

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2018-CP-22-00456

Luke M. Smith, Erica Smith, Peggy Burger,
Individually and as Guardian ad Litem for Caitlyn
Burger, Shawonnah Davis, Individually And as
Guardian ad Litem for Sania Williams, Edison
Chichester, Individually and As Guardian Ad
Litem for Jennifer Chichester, Jenna Grace Singleton
and Dale Singleton.....Appellants'

v.

Carolina's Got Talent, Wardell Brantley, South
Carolina Media Arts Academy, Winyah
Auditorium, City of Georgetown, County Of
Georgetown, WPDE ABC 15, WWMB CW21,
Sinclair Broadcast Group, Inc., Howard Stirk
Holdings, and Cunningham Broadcasting Corporation
Defendants County of Georgetown,Respondents'

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SC Court of Appeals

Respondents' Initial Brief

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STATEMENT OF ISSUES ON APPEAL

- I. The mere grant of A-TAX funds by Georgetown County to Georgetown Winyah Auditorium Corporation does not create a legal duty for the County to run events at Winyah Auditorium.
- II. Summary judgement is not premature in the present case.
- III. The issues in the present case do not make summary judgment improper.
- IV. Georgetown County did not have a duty to warn Appellants about the alleged prior criminal record of Wardell Brantley.
- V. Georgetown County is not liable for Appellants' claim of negligent misrepresentation.

- VI. Appellants' claims are barred by Georgetown County's immunity under the S.C. Tort Claims Act for the acts of unrelated third parties.
- VII. Appellants do not have a claim against Georgetown County under S.C. Unfair Trade Practices Act.
- VIII. Appellants' claims are contrary to public policy.

STATEMENT OF THE CASE

Appellants were contestants in a local talent contest known as Carolina's Got Talent that was held in the years 2016-2017. Appellants won certain prizes while competing in that talent contest. Some the prizes won by appellants were never given to them. On May 11, 2018, Appellants sued the contest organizer/promoter, together with Winyah Auditorium, the City of Georgetown, several news media outlets and Georgetown County because they did not receive the prizes they were promised.

Appellants' claim Georgetown County was negligent, made negligent misrepresentations and engaged in unfair or deceptive trade practices injuring the Appellants because the promoter of the contest allegedly had a criminal record which was not disclosed to Appellants and he failed to award the prizes that were promised to the winners. Georgetown County is the only Respondent in the present appeal.

Fourteen months after the lawsuit was filed, Georgetown County was dismissed from the lawsuit on a summary judgment order granted by the Honorable Benjamin H. Culbertson. The grounds for the dismissal were that Georgetown County owed no legal duty to Appellants that would cause Georgetown Count to be liable to Appellants. Georgetown County did not sponsor, offer funding, or participate in any manner with the

Carolina's Got Talent Contest. In addition, Appellants' claims were barred by Georgetown County's immunity as modified by the S.C. Tort Claims Act. Appellants filed a motion to reconsider the summary judgment order which was denied. Thereafter Appellants filed the present appeal to the S.C. Court of Appeals.

STANDARD OF REVIEW

“When reviewing a grant of summary judgment, appellate courts apply the same standard applied by the trial court pursuant to SCRPC 56(c).” Turner v. Milliman, 392 S.C. 116, 121–22, 708 S.E.2d 766, 769 (2011). “Summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery on file show there is no genuine issue of material fact such that the moving party must prevail as a matter of law.” Turner, 708 S.E.2d at 769. “When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” Id. (citation omitted). Bluestein v. Town of Sullivan's Island, No. 2018-001888, 2020 WL 810963 (S.C. Feb. 19, 2020). When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. SCRPC 56

STATEMENT OF FACTS

Appellants were contestants in a talent contest named the Carolina's Got Talent Contest that was held in the years 2016-2017. The contest was sponsored and promoted

by Wardell Brantley. Appellants allege Mr. Brantley had a prior criminal history of which they were not aware. The contest was held in a performance facility know as Winyah Auditorium. Winyah Auditorium is owned by Georgetown Winyah Auditorium Corporation a private, 501(3)(c) non-profit corporation and run by an all-volunteer Board of Directors.

Georgetown County and other government entities made tourism A-Tax grants to the corporation owning of Winyah Auditorium under the S.C. Accommodations Tax Act. S.C. Code Ann. § 6-4-5, et. eq. The South Carolina Accommodations Tax Act (Act) sets forth the administration of the state sales tax of seven percent imposed on all sleeping accommodations provided to overnight guests. S.C. Code Ann. § 12-36-920(A). That seven percent tax is composed of several components, including a two percent “local accommodations tax” (A-Tax), which is remitted to the counties and municipalities where it was collected. S.C. Code Ann. § 12-36-2630(3). Counties and municipalities receiving A-Tax revenues must expend those funds in accordance with the statutory provisions governing the allocation of A-Tax revenues. See S.C. Code Ann. § 6-4-5 to – 35 (Supp.2012) (providing procedure for expending A-Tax funds). See Tourism Expenditure Review Comm. v. City of Myrtle Beach, 403 S.C. 76, 78–79, 742 S.E.2d 371, 372 (2013).

Respondent Georgetown County is a political subdivision of the State of South Carolina. Although Georgetown County makes A-Tax grants to Georgetown Winyah Auditorium Corporation together with other eligible entities pursuant to the Accommodations Tax Act, the County did not sponsor, offer funding, or participate in any manner with Appellants’ contest, the Carolina's Got Talent Contest. [Affidavit Wesley

Bryant] Georgetown County does not possess any ownership, right, or title to the Georgetown Winyah Auditorium Corporation or its facility Winyah Auditorium. [Id.] Appellants have not proffered any evidence to dispute the above stated facts.

Appellants have candidly admitted in their answers to interrogatories that they do not know of any communications between them and any representative from Georgetown County which they relied upon when entering the Carolina's Got Talent Contest. [See Plaintiffs Answers to Interrogatories]

For purposes of summary judgment, Georgetown County accepts Appellants' allegations that they entered the 2016-2017 Carolina's Got Talent Contest and that they won prizes that were not given to them.

ARGUMENTS

I. The mere grant of A-TAX funds by Georgetown County to Georgetown Winyah Auditorium Corporation does not create a legal duty for the County to run events at Winyah Auditorium.

Winyah Auditorium is a building owned by Georgetown Winyah Auditorium Corporation, a 501(3)(c) non-profit corporation. The auditorium and the corporation are run by an all-volunteer Board of Directors, a part-time Managing Director and folks from the community who serve on its working committees. [Affidavit of Peggy Burger] The affidavit of Wesley Bryant states that Georgetown County, does not possess any ownership, right, or title to the Winyah Auditorium. Appellants do not claim that Georgetown County is a member of Winyah Auditorium's board of directors or that Georgetown County employs its part-time Managing Director.

Appellants do not allege that Georgetown County served on any of the corporation's working committees.

Appellants have assumed incorrectly that merely because Georgetown County makes A-Tax grants to the corporation owning Winyah Auditorium, the County was responsible for running the Carolina's Got Talent Contest. However, the County did not sponsor, offer funding, or participate in any manner with Appellants' contest, the Carolina's Got Talent Contest. [Affidavit Wesley Bryant] As stated in the order by Judge Culbertson, there is not any authority to support the Appellant's assumption that an A-Tax grant gives A-Tax grantors such as Georgetown County managerial and operational control of grant recipients such as Georgetown Winyah Auditorium Corporation. See S.C. Code Ann. § 6-4-5, et seq. Georgetown County's A-Tax grants did not convert Georgetown Winyah Auditorium Corporation into a political subdivision of Georgetown County or confer upon the corporation the tax status of a local government. See Citadel Dev. Found. v. Greenville Cty., 279 S.C. 443, 448, 308 S.E.2d 797, 800 (Ct. App. 1983)(tax exemption status not obtained simply because non-profit corporation received benefits from tax exempt entity). Also see Tourism Expenditure Review Comm. v. City of Myrtle Beach, No. 2011-UP-464, 2011 WL 11735725 (S.C. Ct. App. Oct. 21, 2011) Ct. App. Oct. 21, 2011)(ALC found the Fall Motorcycle Rally complied with S.C. Code Ann. § 6-4-10); City of Myrtle Beach v Tourism Expenditure Review Committee Docket No. 04-ALJ-30-0382-CC

II. *Summary judgement was not premature in the present case.*

In Dawkins v. Fields, 354 S.C. 58, 71, 580 S.E.2d 433, 439–40 (2003) our Supreme Court reaffirmed the requirement that a party claiming summary judgment is premature because they have not been provided a full and fair opportunity to conduct discovery must advance a good reason why the time was insufficient under the facts of the case, and why further discovery would uncover additional relevant evidence and create a genuine issue of material fact. Dawkins, 580 S.E.2d at 439–40. Appellant’s lawsuit was over 14 months old when the County’s motion for summary judgment was argued. Appellants have not offered any reason why the time was insufficient under the facts of the case to prevent them from discovering facts that would show a legal duty from Georgetown County to Appellants.

Appellants claim to have obtained an affidavit from Winyah Board Member Michelle Randolph which may be relevant to the case. Appellants have not given any reason for not obtaining the affidavit or submitting it to the Court before Judge Culbertson ruled on the original motion or on the motion to reconsider. Further, Appellants have not stated what was in the affidavit that would create a genuine issue of material fact. Appellants do not claim the affidavit contradicts the affidavit of Georgetown County Attorney Wesley Bryant. Georgetown County’s motion for summary judgment was ripe for review. See Dawkins, 354 S.C. at 71.

III. The issues in the present case do not make summary judgment improper.

As a general rule, important impressions should not be decided on a motion for summary judgment. Where, however, the dispute is not as to the underlying facts but as to the interpretation of the law, and development of the record will not aid in the resolution of the issues, it is proper to decide even novel legal issues on a motion for summary

judgment. Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office, 346 S.C. 158, 551 S.E.2d 263 (2001). Also see Madison v. Am. Home Prod. Corp., 358 S.C. 449, 595 S.E.2d 493 (2004).

In the present case, the dispute is not as to the underlying facts but as to the interpretation of the law. The dispute is whether Georgetown County had a duty to warn Appellants about the risks associated with Wardell Brantley when entering the talent contest. In addition, the dispute is whether Georgetown County's act of granting Accommodation Tax Act funds to Georgetown Winyah Auditorium Corporation gave the County the right to control Wardell Brantley or made the County potentially liable to all third parties who participated in events promoted by Wardell Brantley inside Winyah Auditorium.

The legal relationship between Georgetown County and Carolina's Get Talent is clearly stated in Wesley Bryant's affidavit. Georgetown County did not sponsor, offer funding, or participate in any manner with the Carolina's Got Talent contest. [Affidavit Wesley Bryant] Georgetown County's acts, contracts and relationships are a matter of public record. Georgetown County only made an A-Tax grant to Georgetown Winyah Auditorium Corporation. Appellants had over a year to discover evidence to support their allegations that Georgetown County managed, controlled or sponsored the Carolina's Got Talent Contest.

Appellants unsupported allegations that they assumed the Carolina's Got Talent Contest was connected to the County because of the A-Tax grant are not sufficient to overcome the County's Motion for Summary Judgment. An adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as

otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. SCRCP 56.

Appellants admit they did not rely on any representations by anyone from Georgetown County in connection with the Carolina's Got Talent Contest when they entered the competition. In responding to the County's Interrogatories, Appellants stated:

QUESTION: Identify any and all individuals from Georgetown County whom the Plaintiffs communicated with by any means and what statements they made which were relied upon by the parties when entering the competition.

ANSWER: None know (sic) at this time.

[See ¶ 7. Plaintiffs Answers to Georgetown County's Interrogatories]

Georgetown County does acknowledge that it together with other government subdivisions made accommodations tax grants to Georgetown Winyah Auditorium Corporation. Such A-Tax grant evidence is a matter of public record and the A-Tax grants were discussed during oral arguments of the County's motion for summary judgment. There was nothing alleged Appellants' Complaint about the Accommodations Tax Act creating legal duties to recipients of A-Tax grants or to participants in events funded by such grants. The County further contends there is nothing in the Act that creates such a duty. See S.C. Code Ann. § 6-4-5, et seq.

IV. Georgetown County did not have a duty to warn Appellants about the alleged prior criminal record of Wardell Brantley.

Appellants appear to claim the County had a duty to warn Appellants about the prior criminal record of Wardell Brantley because of a "special relationship." Generally, one has no duty to control the dangerous conduct of another or to warn a potential victim of such conduct. See Degenhart v. Knights of Columbus, 309 S.C.

114, 420 S.E.2d 495 (1992); Rayfield v. S.C. Dep't of Corr., 297 S.C. 95, 374 S.E.2d 910 (Ct. App. 1988); Restatement (Second) of Torts § 314 (1965) *and* 315 (1965). However, the courts have found that when a defendant has the ability to monitor, supervise, and control an individual's conduct, a special relationship exists between the defendant and the individual, and the defendant may have a common law duty to warn potential victims of the individual's dangerous conduct. See Rogers v. S.C. Dep't of Parole & Cmty. Corr., 320 S.C. 253, 255–56, 464 S.E.2d 330, 332 (1995).

In the present case, Appellants appear to claim that the County had a legal duty to warn the Appellants of Brantley's prior criminal record because of a "special relationship" between Georgetown Winyah Auditorium Corporation and the County. Appellants claim is not correct. The County contends that no South Carolina statutory authority or common law case authority exists which would hold a "special relationship" exists between a governmental entity and an independent non-profit corporation based on the corporation's receipt of A-Tax grants. Further, there is no authority to suggest that a "special relationship" exists between a governmental entity and participants in events funded by A-Tax grants.

Even if a "special relationship" were found to exist, the S.C. Supreme Court has expressly held the "special relationship" duty to warn depends upon and arises from the existence of a prior threat to a specific identifiable victim. See Rogers, 320 S.C. at 256. In the present case there were no prior threats to defraud contestants entering the Carolina's Got Talent Contest alleged. Appellants' claim that Georgetown County had a duty to warn fails as a matter of law. Id.

V. Georgetown County is not liable on Appellants' claim of negligent misrepresentation?

Appellants allege that Georgetown County and the other defendants are liable for negligent misrepresentation. A summary of the required elements of negligent misrepresentation are as follows:

If the damage alleged is a pecuniary loss, the plaintiff must allege and prove the following essential elements to establish liability for negligent misrepresentation: (1) the defendant made a false representation to the plaintiff; (2) the defendant had a pecuniary interest in making the statement; (3) the defendant owed a duty of care to see that he communicated truthful information to the plaintiff; (4) the defendant breached that duty by failing to exercise due care; (5) the plaintiff justifiably relied on the representation; and (6) the plaintiff suffered a pecuniary loss as the proximate result of his reliance upon the representation. AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 222, 420 S.E.2d 868, 874 (Ct. App. 1992)

In the present case, Appellants concede that no one from Georgetown County made any false misrepresentations to them on which they relied in connection with the Carolina's Got Talent Contest. [See Appellants' Answers to Interrogatories] The affidavits submitted by Appellants do not contain any alleged misrepresentations by Georgetown County representatives. Appellants claim for negligent misrepresentation cannot succeed. Id.

VI. Appellants' claims are barred by Georgetown County's immunity under the S.C. Tort Claims Act for the acts of unrelated third parties.

If this Court were to decide that a question of fact existed on whether Georgetown County had a duty to warn or protect the Appellants, the County is entitled to summary judgment because the County did not commit any negligent acts. The act in question was granting A-Tax funds to renovate Winyah Auditorium. As stated above, the County did

not sponsor, offer funding, or participate in any manner with the Carolina's Got Talent contest. [Affidavit Wesley Bryant].

The case of Greenville Mem'l Auditorium v. Martin, 301 S.C. 242, 247, 391 S.E.2d 546, 549 (1990), should be distinguished from the present case because the act of providing an A-Tax grant did not create a reasonably foreseeable risk that all prizes listed in the Carolina's Got Talent Contest would not actually be awarded. Georgetown County did not lease Winyah Auditorium to Carolina's Got Talent Contest. Wardell Brantley was not employed by Georgetown County and the County have any way to control his activities. Georgetown County's award of an A-Tax grant was not a negligent act and the County's liability is barred by the S.C. Tort Claims Act for alleged fraudulent acts of a third party. S.C. Code Ann. § 15-78-60(20).

VII. Appellants do not have a claim against Georgetown County under S.C. Unfair Trade Practices Act.

Appellants' claim is controlled by Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry, 403 S.C. 623, 638, 743 S.E.2d 808, 815 (2013). That case held that the SCUTPA provides that "[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) (1985). Id., 403 S.C. at 638. To recover in an action under the SCUTPA, the plaintiff must show: (1) the defendant engaged in an unfair or deceptive act in the conduct of trade or commerce; (2) the unfair or deceptive act affected [the] public interest; and (3) the plaintiff suffered monetary or property loss as a result of the defendant's unfair or deceptive act(s). An act is 'unfair' when it is offensive to public policy or when it is

immoral, unethical, or oppressive. An act is 'deceptive' when it has a tendency to deceive.

Id.

As defined by the SCUTPA, "trade or commerce" includes "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) (1985). By these plain terms, it is clear the General Assembly intended for the SCUTPA to apply to business or consumer transactions. Health Promotion Specialists, LLC, 403 S.C. at 638–39.

By its very definition, "trade or commerce" involves "[e]very business occupation carried on for subsistence or profit and involving the elements of bargain and sale, barter, exchange, or traffic." *Black's Law Dictionary* (9th ed.2009); see Bretton v. State Lottery Comm'n, 41 Mass. App. Ct. 736, 673 N.E.2d 76, 78–79 (1996) (recognizing that "the proscription in § 2 of 'unfair or deceptive acts or practices in the conduct of any trade or commerce' must be read to apply to those acts or practices which are perpetrated in a business context" (citations omitted)). Id.

In Health Promotion Specialists, LLC, 403 S.C. 623, the Court held that a government enacting an ordinance did not fall within the business context required by SCUPTA. The County contends, in the instant case, the County's sole action of approving a grant of A-Tax funds to Winyah Auditorium does not fall within the definition of "trade or commerce" as the County's act did not involve advertisement, sale, or distribution of services or property within a business context. Id. The allegation that Georgetown Winyah Auditorium Corporation or Carolina's Got Talent may have used some portion of

the grant for a deceptive practice does not create liability for the County because the County's sole act of making an A-Tax grant did not cause the acts alleged. Making an A-Tax grant is not a deceptive practice within a business context. Id.

VIII. Appellants' claims are contrary to public policy.

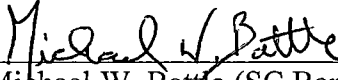
The policy and purpose for A-Tax tourism related expenditures in South Carolina is stated in the Accommodations Tax Act, SC Revenue Ruling #98-22 and the website for the S.C. Tourism Expenditure Review Committee (<http://www.state.sc.us/atax/expenditures.htm>). The public policy of the General Assembly in enacting the act was that A-Tax grant funds must be used for tourism-related expenditures. The funds must not be used as an additional source of revenue to provide services normally provided by the county or municipality but to promote tourism and enlarge its economic benefits through advertising, promotion, and providing those facilities and services which enhance the ability of the county or municipality to attract and provide for tourists. S.C. Code Ann. § 6-4-10.

Appellants' A-Tax grants' claim defeats the statutory purpose of the Accommodations Tax Act. The County contends that one primary purpose of A-Tax grants is to assist private entities and volunteers in their efforts to attract tourists to South Carolina. If an A-Tax grant converted every private entity such as Georgetown Winyah Auditorium Corporation into a political subdivision or made every private volunteer a government employee, the cost of promoting tourism through the A-Tax statutory scheme would be prohibitive. Further, counties and municipalities taking control of private entities and volunteers would defeat the purpose of the Act's inclusion of private entities

in the class of grant recipients. See City of Myrtle Beach v. Tourism Expenditure Review Comm., 407 S.C. 298, 755 S.E.2d 425 (2014).

CONCLUSION

Respondent Georgetown County respectfully requests that the Order of Circuit Court Judge Benjamin H. Culbertson granting summary judgment in favor of Georgetown County be affirmed and that Appellants' appeal be dismissed, for costs and for such other relief as this Court deems appropriate.


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April 3, 2020

THE STATE OF SOUTH CAROLINA
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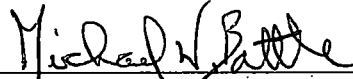
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Defendants County of Georgetown,Respondents'

PROOF OF SERVICE

I certify that on April 3, 2020 I served the Respondents' Initial Brief and Initial Designation Of Matter To Be Included Io The Record On Appeal on counsel by depositing a copy of the same in US Mail, sufficient postage prepaid, addressed and forwarded as noted below:

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April 3, 2020

The Honorable Jenny Abbott Kitchings
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RE: RE: Smith v. Georgetown County
C/A: 2018-CP-22-00456

Dear Ms. Kitchings:

Enclosed for filing are signed originals of the following: (1) Respondents' Initial Brief; (2) Respondents' Initial Designation with Rule 209 Certification and (3) Proof of Service of the same. By copy of this letter, and by the enclosed Proof of Service, I have served the same upon Appellants' counsel.

Sincerely,


Michael W. Battle
Enclosure: stated

C: J. Dwight Hudson

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The Honorable Jenny Abbott Kitching
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