

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM Horry County
Court of Common Pleas
Larry B. Hyman, Circuit Court Judge.

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S.C. SUPREME COURT

CASE NO. 2014-CP-26-1193
APPELLATE CASE NO. 2017-001382

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,

BRIEF OF RESPONDENTS

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QUESTION APPROVED FOR REVIEW

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

STATEMENT OF THE CASE

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) 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 were all employees of Horry County at all times relevant to the Complaint.

Respondents filed a motion to dismiss on March 26, 2014. 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 the 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. Petitioner filed its initial brief on or about March 23, 2015. Following an extension of time granted by the

Court of Appeals, Respondents filed their initial brief by correspondence dated May 21, 2015.

The Court of Appeals heard arguments on November 3, 2016 and issued a ruling on March 8, 2017 (R. pp. 473-474), affirming the Circuit Court's dismissal of Respondents with prejudice. Petitioner filed a motion for rehearing which was denied May 19, 2015. (R. p. 461). Petitioner then filed the instant petition for certiorari seeking review of the Court of Appeals' affirmation of the Circuit Court's dismissal of Respondents with prejudice.

STATEMENT OF FACTS

Petitioner 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, Petitioner 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)

Petitioner'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), SCRCP, 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 COURT OF APPEALS PROPERLY AFFIRMED THE CIRCUIT COURT'S DISMISSAL OF THE INDIVIDUAL DEFENDANTS WITH PREJUDICE.

Petitioner argues that the Circuit Court should not have dismissed its Complaint against the individual Defendants with prejudice and the Court of Appeals should not have affirmed the Circuit Court's decision. In support of this argument, Petitioner relies on 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 the plaintiff should be afforded an opportunity to submit an amended complaint. In *Spence*, this Court stated:

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. When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. An appellate court should follow this procedure when the plaintiff 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, 386 S.C. 106, 130; 628 S.E.2d 869, 882 (2006); citing *Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell*, 708 A.2d 283, 286-87 (Me.1998).

Accordingly, in a case such as this, where Petitioner's Complaint was dismissed with prejudice per Rule 12(b)(6), the Court of Appeals, after determining the dismissal was proper, was armed with the discretion to affirm the dismissal while also allowing for the submission of an amended complaint. Per this Court's guidance from *Spence*, it should have done so if it also found Petitioner had presented "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*, 628 S.E.2d at 882. However, as this Court also noted in *Spence*, if the plaintiff fails to make a sufficient showing of additional facts or alternative theories of recovery, the appellate court, in its discretion, may affirm the dismissal with prejudice. *Id.*

In its brief to this Court, Petitioner asserts it presented arguments in its brief to the Court of Appeals regarding additional factual allegations and asserting different theories of recovery. Petitioner further asserts it submitted a proposed amended complaint with its record on appeal correcting the technical problems and that said submission, coupled with the arguments presented satisfies the requirements described in *Spence* to such a degree that the Court of Appeals should have ruled that Petitioner was entitled to submit its proposed amended complaint.

A review of Petitioner’s brief to the Court of Appeals reveals that Petitioner correctly noted this Court’s guidance from *Spence* and asserted that the proposed amended complaint included in the record on appeal “includes new facts and additional parties that were unknown to Petitioner when the Complaint was originally drafted.” (R. p. 557) Petitioner also conclusively asserts that it “included clauses to its allegations rectifying the offensive omissions identified by Respondents at the hearing and by the court in its order.” (R. p. 557). However, Petitioner’s brief to the Court of Appeals offers no explanation or argument as to what additional factual allegations or alternative theories of recovery are being offered for the purpose of curing the pleading defects that resulted in the dismissal of the case at the Circuit Court level.

Similarly, Petitioner’s reply brief to the Court of Appeals makes reference to the proposed amended complaint; however, it is devoid of any substantive argument as to

how the amended complaint satisfies *Spence* by including 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 against Respondents. (R. pp. 497-507)

Petitioner's brief to this Court does not appear to dispute the affirmation of the dismissal, but rather challenges the Court of Appeals' decision to affirm the Circuit Court's dismissal with prejudice rather than remand with instructions to allow Petitioner to file an amended complaint. Therefore, the primary issue for this Court is whether Plaintiff presented 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 against Respondents." *Spence v. Spence*, 386 S.C. 106, 130; 628 S.E.2d 869, 882 (2006).

Respondents concede that the Court of Appeals' decision affirming the dismissal of Petitioner's Complaint with prejudice does not include a determination that the proposed amended complaint fails to assert sufficient additional factual allegations or alternative theories of recovery to warrant a modification of the Circuit Court's order to allow for the submission of an amended complaint. (R. p. 475) However, Respondents maintain the Court of Appeals arrived at the proper conclusion and assert that if the Court of Appeals erred at all, it did so harmlessly by omitting an explanation of why Petitioner has not satisfied the *Spence* requirement of asserting sufficient additional factual allegations or alternative theories of recovery.

A comparison of the proposed amended complaint included in the record on appeal to the Court of Appeals (R. pp. 55-87) with Petitioner's original Complaint (R. pp. 19-34) reveals the proposed amended complaint does indeed include additional factual allegations – one hundred thirty-eight (138) paragraphs of alleged facts in the proposed

amended complaint as compared to fourteen (14) paragraphs of alleged facts in the original Complaint. Of the one hundred thirty-eight (138) paragraphs of factual allegations set forth in the proposed amended complaint, nine (9) paragraphs include references to one or more of the Respondents. (see proposed amended complaint (R. pp. 61 - 62 at ¶¶ 53, 55, 56, 59, 61-63, 67, 68) Of the nine (9) paragraphs including references to one or more of the Respondents, only one (1) – paragraph 59 – states additional factual allegations not already included in the original Complaint. Said paragraph refers to “HCDA Defendant Jackson” and describes alleged encounters between Jackson and SDMB customers at Hangar 7 during an event at the airport on February 10, 2014. (R. p. 62) However, paragraph 59 contains no allegation that Jackson was acting outside the course and scope of his employment with HCDA (R. p. 62) and Petitioner has offered no explanation or argument as to how this one additional factual allegation may be construed to satisfy the *Spence* test.

Furthermore, a review of the sixteen (16) causes of action set forth in the proposed amended complaint, reveals that they suffer from the same flaws cited by the Court of Appeals as fatal to the claims against the individual Respondents. (R. pp. 70-85) Eleven (11) of the sixteen (16) causes of action set forth in the amended complaint include allegations stated as directed towards one or more of the individual Respondents. (R. pp. 70-85) However, all sixteen (16) causes of action also include allegations stated as directed towards Horry County and HCDA. (R. pp. 70-85) More importantly, there are no causes of action set forth in the proposed amended complaint that are stated as directed solely at one or more of the individual Respondents. (R. pp. 70-85) Therefore, while Petitioner’s proposed amended complaint may include allegations that certain individuals acted outside the scope of his or her employment in an effort to trigger the

exception noted in § 15-78-70(b) of the SCTCA, such statements are compromised by the fact that each and every cause of action is first directed to Horry County and HCDA.

It is axiomatic that an entity acts through its agent employees; and it is undisputed that both Horry County and HCDA are governmental entities with employees entitled to the protections of the SCTCA. Therefore, any liability Horry County and HCDA might have to Petitioner must necessarily stem from actions or inactions of its employees and the SCTCA provides immunity for individual employees for actions taken in the course and scope of their employment. *See Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct.App.2003). “The 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 remedy mandated in the Act is legal action initiated against the governmental entity rather than the individual governmental employee.” *Id.*

Petitioner argues it is entitled to plead alternative theories of recovery and that the claims set forth in the proposed amended complaint would resolve technical drafting deficiencies found in the original Complaint by alleging that certain actions of the individual Respondents were undertaken outside the course and scope of their respective employment with Horry County and/or HCDA. (R. p. 557) However, the manner in which the causes of action are stated as directed against the governmental entities *and* the individuals demonstrates Petitioner’s inability to separate the actions of any of the individual Respondents from their employers.

Respondents assert that alternative theories of recovery must be stated as separate causes of action against one or more of the individuals, alleging tortious conduct of an intentional nature that was outside the course and scope of his or her official duties as a governmental employee. Petitioner’s proposed amended complaint fails to adequately draw

the necessary distinction between the alleged tortious conduct of an employee in furtherance of the employer's business and alleged tortious conduct of an employee undertaken in furtherance of some type of personal motivation or intent to harm. As aptly stated by the Court of Appeals: "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." (R. p. 474)

Petitioner has not sufficiently stated separate and alternative theories of recovery in its original Complaint or the proposed amended complaint included with its appeal to the Court of Appeals; nor has it offered argument as to what additional facts or alternative theories of recovery might be construed to state separate claims against any of the individual Respondents. The absence of any specific argument from Petitioner regarding satisfaction of the *Spence* analysis may explain why the issue was not addressed by the Court of Appeals in its opinion.

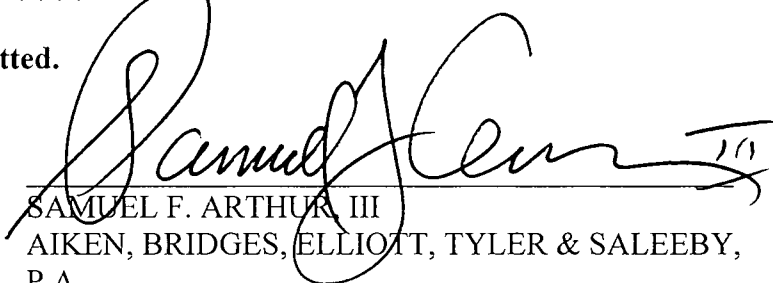
Regardless, a critical evaluation of Petitioner's proposed amended complaint, even with the deferential interpretation required upon review of a motion to dismiss, results in but one inescapable conclusion – that Petitioner's proposed amended complaint also fails to show how Respondents' actions were sufficiently personal and disconnected from their employers' business to warrant modification of the Circuit Court's dismissal order to allow for submission of an amended complaint as contemplated by this Court's decision in *Spence*. Therefore, while the Court of Appeals arguably should have included an explanation of how Petitioner has failed to make the requisite showing of additional facts or alternative theories of recovery to warrant modification of the dismissal order, Respondents respectfully assert that the ultimate result reached by the Court of Appeals - affirmation of the Circuit Court's order of dismissal with prejudice – was correct and should remain

undisturbed.

CONCLUSION

For the reasons set forth more fully above, this Court should affirm the Court of Appeals' affirmation of the Circuit Court's dismissal with prejudice of Petitioner's Complaint in this matter as to the individually named Defendants Haldi, Apone, Jackson, and Teal pursuant to Rule 12(b)(6), SCRPC.

Respectfully submitted.

A handwritten signature in black ink, appearing to read "Samuel F. Arthur III", is written over a horizontal line. The signature is fluid and cursive.

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May 4, 2018

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

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, 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 May 4, 2018 and proper postage was attached thereto.

DOCUMENTS: BRIEF OF RESPONDENTS

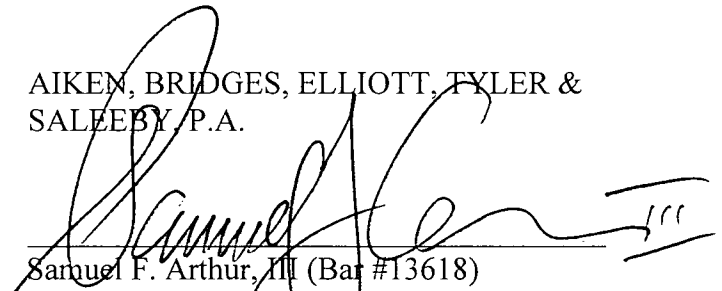
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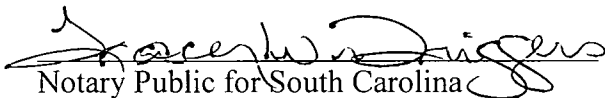
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SWORN to before me this
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Notary Public for South Carolina

My Commission Expires: June 2, 2019