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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Hon. Benjamin H. Culbertson, Circuit Court Judge

Case No: 2018CP2200456

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

Of Which,

County of Georgetown, is ..... Respondent.

Appellants' Final Reply Brief

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ARGUMENT IN REPLY

1. The County's Brief Insufficiently Describes The Relationship Between The County And Winyah:

The County's brief states and emphasizes that Winyah is a 501(C)(3) non-profit corporation run by a volunteer Board of Directors. The brief claims that the County has no role in the ownership or management of Winyah. The Respondent fails to mention the unique role of the County in the renovation and creation of Winyah or that its continued existence is largely due to funding from the City and the County. As Appellant's Initial Brief points out, Winyah's web page states or stated that the auditorium was created through a "partnership" between the City, the County and private citizens.

Respondent admits that it uses public tax money to fund Winyah. There is no dispute that funding an auditorium is a public purpose. *Ashmore et. al. v. Greater Gr'ville Sewer D. et al, 211 SC 77, 44 SE2d 88 (1947)* In electing to support Winyah, the County also supported Wardell Brantley, Winyah's director. Brantley had a criminal record when he was hired as Winyah's director, and he had that record when Winyah supported the talent competition Brantley created by allowing the finals of the event to be held at Winyah. (R.pp. 11-27)

By entering the partnership with Winyah, the County partnered with Wardell Brantley, the criminal who created the Carolina's Got Talent Competition. Creating and continually supporting a public auditorium obligates the County to proper oversight in order to protect the public generally and creates a private and specific obligation to performers and entertainers at the venue.

A public auditorium exists to entertain the public. That entertainment purpose can not be fulfilled without entertainers and performers, like the Appellants. Whether or not the entertainers directly communicate with all owners and managers is irrelevant to the obligations involved. Here, the Appellants would not have been lured and defrauded by Brantley and his competition if the County had exercised proper oversight to decline funding if Winyah hired a criminal and furthered his enterprises by hosting his events. The Respondent's brief describes the County's role in the partnership with Winyah as remote, and any obligation to the Appellants as nonexistent because the Appellants did not directly communicate with the County. That is both incomplete and inaccurate.

Partnering with Winyah to create and run an auditorium obligates the County to those injured by the venue, and that includes these Appellants.

2. The County's Brief Incorrectly Claims That Using Public Funds In Furtherance Of Its Partnership With Winyah Does Not Create A Duty:

The County cites an unpublished case to support its contention that use of public tax funds does not create a duty. One of these cases was an unpublished opinion of a dispute over accommodation tax funds involving the City of Myrtle Beach and a fireworks' display and the fall bike rally. In that case, the city's tourism expenditure review committee, directed that funds be withheld because the entities involved were for-profit. By the time the case reached appeal the legislature had enacted a statute resolving the issue of the funds. *Tourism Expenditure Review Comm. v. City of Myrtle Beach, Unpublished Opinion No. 2011-UP-464 (S.C. Ct. App. Oct. 21, 2011)* This case does not support the proposition for which it was cited.

The County cites another case regarding beneficial ownership of a property for tax exemption purposes. There, a foundation created to benefit The Citadel inherited a building, but

it was not occupied or used for education, and the foundation sold the building to a commercial entity. The foundation paid taxes under protest, claiming an exemption for educational institutions. The Court ultimately determined that the foundation was not entitled to the exemption. The foundation's claim was that the Citadel had beneficial ownership of the building. The case cited by the County does not support the County's position here, but the discussion of beneficial ownership is interesting and possible applicable here to support the County's beneficial ownership interest in the auditorium it partnered with the City and the public to create and fund. *Citadel Dev. Fdn. v. County of Greenville, 279 S.C. 443 (S.C. Ct. App. 1983)*

The Respondent's brief mischaracterizes Appellants' contentions. The Appellants contend that under these facts the County has duties and responsibilities for the public auditorium it created and funds for a number of reasons, including, but not limited to, the public tax funding.

3. Summary Judgment Was Improper And Premature In This Case:

Respondent's brief cites *Dawkins v. Fields, 354 S.C. 58 (S.C. 2003)* to support its contention that Summary Judgment was not premature. *Dawkins* says that a party opposing Summary Judgment must show why it did not have a full and fair opportunity to conduct discovery and must demonstrate why additional discovery would show evidence of a genuine issue of material fact. Respondent says that fourteen (14) months passed before its motion was argued and that this time means Summary Judgment was not premature here. That contention is erroneous.

This case was filed against Winyah, the auditorium where Brantley worked as director which also hosted the finals of the event, against the auditorium's partners, the City and County which created and fund the auditorium, against local television stations which sponsored, advertised and telecasted the event and against the national and regional parent companies of the

local television stations. Most of the parties have settled, but the case started with various of the media outlets filing Motions to Dismiss and the City filing a Motion to Strike punitive damages. This means that there were a number of attorneys, and trial conflicts and vacation schedules delayed the motions to dismiss, and the City had to brief and support the Motion to Strike. Appellants reviewed and researched the City's position and did come to agree with it, and an Order striking punitive damages as to the City was filed. The Motions to Dismiss were heard and denied and then the media outlets filed Answers.

All of this took time and pending the hearings on the dismissal motions, counsel did not want to engage in depositions. Written discovery was served and coordinating responses between the large group of Plaintiffs took a fair amount of time and generated other discovery motions. Depositions were scheduled, trial conflicts arose, and they were attempted to be rescheduled. In lieu of responding to discovery, the Respondent filed this motion. During all of this time, the Appellants were working to contact certain board members of Winyah, and this, largely, had to be done without assistance from the entity. By the time the Appellants obtained an Affidavit from board member Michelle Randolph, this Motion had been heard and granted. Appellants make no contentions about this Affidavit opposing the County's position because the Affidavit is not of record in this appeal, having been obtained after the lower court rulings.

The Appellants do not know what discovery responses from the County might show, but they believe they are entitled to those responses. The Appellants also believe that the facts here, especially in this novel case, justified and supported denial of the Summary Judgment Motion. The County partnered with the City and the public to create and fund Winyah and that partnership alone means that the County had at least enough of a duty of oversight to step in when Winyah hired a criminal as director and furthered the director's defrauding of contestants in this

competition by allowing him use of the auditorium for this competition. That association and allowed use of the auditorium advertised, publicized and associated the County with the competition, providing further evidence to the Appellants of the contest's legitimacy.

Summary Judgment to the County was not only premature, under these facts it was improper.

4. Georgetown County May Be Liable For Failure To Warn and Negligent Misrepresentation:

The County was both Winyah's partner and is a government entity with direct responsibility for the public good. Official powers exist only for the public good and do not exist when the public good is not their aim. *Williams v. Condon, 347 S.C. 227 (S.C. Ct. App. 2001)* By partnering with, promoting and funding Winyah, the County represented to the public generally, and to the CGT contestants specifically that Winyah's employees and events were reputable. A County can be liable to invitee business visitors like the Plaintiffs under the Tort Claims Act and under common law principals. *LeFont v. City of Myrtle Beach, Appellate No. 2017-001258 (S.C. Ct. App. Mar. 11, 2020)*

This is not a case where the County merely supported a non-profit venture with public funds. The County publicly partnered with the City to create the auditorium. The County funded the auditorium on a continual basis so County money supported staffing, including the hiring of Brantley, and it funded keeping the auditorium open for events like this competition. The County knew or should have known of Brantley's history and background and it could have and should have warned the public and the Appellants of the risks associated with Brantley and his ventures – like Winyah and this contest. Contestants in the competition were not unknown members of the general public.

Winyah and the County were partners. A partnership is normally for transacting general business of a specific kind. *Welling et al. v. Crosland et al, 129 S.C. 127 (S.C. 1924)* Here, they created and operated an auditorium to host events involving entertainers like the Appellants. Brantley was Winyah's director. Brantley's representations to the Appellants bind Winyah and the County.

Further, the Appellants were reasonably foreseeable parties in the field of danger who were directly at risk from Brantley's known character and criminal history. *Hardee v. Bio-Medical Applications, 370 S.C. 511 (S.C. 2006)* The Appellants were specific and known persons exposed to a specific threat from Brantley. *Bishop v. South Carolina Department of Mental Health, 331 S.C. 79 (S.C. 1998)* Brantley was an employee of the County's partner, Winyah. As such, "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." *Gilmer v. Martin, 323 S.C. 154, 157 (S.C. Ct. App. 1996)*

At a minimum, further discovery is needed to explore the relationship between Winyah, the County, Brantley, and the Appellants. This Court should, therefore, reverse the grant of Summary Judgment.

5. Appellants' Claims Are Not Barred By the Tort Claims Act

Respondent's brief claims that its only "act" was to disperse accommodations tax funds and that if Winyah used some part of these funds for deceptive purposes, then the County is not liable. The County partnered with Winyah and the City to renovate, create, fund and operate an auditorium to increase tourism and to provide citizens with entertainment. Now, the County wants

to disclaim responsibility for the venture. Increased tourism provides a direct economic benefit to the County, falling directly in the definition of trade or commerce cited by Respondent's brief.

The County's own lack of oversight and failure to warn allowed Winyah's director, Brantley, to prey on the competition's contestants. The County built an auditorium in partnership with Winyah and the City and did so intending to attract entertainers like the Appellants. As in the *Greenville Memorial Auditorium* case involving that publicly funded venue, the risks to the Appellants from Brantley's criminal acts was foreseeable and was grounded in the County's negligence in oversight and failure to warn. See: *Greenville Memorial Auditorium v. Martin, 301 SC 242, 391 SE 546 (1990)*

The County claims that it did nothing more than disperse accommodation tax funds to Winyah. Since it partnered with the City to create the public auditorium, and it annually and continually funds the auditorium, the County has a duty to do more than write a check. The County has admitted that its actions relative to its auditorium consist of blindly paying money. That admission alone is grounds for the reversal of the grant of Summary Judgment.

6. Respondent's Claims Are Contrary to Public Policy

Respondent's brief claims that the County's use of accommodations tax funds shield it from liability and that holding otherwise would violate public policy. Essentially, Respondent claims that the County can avoid responsibility to the public based on which public money it uses to fund its auditorium. That is the claim that contradicts public policy and betrays the public.

The County did much more here than write a check to an independent non-profit organization trying to attract and increase tourism. The County partnered with the City to renovate a historic building for use as an auditorium and then the County funded the auditorium annually. That's more like a parent with a child than a County with an independent non-profit entity. The

facts and the history matter to the legal relationship of the parties to each other and to the duties of the parties to the public and to performers like the Appellants.

Ultimately, the funds used to attract tourists attracted the Appellants to come and perform in the County's public auditorium. The competition was covered by the press and carried on television, attracting the public to attend and to spend money in the area. All of that benefitted Georgetown County and its business economy like the rock concert benefitted Greenville County. Like Greenville County, Georgetown County seeks to seize the benefit without bearing the burden. That did not work for Greenville County {*Greenville Memorial Auditorium v. Martin, 301 SC 242, 391 SE2d 546 (1990)}* and it must not work for Georgetown County.

The public harm here would be allowing the Respondent's choice of how it funds its auditorium to shield it from liability. Whether the County used accommodations taxes, county taxes or utility revenue to fund its auditorium is irrelevant to the counties' duties and responsibilities. Georgetown County built this auditorium, but structured its legal status so that the County could support and benefit from the auditorium without bearing responsibility for it. That is the violation of public policy this Court should not allow.

The grant of Summary Judgment should be reversed.

CONCLUSION

Winyah Auditorium is the child of the City and the County of Georgetown. The entities are partners and agents. The legal structure and the type of tax money used to pay for the auditorium do not change the reality or how the public perceives that reality. The Smiths and the Burgers' understanding from Winyah's website that the auditorium was a partner with the City and County influenced their opinion that this contest was legitimate, that it was worth their time,

talents, and commitments. (R.pp. 119-133) These representations, along with the history of the auditorium and the relationships of the City, the County, and Winyah are all important factors here.

The Appellants are the performers who made this competition possible and they were the only parties who knew nothing of Brantley's criminal history and background. Winyah, the City and the County all knew the risks they took in hiring Brantley as director and in allowing Brantley to hold this competition at Winyah. Winyah, the City and the County took the risk and reaped the reward in publicity from television coverage and in tourist dollars from those who came to the competition and spent money in the area. The Appellants knew nothing of the risks. They believed and relied on representations made by word and by deed that this competition was legitimate and that if they worked and won they would get the money, scholarships and career opportunities they were promised. The County didn't watch over this contest, despite knowing Brantley's history, and it didn't warn the contestants.

This is a novel action, yet the trial court granted Summary Judgment to the County before written discovery was complete and before depositions were taken. Genuine issues of material fact exist in this novel situation, making the grant of Summary Judgment erroneous or, at least, premature. This Court should reverse and remand.

Respectfully submitted,

s/ J. Dwight Hudson

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Dated: May 29, 2020

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RULE 211(b) CERTIFICATION

The undersigned certifies that the foregoing ***Appellants' Final Reply Brief*** complies with Rule 211(b), *SCACR*.

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