 643. The testimony relied upon by Plaintiff would amount to inadmissible hearsay not subject to an exception. Rules 802 and 803, SCRE.

Additionally, and perhaps most importantly, Plaintiff has failed to show any evidence indicating that any outdoor advertiser declined to offer him a contract due to any alleged action by SCDOT. There is no testimony in the records from any outdoor advertising company indicating why they declined to do business with Plaintiff. Plaintiff has put forth, at best, "speculative, theoretical, and hypothetical views" that do not amount to admissible evidence. *See Crawford*, 30 S.E.2d at 849. Consequently, Plaintiff cannot prove either of his Causes of

Action.

Finally, within each of his Causes of Action, Plaintiff alleges that a specific SCDOT employee purposefully interfered with Plaintiff's contractual relationships with one or more companies, and did so for personal reasons, allegedly to squeeze Plaintiff out of the billboard related tree trimming business so a friend would have less competition. (*See* Complaint ¶ 20.)

A state agency, such as the Defendant here, is "liable for [its] torts in the same manner and to the same extent as a private individual under like circumstances, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained [within the S.C. Tort Claims Act]." S.C. Code Ann. § 15-78-40. When analyzing claims brought under the S.C. Tort Claims Act, the "limitations on and exemptions to the liability of the State . . . must be liberally construed in favor of limiting the liability of the State." S.C. Code §§ 15-78-20(f), 15-78-200. Among the numerous limitations and exemptions contained within the Act, a "governmental entity is not liable for a loss resulting from . . . employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-60(17). For the purposes of the South Carolina Tort Claims Act, the "'[s]cope 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).

In his memorandum, and at hearing, counsel for Defendant argued that the conduct alleged by Plaintiff if true, would contain an intent to harm Plaintiff and would also consist of conduct outside the scope of the employee's official duties. Based on Plaintiff's allegations and the evidence in the record, the alleged conduct of SCDOT's employee would have been outside the scope of his official duties and would further contain an intent to harm. As a result,

Defendant is entitled to immunity under section 15-78-60(17) of the S.C. Tort Claims Act and is entitled to judgment as a matter of law based on the exemptions from the South Carolina Tort Claims Act.

Therefore, it is ordered that Defendant's Motion for Summary Judgment be granted, and that Plaintiff's Complaint be dismissed with prejudice.

AND IT IS SO ORDERED.

October 14, 2018

R. Knox McMahon
Circuit Court Judge

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	Case No. 2015-CP-40-06551
Chad Crosby d/b/a Low Country Tree Service,	)	
Plaintiff(s),	)	
vs.	)	**CERTIFICATE OF SERVICE**
South Carolina Department of Transportation,	)	
Respondent.	)	

I hereby certify that on the 21st day of March, 2018, I served, via first class mail, at the address below, a copy of the Notice of Appeal pertaining to the above-referenced action.

Evan Gessner
Davis Frawley
PO Box 489
Lexington, SC 29071

Vicky Cannon
Legal Assistant

Columbia, South Carolina

Date: 3/21/18

The South Carolina Court of Appeals

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March 27, 2018

Mr. Mark Weston Hardee, Esquire
2231 Devine St. Suite 202
Columbia SC 29205-2403

Re: Chad Crosby v. SCDOT
Appellate Case No. 2018-000502

Dear Counsel:

Upon reviewing your notice of appeal, the following deficiency has been noted under the South Carolina Appellate Court Rules (SCACR), and must be corrected within ten (10) days of the date of this letter or your appeal will be dismissed:

- You must provide proof of filing the notice of appeal with the clerk of court for Richland County.

Very truly yours,

V. Claire Allen, Deputy

CLERK

cc: Evan Markus Gessner, Esquire

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March 28, 2018

Jenny Abbott Kitchings
Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Chad Crosby d/b/a Low Country Tree Service v. South Carolina Department of Transportation
Case: 2018-000502

Dear Ms. Kitchings,

I am in receipt of you letter dated March 27, 2018 requesting proof of filing of the Notice of Appeal with the Clerk of Court for Richland County. Please find enclosed the filed copy of the Notice of Appeal.

If you have any questions, please feel free to contact me.

Sincerely,

Vicky Cannon
Assistant to Mark Hardee

MWH/vvc
Enclosure
CC: Evan Gessner

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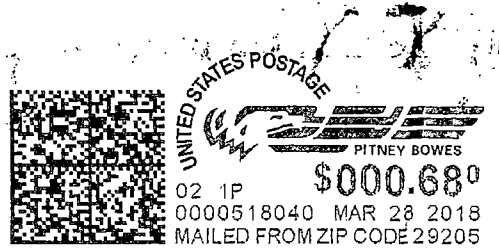

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