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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
In the Court of Common Pleas for the Fourteenth Judicial Circuit  
Hon. Marvin H. Dukes, III, Master in Equity

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Appellate Case No. 2018-002170

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Steven Craig Molloy and Island Group, Inc., d/b/a Carolina  
Cleaning ..... Plaintiffs

Of which Steven Craig Molloy is the ..... Appellant

v.

Beaufort County; Gary Kubic, Individually, and as Beaufort  
County Administrator; Josh Gruber, Individually and as former  
Beaufort County In-House Attorney; Bryan Hill, Individually and  
as former Beaufort County Deputy Administrator; Shannon Loper,  
Individually, and as Employee of the Beaufort County Parks and  
Leisure; Stu Rodman, as finance Chair of Beaufort County  
Council; and Dave Thomas, Procurement Director for Beaufort  
County, South Carolina; Disabilities and Special Needs (Non-  
Profit); and Beaufort County DSN Board, ..... Respondents

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**FINAL BRIEF OF RESPONDENTS**

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**STATEMENT OF ISSUES ON APPEAL**

- A. Did Judge Dukes properly grant summary judgment to Defendants where Plaintiff Steven Craig Molloy (the only Appellant) has not sustained any individual injury and cannot assert any claims against Defendants in his own right?

**Suggested Answer:** YES.

- B. Did Judge Dukes properly enter summary judgment where Plaintiff Steven Craig Molloy did not comply with Rule 56(f) and did not make any showing that further discovery was appropriate or necessary in this case (Mr. Molloy's Issue I)?

**Suggested Answer:** YES.

- C. Did Judge Dukes properly enter summary judgment where Plaintiff Steven Craig Molloy's claims were plainly time-barred under the South Carolina Tort Claims Act (Mr. Molloy's Issue II)?

**Suggested Answer:** YES.

- D. Did Judge Dukes properly enter summary judgment where the express language of Carolina Cleaning's 2010 agreement with Beaufort County granted the County the exclusive right to terminate in its discretion?

**Suggested Answer:** YES.

- E. Did Judge Dukes properly enter summary judgment where Plaintiff Steven Craig Molloy failed to properly assert his rights in the protest process as required by the Beaufort County Procurement Code and the RFP and contract documents?

**Suggested Answer:** YES.

- F. Did Judge Dukes properly enter summary judgment where Plaintiff Steven Craig Molloy presented no evidence that any of the Defendants acted outside of the scope of their job duties (Mr. Molloy's Issue III)?

**Suggested Answer:** YES.

- G. Did Judge Dukes properly enter summary judgment where Plaintiff Steven Craig Molloy presented no evidence that any of the Defendants acted unconscionably or in bad faith (Mr. Molloy's Issue IV)?

**Suggested Answer:** YES.

**H. Did Judge Dukes properly enter summary judgment where Plaintiff Steven Craig Molloy could not establish that BCDSN was a separate entity from Beaufort County, but rather is a department of the County (Mr. Molloy's Issue V)?**

**Suggested Answer: YES.**

**I. Did Judge Dukes properly enter summary judgment as to Plaintiff Steven Craig Molloy's contract-based claims against the individual Defendants?**

**Suggested Answer: YES.**

**J. Did Judge Dukes properly enter summary judgment as to Plaintiff Steven Craig Molloy's tort-based claims against the individual Defendants?**

**Suggested Answer: YES.**

**K. Did Judge Dukes properly enter summary judgment as to Plaintiff Steven Craig Molloy's breach of contract accompanied by a fraudulent act claim (Count 1)?**

**Suggested Answer: YES.**

**L. Did Judge Dukes properly enter summary judgment as to Plaintiff Steven Craig Molloy's interference with prospective contract claim (Count 2)?**

**Suggested Answer: YES.**

**M. Did Judge Dukes properly enter summary judgment as to Plaintiff Steven Craig Molloy's unjust enrichment claim (Count 6)?**

**Suggested Answer: YES.**

**N. Did Plaintiff Steven Craig Molloy fail to preserve any issue for appellate review regarding his taxpayer standing claim (Count 9)?**

**Suggested Answer: YES.**

## STATEMENT OF THE CASE

### A. Factual Background

This lawsuit involves contracts for the performance of janitorial services at various buildings owned by Respondent Beaufort County. Specifically, Plaintiffs have challenged the manner in which Beaufort County terminated (in part) a janitorial contract and the manner in which it awarded subsequent contracts for that work. Only Mr. Molloy (in his individual capacity) has appealed from the entry of summary judgment in favor of Defendants Beaufort County, Gary Kubic (Individually, and as Beaufort County Administrator), Josh Gruber (Individually and as former Beaufort County In-House Attorney), Bryan Hill (Individually and as former Beaufort County Deputy Administrator), Shannon Loper (Individually, and as employee of the Beaufort County Parks and Leisure), Stu Rodman (Finance Chair of Beaufort County Council), Dave Thomas (Individually and as Procurement Director for Beaufort County), and Disabilities and Special Needs (NON-PROFIT) Beaufort County DSN Board (collectively "Defendants" or "Respondents").

#### 1. The BCDSN Janitorial Program

Some of the issues raised in this appeal concern the Beaufort County Disabilities & Special Needs Board, the advisory board for the Beaufort County Disabilities and Special Needs Department (collectively "BCDSN"), whose mission is "[t]o provide quality services and support to our consumers and to facilitate opportunities for them to live productively and inclusively in the community." (*See* R. p. 86 ¶ 6 (all references herein to the Record on Appeal are to the Supplement to Appellant's Record on Appeal ("Record") served on March 12, 2020)). Among the services BCDSN provides to individuals with disabilities or special needs ("consumers") are residential services, day program services, waiver services, respite services, job coach services, early intervention services, family support services and Camp Treasure Chest and after school programs, among others. (*See id.* ¶ 7). BCDSN also provides people with disabilities, including intellectual, mental health, and traumatic brain injury disabilities, among others, and assistance

with obtaining and maintaining employment through various approaches. (*See id.* ¶ 8). The focus of the BCDSN employment program is:

- The creation of jobs for people with disabilities
- Job selection and placement that focuses on the individual's abilities and desires
- Training to assist in the job field selected and in the specific job for which an individual is hired
- Stabilization when the job is obtained, including all aspects of the job
- Proactive follow along to ensure that the individual meets the employer needs and the job is a good fit for the individual
- Transitional services to assist individuals in being introduced or adjusting to BCDSN services that are available

(*See id.* ¶ 9). BCDSN employs 26 consumers to work on janitorial crews which provide services to Beaufort County as part of its employment program. (*See id.* ¶ 10).

Because of disability limitations of some individuals, federal law permits them to be paid amounts less than the prevailing minimum wage, in order to facilitate their employment opportunities. (*See id.* ¶ 11). Some BCDSN consumers have benefitted from this law by being able to provide janitorial services for Beaufort County, as part of the county's job training and employment program. (*See id.* ¶ 12). County funds paid the BCDSN consumers who performed janitorial work for the County. (*See R. p. 87* ¶ 13). The federal government did not compensate the County for wages paid to BCDSN consumers performing janitorial work. (*See id.* ¶ 14). Beaufort County and BCDSN comply with all state and federal laws in connection with the employment of BCDSN consumers. (*See id.* ¶ 15).

The employment of BCDSN consumers to perform janitorial work serves the public interest in multiple ways. (*See id.* ¶ 16). First, it permits individuals with special needs to obtain employment in a safe, supervised environment, and hopefully to become tax paying citizens. (*See id.*). These individuals receive pay for their work in accordance with the law, and they also benefit from having a sense of purpose. (*See id.*). Additionally, the cost savings that this

program provides benefits the County's taxpayers. (*See id.*). BCDSN consumers involved in the provision of janitorial services are not "exploited." (*See id.* ¶ 17). To the contrary, they benefit from a win-win proposition in which they are gainfully employed and trained and the County receives economical, high quality service.

Because any "contract" for the use of BCDSN was a use of county employees, it was not required to be offered out for bid or proposal under the Beaufort County Procurement Code. (*See R.* p. 115 ¶ 22). Nonetheless, the County permitted the submission of competing proposals. (*See id.* ¶ 23). Every RFP in which BCDSN submitted a proposal fully complied with all applicable procurement procedures. (*See id.* ¶ 24). BCDSN was never given any advantage with regard to making proposals or contracting. (*See id.* ¶ 25).

**2. The 2010 Contract (RFP # 3910/100566)**

On October 25, 2010, Beaufort County entered a Contract for Janitorial Services ("2010 Contract") with Island Group Inc., d/b/a Carolina Cleaning ("Carolina Cleaning"), which referenced Request for Proposal ("RFP") # 3910/100566. (*See R.* p. 113 ¶ 7 & pp. 124-226). Carolina Cleaning is not a party to this appeal. Rather, the only Appellant is Plaintiff Steven Craig Molloy, the principal of Carolina Cleaning.

Under the 2010 Contract, Carolina Cleaning "does hereby offer to the County services for the purpose of providing Janitorial Services as contained and fully described in RFP # 3910/100566 (Janitorial Services for Beaufort County Facilities) and including Addendum 1." (*See R.* pp. 113 ¶ 12 and 125 ¶ 1). The term of the 2010 Contract was for a period of one (1) year starting on November 1, 2010 and ending on October 31, 2011, with four (4) one-year renewals available at the approval of Beaufort County. (*See R.* pp. 113 ¶ 13 and 125 ¶ 5). As a result, the 2010 Contract was not to exceed five (5) years in duration. (*See id.*).

In 2010, Beaufort County began an effort to reduce all contracts by 10% to help alleviate its budget deficit. (*See R.* p. 114 ¶ 14). At that time, the County was even discussing furloughs for employees and seeking ways to save money on contracts. (*See id.*). In this regard, Beaufort County sent letters to all contractors, including Carolina Cleaning, requesting a 10% reduction in

contract amounts. (*See id.* ¶ 15). On September 8, 2011, the County wrote to Mr. Molloy, and Mr. Molloy countersigned the letter (binding Carolina Cleaning) on October 30, 2011. (*See R.* pp. 114 ¶ 16 and 227). That letter provided, in relevant part:

It is with great pleasure that Beaufort County desires to renew the Contract for the Janitorial Services, per our option as specified in Contract #3910/100566, with a 10% cost reduction to Beaufort County. Please sign below and return to our Office as soon as possible. The Renewal Contract dates will be for one (1) year commencing on November 1, 2011 thru October 31, 2012. There are now three (3) one (1) year Contract Renewals remaining on the Contract.

(*See R.* pp. 114 ¶ 17 and 227). On July 5, 2012, the County extended the 2010 Contract through November 1, 2013. (*See R.* pp. 114 ¶ 17 and 228).

**3. RFP # 3910/120221 (Locations North of the Broad and the DNA Laboratory)**

In 2012, the County issued RFP # 3910/120221, entitled "Request for Proposals to Provide Janitorial Services, North of the Broad River, Eight Locations for Beaufort County South Carolina," with a closing date of March 22, 2012. (*See R.* pp. 115 ¶ 27 and 251-303). RFP # 3910/120221 sought proposals for the cleaning of the following locations:

- Coosaw Center
- Broomfield Recreation Center
- Green Street Gym
- Scott Community Center
- Seaside Center
- St. Helena Gymnasium
- Port Royal Community Center
- BCDSN

(*See R.* pp. 115 ¶ 28 and 251-303). Addenda # 1 and Addenda # 2 to RFP # 3910/120221 increased the total number of locations for that RFP to ten (10) by adding Booker T Washington and the Sheriff's Office DNA lab. (*See R.* p. 116 ¶¶ 29-31 (the Record does not include Exhibits E and F referenced in Respondents' Initial Brief)).

Beaufort County awarded a contract to BCDSN from responses to RFP # 3910/120221 for all of the locations in that RFP except for the DNA lab. (*See R.* pp. 117 ¶ 39 and 229). BCDSN's proposal for all locations except for the DNA laboratory was \$52,026. (*See id.*). The price that Carolina Cleaning proposed for the same work was \$88,680, making it the third-place finisher for the nine buildings North of the Broad River. (*See id.*).

Thus, on July 30, 2012, the County issued Addendum #3 to RFP # 3910/120221, dated July 30, 2012, which indicated that the only remaining location available for contracting was the Sheriff's Office DNA lab and requested pricing on that one location by August 9, 2012. (*See R.* p. 116 ¶ 32 (the Record does not include Exhibit G referenced in Respondents' Initial Brief)). Addendum # 3 indicated that the other nine (9) locations under RFP # 3910/120221 "no longer need services." (*See id.* (the Record does not include Exhibit G referenced in Respondents' Initial Brief)). Carolina Cleaning did not file a protest to complain about Addendum #3 to RFP # 3910/120221. (*See R.* p. 116 ¶ 33). To the contrary, as requested by Addendum # 3, on August 6, 2012, Carolina Cleaning — which had previously submitted a proposal for all ten locations under RFP # 3910/120221 — submitted a revised proposal for only the Sheriff's DNA lab. (*See R.* pp. 116 and 245-47).

Carolina Cleaning was awarded the contract on part of RFP # 3910/120221 for the DNA Lab. (*See R.* p. 117 ¶ 40). On September 4, 2012, Dave Thomas of the County wrote to Mr. Molloy to inform him that the County was terminating Carolina Cleaning's contract as to certain North of the Broad locations, but adding other locations:

We wish to inform you that Beaufort County has selected our in-house DSN for the contract award. Thus, your cleaning services for the Dale Center, the Bluffton Center, Burtons Wells concession and press box, and the Burton Wells Senior Center will end August 31, 2012.

However, we also wish to congratulate you that you are the winning bidder for both our DNA lab and the new Sheriff's Office on Hilton Head Island. The term on this particular service is September 1, 2012 to June 30, 2013.

(See R. pp. 117 ¶ 41 and 230-31). On December 12, 2012, the County terminated the 2010 Contract with regard to the Bluffton Gym stating, *inter alia*: "This is absolutely no reflection on your work; however as a cost-cutting measure, we have decided to take care of this facility in-house. All other terms, condition, amendments, and prices remain in effect." (See R. pp. 117-18 ¶ 42 and 232). On May 30, 2013, the County provided 60-day notice of the cancellation of the 2010 Contract regarding the Buckwalter Recreation Center and the Burton Wells Recreation Center. (See R. pp. 118 ¶ 43 and 233).

**4. RFP #133020130215 (New St. Helena Library)**

On or about October 16, 2012, the County extended to Carolina Cleaning a month-to-month contract for the cleaning of the new St. Helena Library. (See R. pp. 118 ¶ 45 and 236-37). The County then issued RFP #133020130215, entitled "Request for Proposals to Provide Janitorial Services for Beaufort County's St. Helena Library," with a closing date of January 24, 2013. (See R. p. 118 ¶ 46 (the Record does not include Exhibit N referenced in Respondents' Initial Brief)). Carolina Cleaning submitted a proposal for RFP #133020130215. (See R. p. 118 ¶ 47).

By memorandum dated June 14, 2013, Dave Thomas of the County made his recommendation for the award of the contract for RFP # 133020130215. (See R. pp. 119 ¶ 51 and 238-44). BCDSN's proposed pricing for RFP # 133020130215 was \$22,511.25, compared to \$31,800 for Carolina Cleaning. (See R. pp. 119 ¶ 52 and 238-44). In accordance with Mr. Thomas' recommendation, Beaufort County awarded the contract for St. Helena Library to BCDSN. (See R. p. 119 ¶ 53). On June 27, 2013, the County wrote to Carolina Cleaning, stating that the County was cancelling its month-to-month agreement for the St. Helena Library, because it had "decided to go with Disabilities and Special Needs [BCDSN] for the long term" under RFP # 133020130215. (See R. p. 119 ¶ 54).

**5. RFP #14305 (New Contract)**

Carolina Cleaning's 2010 Contract term had been extended from November 1, 2012 to October 31, 2013 for \$566,521. (See R. p. 119 ¶ 55). After that date, the 2010 Contract was extended on a month-to-month basis. (See R. p. 119 ¶ 56). The County then issued RFP #14305, entitled "Request for Proposals to Provide Janitorial Services for Beaufort County, South Carolina," with a closing date of March 5, 2014. (See R. p. 119 ¶ 57 (the Record does not include Exhibit Q referenced in Respondents' Initial Brief)). The County submitted RFP #14305 to vendors capable of providing janitorial services for Beaufort County facilities located both North and South of the Broad River (27 facilities in the North, including additional services needed at the 14 buildings currently being serviced by BCDSN, and 9 facilities in the South). (See R. p. 120 ¶ 58). Carolina Cleaning submitted a proposal for RFP # 140305. (See R. p. 120 ¶ 59).

On May 19, 2014, Dave Thomas made his recommendation that the contract for RFP # 140305 be awarded to A&B Cleaning Service Inc. of Greenville, North Carolina. (See R. pp. 120 ¶¶ 63-64 and 248-50). On the final scoresheet for RFP # 140305, A&B had the highest score with 503 points and a cost of \$585,828. (See R. pp. 120 ¶ 65 and 248-50). On the other hand, Carolina Cleaning, the incumbent on that contract, had a score of 333 points and a cost of \$833,628, finishing in 10th place out of 16 potential vendors. (See R. pp. 120 ¶ 66 and 248-50). Carolina Cleaning has done no work for Beaufort County since June 30, 2014. (See R. p. 121 ¶ 69).

**B. Procedural History**

This case has a long and complex procedural history. In the interest of providing the Court with a complete understanding of this case, Defendants offers the following summary of the tortured procedural history of this case.

**1. The First Two Complaints**

This lawsuit was commenced on August 22, 2016 by Appellant Steven Craig Molloy and non-parties to this appeal, Jack Wayne Molloy (who would later apparently be dropped as a

plaintiff in this matter) and Carolina Cleaning. (*See R.* pp. 3-47). This Complaint asserted claims against Beaufort County, as well as the following individual Defendants:

- Gary Kubic, Individually, and as Beaufort County Administrator;
- Josh Gruber, Individually and as former Beaufort County In-House Attorney;
- Bryan Hill, Individually and as former Beaufort County Deputy Administrator;
- Shannon Loper, Individually, and as employee of the Beaufort County Parks and Leisure;
- Stu Rodman, Finance Chair of Beaufort County Council;

(*See id.*). Plaintiffs were represented in the filing of this Complaint by attorney Lauren L. Martel, Esq. On September 26, 2016, the above-referenced defendants all filed a Motion to Dismiss or in the Alternative for a More Definite Statement and to Strike. This Motion was set for a hearing on February 2, 2017. Ms. Martel did not appear for this hearing, and the Court entered an Order granting the motion for a more definite statement. (*See R.* pp. 48-50).

As a result, on February 15, 2017, Plaintiffs Steven Craig Molloy and Carolina Cleaning (but not Jack Wayne Molloy) filed their Amended Verified Complaint in this matter. In their Amended Verified Complaint, Plaintiffs sued the above-referenced Defendants, as well as Dave Thomas, Procurement Director for Beaufort County. (The Record does not include the Amended Verified Complaint referenced in Respondents' Initial Brief). Plaintiffs' Amended Verified Complaint is a lengthy, rambling 40-page document, claiming numerous acts of misconduct by the various Defendants. In addition to monetary relief, it also sought a preliminary and final injunctive relief against Defendants. Plaintiffs' Amended Verified Complaint included the following causes of action: (1) violations of the South Carolina Consolidated Procurement Code; (2) "bid-rigging"/collusion/interference; (3) "breach"; (4) fraud; (5) tortious interference with contractual relations; (6) unjust enrichment and violation of S.C. Code § 2-532 (*sic*); (7) violation of the South Carolina Unfair Trade Practices Act; (8) conspiracy (individual Defendants); and (9) assault of a minor (Plaintiff Mr. Molloy's minor child). The named

Defendants filed their Answer to Amended Complaint on or about March 1, 2017. (*See R. pp. 57-74*)

**2. Plaintiffs' Request for Interim Injunctive Relief**

In support of their claim for injunctive relief in the Amended Verified Complaint, Plaintiffs filed the following evidence on February 21, 2017: (a) Affidavit of Craig Molloy; (b) Affidavit Statement by Edward Wilberding (Merry Maids); and (c) United States Department of Labor Supplemental Data Sheet for Application for Authority to Employ Workers with Disabilities at Special Minimum Wages. On March 15, 2017, Plaintiffs filed a Motion for Temporary Injunction and Temporary Restraining Order, requesting an emergency hearing. (*See R. pp. 75-79*). This motion sought a temporary injunction "preventing the Defendants from, (a) using the Plaintiff[s] confidential information; (b) bid rigging within the County using confidential information; (c) diverting tax money or co-mingling tax money used for Commercial Cleaning for Beaufort County with the DSN program; and (d) Ordering an Audit of these programs and/or a forensic accounting." (*See R. pp. 75-79*). In further support of this motion, on April 6, 2017, Plaintiffs filed the Affidavit of Mary L. Sieger (Certified Public Accountant). Additionally, on April 10, 2017, Plaintiffs submitted a seven-page Supplemental Affidavit of Craig Molloy.

In opposition to Plaintiffs' request for injunctive relief, the named Defendants submitted several affidavits (with relevant exhibits) supporting their contentions:

- Affidavit of Lieutenant Brian Baird in Opposition to Plaintiffs' Motion for Temporary Injunction and Temporary Restraining Order (filed April 6, 2017) (R. pp. 80-81);
- Affidavit of Shannon Loper in Opposition to Plaintiffs' Motion for Temporary Injunction and Temporary Restraining Order (filed April 6, 2017) (R. pp. 82-84);
- Affidavit of William Love in Opposition to Plaintiffs' Motion for Temporary Injunction and Temporary Restraining Order (filed April 6, 2017) (R. pp. 85-111);
- Affidavit of Dave Thomas in Opposition to Plaintiffs' Motion for Temporary Injunction and Temporary Restraining Order (filed April 7, 2017) (R. pp. 112-303);  
and

- Affidavit of Alicia Holland in Opposition to Plaintiffs' Motion for Temporary Injunction and Temporary Restraining Order (filed April 10, 2017) (R. pp. 304-12).

Additionally, on April 7, 2017, the named Defendants filed a Memorandum in Opposition to Plaintiffs' Motion for Temporary Injunction and Temporary Restraining Order.

After a full hearing on the matter, on April 17, 2017, the Honorable Carmen T. Mullen entered a Form 4 Order stating "Plaintiff's Motion for Temporary Injunction and Temporary Restraining Order is respectfully denied." (*See* R. pp. 320-24). On April 26, 2017, Plaintiffs filed a Motion for Reconsideration arguing for the first time, among other things, that Judge Mullen should have recused herself and that Plaintiffs were entitled to a transfer of venue. Judge Mullen denied this Motion for Reconsideration via Form 4 Order on May 2, 2017 stating simply: "Plaintiff's Motion for Reconsideration of this Court's Order, dated April 17, 2017, denying Plaintiff's Motion for a Temporary Injunction and Temporary Restraining Order is respectfully denied without rehearing." (*See* R. pp. 325-27).

### **3. Defendants' Motion for Summary Judgment**

Defendants' Motion for Summary Judgment, which the trial court ultimately granted, has been a laborious and lengthy process.

Defendants first moved for summary judgment in this matter on July 21, 2017, in the form of Defendants' Notice of Motion and Motion for Summary Judgment. (*See* R. pp. 328-56). That detailed motion incorporated by reference the Affidavits of Baird, Loper, Love, Thomas and Holland, which Defendants had previously submitted to the Court in opposition to Plaintiffs' request for preliminary injunctive relief. (*See* R. p. 329). The grounds for summary judgment included in that motion included, *inter alia*: (a) the fact that Carolina Cleaning's contract permitted Beaufort County the right to terminate in whole or in part; (b) Plaintiffs' failure to exhaust protest remedies under governing documents and laws; (c) the statute of limitations under the South Carolina Tort Claims Act; and (d) numerous other facial and undisputed defects in Plaintiffs' claims. (*See* R. pp. 328-56).

On August 1, 2017, Plaintiffs filed a 42-page Return Motion in Opp. to Summary Judgment. (*See R. pp. 357-98*). Therein, Plaintiffs based their return on:

1. Affidavit(s) of Plaintiff, Steven Craig Molloy and supplemental Affidavits;
2. Affidavit(s) of all the Defendants and exhibits to the Plaintiff's Affidavits that demonstrate conflicting positions and results in prima facie evidence of genuine issue of material fact and case and controversy.
3. Affidavits of Mary Seiger
4. Affidavits of Merry Maids
5. Affidavits of Island Car Wash
6. Affidavit of Cynthia Bensch
7. DSN board member/ parent concerns set out to Beaufort County Council meeting
8. All previously filed Exhibits and Memorandum
9. New Affidavit of Craig Molloy and Exhibits 1-36
10. Procurement Law
11. SC Case Law and Statutes
12. All Previously Filed Pleadings, Affidavits and Memorandum of Law on behalf of the Plaintiff
13. Transcript from TRO Hearing

(*See R. p. 358*).

On December 4, 2017, Plaintiffs — essentially conceding that no triable issues of fact existed — filed their own Motion for Summary Judgment. (*See R. pp. 399-402*). On the same date, Mr. Molloy also filed yet another affidavit, this an 8-page Supplemental Affidavit by Craig Molloy in Support of Motion for Summary Judgment.

On February 7, 2018, Defendants filed a Supplemental Memorandum in Support of Motion for Summary Judgment and Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment.

On February 25, 2018, Plaintiffs filed a Notice of Motion and Motion to Compel Answers to Discovery and Depositions and Motion to Amend. (*See R.* pp. 403-05). The following day Plaintiffs filed yet another Affidavit of Craig Molloy in support of such motion. On March 21, 2018, Plaintiffs submitted an Affidavit of Lauren Martel to Support Motion to Compel Discovery. On March 22, 2018, Defendants filed a comprehensive Memorandum in Opposition to Motion to Compel Answers to Discovery and Depositions and Motion to Amend.

On March 21, 2018, Plaintiffs also filed yet another Affidavit of Craig Molloy in opposition to Defendants' Motion for Summary Judgment.

On March 23, 2018, a more than three-hour hearing was conducted on the parties' pending motions before the Honorable Marvin H. Dukes. At that hearing, Judge Dukes permitted leave to supplement the record to address certain issues. As a result, on April 20-May 2, 2018, Plaintiff made a number of filings, including: (a) a May 2, 2018 Post Hearing Memorandum; (b) an Affidavit of Cynthia Bensch; and (c) several exhibits Plaintiffs believed supported their arguments. On May 8, 2018, Plaintiff Mr. Molloy filed yet another self-serving Affidavit, as well as an exhibit entitled FLSA Narrative.

On May 11, 2018, Judge Dukes held another lengthy hearing on the parties' pending motions, in which he granted Plaintiffs even more time to marshal evidence in opposition to summary judgment. In response, from May 17-May 25, 2018, Plaintiffs submitted *further* evidence in support of their contentions, including yet another six-page Affidavit of Craig Molloy.

With regard to the further amendment of Plaintiffs' complaint, on June 6, 2018 the Court entered the following order on consent of the parties:

Parties are in consent for the Plaintiff to amend the Summons and Complaint. Plaintiff filed an Amended Complaint on May 25th, 2018 and another Amended Complaint on June 5th, 2018. The Amended Complaint filed on May 25th, 2018 was filed in error. The Amended Complaint filed on June 5th, 2018 is accepted by all parties and the court as the new Verified Complaint. The May 25th, 2018 Complaint shall be stricken from the record.

(*See R.* pp. 530-32). In the sixty-page second Amended Verified Complaint, filed on June 5, 2018, Mr. Molloy and the other Plaintiffs asserted the following causes of action: (1) breach of contract

accompanied by a fraudulent act; (2) intentional interference with prospective contractual relations; (3) "coercion"; (4) violation of procurement, Article 4 of the Consolidated Procurement Code; (5) "statute of limitations threshold"; (6) bid-rigging/collusion/interference; (7) unjust enrichment and "breach of South Carolina Code § 2-532 (*sic*) Reporting Anti-Competitive Practices"; (8) unfair trade practices (as to individual defendants); and (9) "taxpayer standing to sue." Of note, Plaintiffs' second Amended Verified Complaint added the following final additional named Defendant: "Disabilities and Special Needs (NON-PROFIT) Beaufort County DSN Board." (*See* R. pp. 472-529.). On June 19, 2018, all Defendants filed their Answer to Plaintiffs' (Second) Amended Verified Complaint. (*See* R. pp. 533-66). In addition, the second Amended Verified Complaint withdrew any causes of action relating to an alleged assault of Mr. Molloy's son. (*See generally id.*). On June 19, 2018, all Defendants filed their Answer to Plaintiffs' (Second) Amended Verified Complaint. (*See* R. pp. 533-66).

On June 25, 2018, Defendants filed their Second Supplemental Memorandum in Support of Motion for Summary Judgment (with exhibits) to address the numerous issues raised in Plaintiffs' most recent filings.

On November 27, 2018, Judge Dukes filed an Order Granting Defendants' Motion for Summary Judgment. This appeal followed. Specifically, on December 10, 2018, Plaintiff Steven Craig Molloy individually filed a Notice of Appeal from Judge Dukes' November 27, 2018 Order **only**. Neither Carolina Cleaning nor Jack Wayne Molloy is a party to the instant appeal. Moreover, Steven Craig Molloy has not preserved any challenges to any other orders of the trial judge in this appeal. For the reasons set forth herein, this Court should affirm Judge Dukes' entry of summary judgment in favor of all Defendants in this matter.

## ARGUMENTS

### **I. STANDARD OF REVIEW**

The standards governing this Court's review of an order granting summary judgment are well-settled:

This court reviews the grant of a summary judgment motion *under the same standard applied by the trial court* pursuant to Rule 56(c), SCRCP. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n. 2, 677 S.E.2d 612, 614 n. 2 (Ct. App. 2009). Rule 56(c), SCRCP, provides that summary judgment shall be granted when "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 a judgment as a matter of law." "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (*citing George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

An adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth specific facts showing there is a genuine issue for trial. *Strickland v. Madden*, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). Nonetheless, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

*See Paine Gayle Props., LLC v. CSX Transp., Inc.*, 400 S.C. 568, 576, 735 S.E.2d 528, 532-33 (Ct. App. 2012) (emphasis added) (affirming grant of summary judgment).

"However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Harbit v. City of Charleston*, 382 S.C. 383, 390, 675 S.E.2d 776, 779 (Ct. App. 2009) (*quoting George*, 345 S.C. at 452, 548 S.E.2d at 874). Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law. *See Jackson*, 383 S.C. at 14 n.2, 677 S.E.2d at 614 (*citing S.C.R. Civ. P. 56(c)*).

"[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Moore v. Barony House Restaurant, LLC*, 382 S.C. 35, 40, 674 S.E.2d 500, 503 (Ct. App. 2009) (quoting *Rife v. Hitachi Constr. Mach. Ltd.*, 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005)). Stated otherwise, "when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Brooks v. Northwood Little League, Inc.*, 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997).

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *M&M Grp., Inc. v. Holmes*, 379 S.C. 468, 473, 666 S.E.2d 262, 264 (Ct. App. 2008) (quoting *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)).

On summary judgment, the court's task is not to try issues of fact but to determine if genuine issues of material fact exist. *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 408, 563 S.E.2d 109, 112 (Ct.App.2002). "The problem besetting courts lies in deciding what is or what is not a 'genuine issue as to any material fact.'" *Spencer v. Miller*, 259 S.C. 453, 456, 192 S.E.2d 863, 864 (1972).

*Murphy v. Tyndall*, 681 S.E.2d 28, 30 (Ct. App. 2009).

Where, as in this case, the non-moving party bears the burden of proof, it must present evidence sufficient to make a showing as to the required elements of its claim:

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party *who fails to make a showing sufficient to establish the existence of an element essential to the party's case*, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. *The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.*"

*See Jones ex rel. Jones v. Enterprise Leasing Co.*, 383 S.C. 259, 263-64, 678 S.E.2d 819, 821 (Ct. App. 2009) (emphasis added) (*quoting Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991)). It is undisputed that Plaintiff Mr. Molloy bears the burden of proving each alleged occurrence. *See Chastain v. AnMed Health Found.*, 388 S.C. 170, 174, 694 S.E.2d 541, 543-44 (2010).

This Court "may affirm the grant of summary judgment *on any ground* found in the record." *See Moore v. Weinberg*, 373 S.C. 209, 229, 644 S.E.2d 740, 750 (Ct. App. 2007) (*citing* Rule 220(c), S.C.A.C.R. ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.")).

Under the foregoing standards, the Court should affirm the entry of summary judgment in favor of all Defendants in this matter.

## **II. THIS COURT SHOULD AFFIRM JUDGE DUKES' WELL-REASONED GRANT OF SUMMARY JUDGMENT IN THIS MATTER**

### **A. Plaintiff Steven Craig Molloy Has Not Sustained Any Individual Injury and Cannot Successfully Assert Claims Against Defendants in His Own Right**

As noted above, the only Appellant in this matter is Steven Craig Molloy, individually, proceeding *pro se*. Attorney Martel, who once represented all of the Plaintiffs, has now withdrawn as counsel. As set forth below, the only real party in interest with *any* potential claim in this lawsuit is Carolina Cleaning, not Mr. Molloy. Any injuries that Mr. Molloy might claim are derivative of claimed direct harm to Carolina Cleaning. As a result, Mr. Molloy does not have any personal, individual, direct claims against Defendants.

The most recent version of the Complaint alleged that "The Island Group, Inc. is a corporation organized and operating under the laws of the State of South Carolina." (*See* R. pp. 473-74 ¶ 1). It further alleges that Mr. Molloy "is a resident and citizen of Beaufort County" and "is the owner of the Island Group, Inc., d/b/a Carolina Cleaning." (*See* R. p. 474 ¶ 2). As discussed above in the Statement of the Case, this lawsuit alleges tort and contract causes of action relating to Beaufort County's termination of a contract with Carolina Cleaning and conduct relating to the

award of a contract or contracts in which Carolina Cleaning was an entity making proposals. Mr. Molloy's contention seems to be that the Court should disregard the corporate form to permit him to sue individually to assert the rights of a corporation. However, there is no evidence that Mr. Molloy personally entered into any agreement with Beaufort County. There is no evidence that Mr. Molloy performed work for Beaufort County as a sole proprietorship or unincorporated entity; to the contrary, he acted at all times through his corporation, Island Group, Inc. There is no evidence that Mr. Molloy ever submitted a proposal to Beaufort County in his own name individually. To the contrary, all of the claims asserted in this case stem exclusively from, and are related to, alleged contracts between Beaufort County and Carolina Cleaning (or proposals that Carolina Cleaning submitted).

Under South Carolina law, corporations have the power and authority to "sue and be sued, complain, and defend in its corporate name." *See* S.C. Code § 33-3-102(a). "Generally, one not in privity of contract with another cannot maintain an action against him in breach of contract, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff." *Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) (*quoting Bob Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994)); *accord Professional Bankers Corp. v. Floyd*, 285 S.C. 607, 612, 331 S.E.2d 362, 365 (Ct. App. 1985) ("In each counterclaim Floyd asserted the contractual rights of International. Without an assignment of those rights, he was not the proper party to bring the actions."). Here, the only entity in contractual privity with Beaufort County that could assert *any* claim against *any* defendant was Carolina Cleaning, *not* Mr. Molloy.

Mr. Molloy cannot show that he was the real party in interest in this case; to the contrary, non-appellant Carolina Cleaning was the only real party in interest:

[T]he defendants invoked the "real party in interest" requirement of Rule 17(a) of the South Carolina Rules of Civil Procedure, which provides, "Every action shall be prosecuted in the name of the real party in interest." A real party in interest is "the party who, by the substantive law, has the right sought to be enforced. It is

ownership of the right sought to be enforced which qualifies one as a real party in interest.” *Bank of Am., N.A. v. Draper*, 405 S.C. 214, 220, 746 S.E.2d 478, 481 (Ct. App. 2013); *see also* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 1541 (3d ed. 2010) (stating Rule 17(a) provides “that the action should be brought in the name of the party who possesses the substantive right being asserted under the applicable law....”); 6 Cyclopedia of Federal Procedure § 21.7 (3d ed., rev. 2017) (“The ‘real party in interest’ ... is defined as the person holding the substantive right to be enforced, and not necessarily the person who will ultimately benefit from the recovery.”).

*See Patton v. Miller*, 420 S.C. 471, 479, 804 S.E.2d 252, 256 (2017), reh'g denied (Sept. 27, 2017).

The mere fact that a person or entity is a shareholder of a corporation does not make him a real party in interest on a corporate claim. *See WeSav Fin. Corp. v. Lingefelt*, 316 S.C. 442, 444, 450 S.E.2d 580, 582 (1994) (“However, the RTC's status as a shareholder does not make it the real party in interest.”). Mr. Molloy is not the real party in interest as to any claims, because he does not own the right sought to be enforced. To the contrary, only Carolina Cleaning owned such right and could be a real party-in-interest.

It is apparent that Carolina Cleaning cannot possibly be a party to this appeal, since there is no attorney of record and Mr. Molloy is proceeding *pro se*. A corporate entity may not appear *pro se* in Circuit Court or the Court of Appeals. *See Doe v. McMaster*, 355 S.C. 306, 313, 585 S.E.2d 773, 777 (2003) (“We explicitly rejected a corporation's ability to appear *pro se* in a state circuit or appellate court.”); *accord Brown v. Coe*, 365 S.C. 137, 140, 616 S.E.2d 705, 707, *order clarified*, 365 S.C. 664, 620 S.E.2d 323 (2005) (“[A] non-lawyer cannot represent a corporation in circuit or appellate courts.”).

For the foregoing reasons, because Mr. Molloy (the only appellant in this case) is not a real party in interest, this Court should affirm the trial court's entry of summary judgment in favor of all Defendants.

**B. Plaintiff Mr. Molloy Was Not Deprived of a Full and Fair Opportunity to Conduct Discovery (Mr. Molloy's Issue I)**

Mr. Molloy first argues that Judge Dukes erred in entering summary judgment because he was “deprived of a full and fair opportunity to conduct discovery.” (*See Init. Appellant's Br.*, at

15). For the reasons that follow, Judge Dukes correctly entered summary judgment and did not deprive Mr. Molloy of the ability to conduct necessary discovery.

Under South Carolina Rule of Civil Procedure 56(f), "[s]hould it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such order as is just." "Rule 56(f) requires the party opposing summary judgment to at least present affidavits explaining why he needs more time for discovery." *Matter of Estate of Smith*, 419 S.C. 111, 123, 796 S.E.2d 158, 164 (Ct. App. 2016), reh'g denied (Feb. 24, 2017) (quoting *Doe ex rel. Doe v. Batson*, 345 S.C. 316, 321, 548 S.E.2d 854, 857 (2001)). Respectfully, Mr. Molloy has never made the required showing under Rule 56(f), either in this Court or the trial court. As set forth below (and in Defendants' filings in the trial court), summary judgment was appropriate in this case because of several indisputable facts and information within the possession of Mr. Molloy and his trial counsel. Mr. Molloy has not explained precisely what information he expects to uncover in discovery that would defeat the straightforward grounds for summary judgment asserted by Defendants. To the contrary, Judge Dukes' cogent analysis would remain the same, irrespective of anything Plaintiff might uncover with further investigation or discovery.

Because appellant Mr. Molloy has not made a proper showing under Rule 56(f), this Court should affirm the trial court's grant of summary judgment as to all claims.

**C. Plaintiff Mr. Molloy Cannot Produce a Scintilla of Evidence Supporting Any Claims**

Even assuming, *arguendo*, that Mr. Molloy could conceivably be a real party in interest in this case for injuries allegedly sustained by a corporation he owned, it is clear that the trial court properly entered summary judgment in favor of Defendants on the merits of this case. Notwithstanding any arguments Mr. Molloy makes in his Brief, it is apparent that — for several quite simple reasons — Defendants were entitled to summary judgment in this matter because: (a) Mr. Molloy's tort claims are time-barred; (b) Defendant Beaufort County was entitled to

terminate the 2010 Contract; and (c) Mr. Molloy and Carolina Cleaning failed to avail themselves of the protest process, which precludes any claims regarding the proposal process.

**1. The Trial Court Correctly Held That the Tort Claims Are Time-Barred (Mr. Molloy's Issue II)**

The SCTCA "is the *exclusive* civil remedy available for any tort committed by a government entity, its employees, or its agents except as provided in § 15-78-70(b)." *See Health Promotion Specialists, Inc. v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 635, 743 S.E.2d 808, 814 (2013) (emphasis added); *accord* S.C. Code § 15-78-200 (SCTCA "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."); *Proctor v. Dep't of Health & Env'tl Ctrl.*, 368 S.C. 279, 290, 628 S.E.2d 496, 502 (Ct. App. 2006) ("The [SCTCA] governs all tort claims against governmental entities and is the *exclusive* civil remedy available in an action against a governmental entity or its employees.") (emphasis added).

"Because the Tort Claims Act provides the 'exclusive' remedy for torts committed by governmental employees, unless an exception applies, the statute of limitations contained within the act will apply." *See Loadholt v. Cribb*, No. 2004-UP-238, 2004 WL 6251537, at \*3 (Ct. App. Apr. 12, 2004). Under the SCTCA, Plaintiff Mr. Molloy must have commenced this lawsuit "within two years after the date the loss was or should have been discovered." *See* S.C. Code § 15-78-110.<sup>1</sup> This statute of limitations applies to both claims against governmental entities *and* those against individual governmental employees (if such claims are cognizable under the Tort Claims Act). *See Flateau v. Harrelson*, 355 S.C. 197, 208, 584 S.E.2d 413, 419 (Ct. App. 2003).

Because the SCTCA "contains a definition of loss that differs from that of other statutes," the statutory period runs from the date of injury, not when Plaintiff Mr. Molloy learned what caused his injury. *See Bayle v. South Carolina Dep't of Transp.*, 344 S.C. 115, 121-127, 542

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<sup>1</sup> The period under the SCTCA may be extended to *three* years, "if the claimant first filed a claim pursuant to this chapter." *See* S.C. Code § 15-78-110. Mr. Molloy has presented no evidence that he would be entitled to the benefit of this rule.

S.E.2d 736, 739-42 (Ct. App. 2001) ("Bayle asserts the Circuit Court erred in defining 'loss' as the date of his wife's death rather than the date he learned of a possible latent defect in the road surface. We disagree."). "Under the Tort Claims Act, however, the statute of limitations begins to run when the plaintiff should know that he might have a potential claim against another, not when he develops a full-blown theory of recovery." *Joubert v. South Carolina Dep't of Soc. Servs.*, 341 S.C. 176, 190, 534 S.E.2d 1, 8 (Ct. App. 2000).

The statute of limitations under the SCTCA is also governed by a discovery rule, which can delay the running of the statute of limitations:

Actions brought under the Act are subject to the discovery rule. *Joubert v. South Carolina Dept. of Soc. Services*, 341 S.C. 176, 190, 534 S.E.2d 1, 8 (Ct.App.2000). "According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been discovered." *Id.* The statute does not necessarily run from the date of the negligent act, but from when the injury resulting from the negligent act is discovered or may be discovered by the exercise of "reasonable diligence." *Id.*, 341 S.C. at 190-91, 534 S.E.2d at 8. "The exercise of reasonable diligence means simply that an injured party must act with some promptness where the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." *Snell v. Columbia Gun Exch., Inc.*, 276 S.C. 301, 303, 278 S.E.2d 333, 334 (1981). "The date on which discovery should have been made is an objective, not subjective, question." *Joubert*, 341 S.C. at 191, 534 S.E.2d at 9. Additionally, the fact that the injured party does not comprehend the full extent of his injuries is immaterial. *Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996).

*Knox v. Greenville Hosp. Sys.*, 362 S.C. 566, 570-71, 608 S.E.2d 459, 462 (Ct. App. 2005).

The statute does not run separately as to each defendant, but rather runs at one time for all claims based on the injury. *See Tollison v. B&J Machinery Co.*, 812 F. Supp. 618 (D.S.C. 1993); *accord Cline v. J.E. Faulkner Homes, Inc.*, 359 S.C. 367, 597 S.E.2d 27 (Ct. App. 2004); *McClain v. Jarrard*, 354 S.C. 218, 580 S.E.2d 763 (Ct. App. 2003); *Wiggins v. Edwards*, 314 S.C. 126, 128, 442 S.E.2d 169, 170 (1994).

Plaintiff Mr. Molloy's claims of improper conduct in connection with RFP # 3910/120221 involve conduct occurring in 2012. Carolina Cleaning has done no work for Beaufort County since June 30, 2014. (*See R. p. 121 ¶ 69*). Plaintiffs did not file this lawsuit

until August 22, 2016. Under the Tort Claims Act's two-year statute of limitations, all of Plaintiffs' tort claims are time-barred. Plaintiff Mr. Molloy cannot proffer any evidence to support the invocation of the discovery rule or any other reason why the Court should not apply the two-year statute of limitations as to the tort claims, running from (at the absolute latest) June 30, 2014.

Mr. Molloy's only argument opposing the statute of limitations seems to be that he did not discover his claims until he obtained certain emails via a Freedom of Information Act request in September, 2014. However, Mr. Molloy present no evidence that, in the exercise of reasonable diligence, he could not have known of his alleged "loss" prior to that time. To the contrary, it is undisputed that Mr. Molloy knew of the termination of Carolina Cleaning's contract and the fact that Carolina Cleaning did not obtain contracts at the same time those incidents actually occurred. While he might not have known all of the details of Beaufort County's internal correspondence, he certainly was placed on notice of a potential claim and was under a duty to conduct a reasonable investigation into his claims. Mr. Molloy has not directed this Court to any record evidence justifying his failure to timely file this lawsuit.

Therefore, for the foregoing reasons, this Court should affirm the entry of summary judgment because Plaintiff Mr. Molloy's tort claims against Defendants were untimely.

**2. The Express Language of Carolina Cleaning's 2010 Agreement Precludes Any Claims Regarding the Termination of That Agreement**

Much of Plaintiffs' Amended Complaint involves allegations that the County wrongfully terminated Carolina Cleaning's 2010 Agreement with Beaufort County. The plain language of the governing contractual documents makes clear that the County acted within its contractual rights. Therefore, the trial court properly granted Defendants' Motion for Summary Judgment to the extent Mr. Molloy's claims center around the termination of Carolina Cleaning's contract.

The 2010 Agreement permitted the County to terminate (or not renew) for any reason. The 2010 Agreement provides for the following regarding its duration:

The term of this Agreement shall be for a period of one (1) year starting on November 1, 2010 and ending on October 31, 2011. There are four (4) one (1) year renewals available on this Contract all at the approval of Beaufort County. The Contract shall not exceed five (5) years.

(See R. p. 125 ¶ 5). The 2010 Agreement states that "[e]ither party may terminate this Agreement upon sixty (60) days' written notice to the other party." (See R. p. 126 ¶ 9). The RFP<sup>2</sup> for the 2010 Agreement states that "[t]he County may without cause terminate this contract in whole or in part at any time for its convenience." (See R. p. 153 ¶ 16.0 (emphasis added)). Under that provision, Carolina Cleaning "expressly waive[d] any claims for lost profit or consequential damages, delay damages, or indirect costs which may arise from the County's election to terminate this contract in whole or in part for its convenience." (See *id.*).

Under those terms, the County was free to terminate all, or part, of the 2010 Contract with notice for any reason or for no reason at all. There is nothing in the contractual documents that prohibited the County from terminating or not renewing the 2010 Contract — either *in toto* or as to certain locations — for any reason, including making the choice to have those services provided in-house. Over time, the County exercised its contractual right to terminate the 2010 Contract in part as to certain locations. (See R. pp. 230-33). With regard to the remaining locations, rather than extend the 2010 Contract any further, the County exercised its right to not renew that contract and awarded the contract for the remaining locations to BCDSN. Plaintiff Mr. Molloy can cite to nothing in the 2010 Contract that prohibited it from terminating that agreement at-will or electing not to renew that contract.

While there is a covenant of good faith and fair dealing implied in every contract, "there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 653, 780 S.E.2d 263, 273 (Ct. App. 2015) (citation omitted).

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<sup>2</sup> The 2010 Agreement provides that it "shall consist of all the terms, conditions, scope of work, specifications and provisions which are hereby incorporated and made part of this Contract Agreement, by reference, and contained in RFP # 3910/100566 dated May 27, 2010, Addendum # 1 dated May 18, 2010 and the Contractor's Proposal dated May 27, 2010." (See April 7, 2017 Thomas Aff. Ex. A, Contract for Janitorial Services).

Moreover, that implied covenant is not actionable as a separate cause of action. *See RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004).

Therefore, to the extent Mr. Molloy's claims flow from the argument that Beaufort County improperly terminated the 2010 Contract, the trial judge properly granted Defendants summary judgment.

**3. The Trial Judge Properly Granted Summary Judgment Because Plaintiffs Failed to Assert Their Remedies Under the Beaufort County Procurement Code and the RFP/Contract Documents**

Plaintiff Mr. Molloy's claims are also without merit because Plaintiffs failed to exhaust certain administrative remedies before filing this action. The Beaufort County Procurement Code was adopted pursuant to the terms of the South Carolina Consolidated Procurement Code, which states (in relevant part) that "[a]ll political subdivisions of the State shall adopt ordinances or procedures embodying sound principles of appropriately competitive procurement . . . ." *See* S.C. Code § 11-35-50. The Beaufort County Procurement Code requires that pre-litigation steps be taken with regard to any claims by proposers or contractors:

(a) Right to protest. Any actual or prospective bidder, offeror or contractor who is aggrieved in connection with the solicitation or award of a contract under this division may protest to the purchasing director. *The protest shall be submitted in writing 14 days after such aggrieved person knows or should have known of the facts giving rise thereto.*

(b) Authority to resolve protest. The purchasing director shall have authority, *prior to the commencement of an action in court* concerning the controversy, to settle and resolve a protest of an aggrieved bidder, offeror or contractor, actual or prospective, concerning the solicitation or award of a contract.

(c) Decision. If the protest is not resolved by mutual agreement, the purchasing director shall issue a decision in writing within ten days. The decision shall:

- (1) State the reasons for the action taken; and
- (2) Inform the protestant of its right to administrative review as provided in this section.

See Beaufort County Code § 2-551(a)-(c) (emphasis added). Thus, if Mr. Molloy had any complaints about any contract or the proposal process for any contract, he should have pursued his rights under the protest process.

The 2010 Contract incorporates detailed requirements regarding the administrative remedy of a protest as a precedent to a lawsuit filed in court:

14.1 Right to Protest: Any actual or prospective proposer, offeror, or contractor who is aggrieved, in connection with the solicitation or award of a contract, may protest to the Purchasing Director. The protest *shall be submitted in writing fourteen (14) days* after such aggrieved person knows or should have known of the facts giving rise thereto. The protest must be accompanied by a detailed statement, indicating the reasons for such protest.

14.2 Authority to Resolve Protest: The Purchasing Director shall have authority, *prior to the commencement of an action in court concerning the controversy*, to settle and resolve a protest of an aggrieved proposer, offeror, or contractor; actual or prospective, concerning the solicitation or award of a contract.

14.2 Decision: If the protest is not resolved by mutual agreement, the Purchasing Director shall issue a decision, in writing within ten (10) days. The decision shall,

14.2.1 State the reasons for the action taken; and

14.2.2 Inform the protestant of its right to administrative review as provided in this Section.

14.4 Notice of Decision: A decision under Subsection (3) of this Section shall be mailed or otherwise furnished immediately to the protestant and any other party intervening.

14.5 Finality of Decision: A decision under Subsection (3) of this Section shall be final and conclusive, unless fraudulent, or

14.5.1 Any person adversely affected by the decision appeals administratively, within ten (10) days after receipt of decision under Subsection (3) to the County Council in accordance with this Section.

(See R. pp. 156-57 (emphasis added)). The 2010 Contract documents also provides that "[a]ll contract disputes will be referred to Beaufort County Purchasing Director for resolution." (See R. p. 138). Similarly, RFP # 3910/120221 contains nearly identical requirements that Carolina

Cleaning exhaust administrative remedies if it believes it was wronged in the procurement process. (*See* R. pp. 279-80).

If Mr. Molloy believed that the County (or any employee) wronged it with regard to the 2010 Contract or the procurement process relating to any other contract, the proper forum for such a dispute was the administrative remedy provided by the county procurement ordinance. Carolina Cleaning and Mr. Molloy never filed a protest concerning the proposals, procurement or contracting for janitorial services in Beaufort County. (*See* R. p. 123 ¶ 88). If Carolina Cleaning believed that the contracting or RFP process was unfair, it had the opportunity to file a formal protest in writing. (*See* R. p. 122 ¶ 86). Such protest procedures are included in the Beaufort County Procurement code and all of Beaufort County's RFPs for vendors to follow if they have a reason or desire to protest an award. (*See* R. p. 122 ¶ 87).

Therefore, because Plaintiffs' exclusive remedy was the protest procedure under the Beaufort County Procurement Code and governing contractual documents, Mr. Molloy's claims are improper as he has not exhausted such remedies.

**D. Mr. Molloy Raises Several Red-Herrings Confusing the True Issues in this Case (Mr. Molloy's Issues III, IV and V)**

As set forth above, the plain face of the record made clear beyond any issue of material fact that Defendants were entitled to summary judgment as a matter of law. For the most part, Plaintiff Mr. Molloy has not even addressed the arguments squarely. To the contrary, he raises a number of arguments that have no bearing on the key issues in this case and do not require the reversal of Judge Dukes' grant of summary judgment. Moreover, Judge Dukes never specifically ruled on any of these issues and Mr. Molloy (represented by counsel) never filed a proper Rule 59(e) motion. As a result, none of these arguments has been properly preserved for appellate review. *See Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004). Nonetheless, as discussed below, none of these arguments has any merit.

**1. There Is No Evidence That Any of the Defendants Acted Outside the Scope of Their Job Duties (Mr. Molloy's Issue III)**

In his Issue III in this appeal, Mr. Molloy purports to argue that the trial court erred "in granting Summary Judgment when Respondents acted outside the scope of their job duties in violation of the South Carolina Procurement Code." (*See* Appellant's Init. Br., at 22). Although it is difficult to divine the core of this argument, it seems that Mr. Molloy is arguing that certain employees of Beaufort County acted outside of the scope of their employment to assist the BCDSN to obtain the contract to clean certain locations, using Carolina Cleaning's confidential information submitted in connection with its proposal on the 2012 request for proposals and allowing the BCDSN to submit a proposal under a different time frame or under other standards. Mr. Molloy's argument is flawed in numerous respects.<sup>3</sup>

Initially, as to any claims against the individual Defendants (which seems to be a focus of Mr. Molloy's Issue III), it is clear that they did not act in a manner that would permit individual claims against them. Under the South Carolina Tort Claims Act, claims against individual Defendants are permitted only in rare circumstances: "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." *See* S.C. Code § 15-78-70(B). In the instant case, despite Mr. Molloy's bluster, he presents no evidence of any specific action by any particular individual Defendant that would qualify under this statute. Although he generally claims that some people made untrue statements, he does not show that any specific individual Defendant acted outside of the scope of their employment, engaged in actual fraud or malice, had intent to harm or committed a crime involving moral turpitude.

Moreover, Mr. Molloy's argument is without merit because he cites and relies upon numerous laws and standards governing *state* procurement, not county procurement. For example,

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<sup>3</sup> Mr. Molloy also argues that he has some claim because of the manner in which members of the Beaufort County Disabilities and Special Needs Board were appointed. It defies logic to argue that this has any bearing on the issues raised concerning Carolina Cleaning's 2010 Contract and efforts to obtain future contracts. In any event, Mr. Molloy has not properly preserved this issue for appellate review by obtaining a specific ruling from the trial judge. *See Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004).

Mr. Molloy cites S.C. Code § 11-35-410(C), which is part of the South Carolina Consolidated Procurement Code, S.C. Code §§ 11-35-10, *et seq.* (See Appellant's Init. Br., at 26). By its express terms the South Carolina Consolidated Procurement Code applies to the "procurement or expenditure of funds *by this State* under contract acting through a governmental body" (see S.C. Code § 11-35-40(2)) and defines "governmental body" as follows:

[A] state government department, commission, council, board, bureau, committee, institution, college, university, technical school, agency, government corporation, or other establishment or official of the executive or judicial branch. Governmental body *excludes* the General Assembly or its respective branches or its committees, Legislative Council, the Legislative Services Agency, and all local political subdivisions such as counties, municipalities, school districts, or public service or special purpose districts or any entity created by act of the General Assembly for the purpose of erecting monuments or memorials or commissioning art that is being procured exclusively by private funds.

See S.C. Code § 11-35-310(18) (emphasis added). Beaufort County is plainly not a "governmental entity" subject to the state's procurement code. Consequently, the South Carolina Consolidated Procurement Code is not applicable.

Similarly, Mr. Molloy argues that "Respondents had a duty under the Budget and Control Board Regulations 19-445.2045 . . . [and] 19-445.2050." (See Appellant's Init. Br., at 25). However, those regulations — which are implemented under the South Carolina Consolidated Procurement Code — are only applicable to state procurement, not to county procurement:

These Regulations issued by the South Carolina Budget and Control Board, hereafter referred to as the Board, establish policies, procedures, and guidelines relating to the procurement, management, control, and disposal of supplies, services, information technology, and construction, as applicable, under the authority of the South Carolina Consolidated Procurement Code, as amended. These Regulations are designed to achieve maximum practicable uniformity in purchasing throughout state government. Hence, implementation of the Procurement Code *by and within governmental bodies, as defined in Section 11-35-310(18) of the Procurement Code*, shall be consistent with these Regulations.

See 19 South Carolina Admin. Code § 445.2000(A). Thus, this regulation also has no application to any of the conduct at issue in this case.

Aside from these plainly inapplicable state procurement laws, Mr. Molloy has not cited to any authority supporting his contention that Beaufort County somehow engaged in wrongful conduct with regard to the alleged use of Carolina Cleaning's information. Far from being some sinister conspiracy the efforts to move cleaning work for some of the locations to BCDSN served a noble purpose. BCDSN is a department of Beaufort County, whose mission is "[t]o provide quality services and support to our consumers and to facilitate opportunities for them to live productively and inclusively in the community." (*See* R. p. 86 ¶ 6). Among the services BCDSN provides to individuals with disabilities or special needs are residential services, day program services, waiver services, respite services, job coach services, early intervention services, family support services and Camp Treasure Chest and after school programs, among others. (*See* R. p. 86 ¶ 7). BCDSN also provides people with disabilities, including intellectual, mental health, and traumatic brain injury disabilities, among others, assistance with obtaining and maintaining employment through various approaches. (*See* R. p. 86 ¶ 8). The focus of the BCDSN employment program is:

- The creation of jobs for people with disabilities
- Job selection and placement that focuses on the individual's abilities and desires
- Training to assist in the job field selected and in the specific job for which an individual is hired
- Stabilization when the job is obtained including all aspects of the job
- Proactive follow along to ensure that the individual meets the employer needs and the job is a good fit for the individual
- Transitional services to assist individuals in being introduced or adjusting to BCDSN services that are available

(*See* R. p. 86 ¶ 9). BCDSN employs 26 consumers who work on janitorial crews which provide services to Beaufort County as part of its employment program. (*See* R. p. 86 ¶ 10).

Because of some disability limitations of some individuals, federal law permits them to be paid amounts less than the prevailing minimum wage, to facilitate their employment

opportunities. (*See* R. p. 86 ¶ 11). In this respect, some BCDSN consumers have provided janitorial services for Beaufort County, as part of the job training and employment program. (*See* R. p. 86 ¶ 12). County funds paid the BCDSN consumers who performed janitorial work for the County. (*See* R. p. 87 ¶ 13). The federal government does not compensate the County for wages of BCDSN consumers performing janitorial work. (*See* R. p. 87 ¶ 14). Beaufort County and BCDSN comply with all state and federal laws in connection with the employment of BCDSN consumers. (*See* R. p. 87 ¶ 15).

The employment of BCDSN consumers to perform janitorial work serves the public interest in multiple ways. (*See* R. p. 87 ¶ 16). First, it permits individuals with special needs to obtain employment in a safe, supervised environment, and hopefully to eventually become tax paying citizens. (*See id.*). These individuals receive pay for their work in accordance with the law, and they also benefit from having a sense of purpose. (*See id.*). Additionally, the cost savings that this program provides benefits the County's taxpayers. (*See id.*). BCDSN consumers involved in the provision of janitorial services are not "exploited." (*See* R. p. 87 ¶ 17). To the contrary, they benefit from a win-win proposition in which they are gainfully employed and trained and the County receives economical, high quality service. Because any "contract" for the use of BCDSN was essentially a use of Beaufort County's own "in-house" employees, it was not required to be offered out for bid or proposal under the Beaufort County Procurement Code. (*See* R. p. 115 ¶ 22).

Mr. Molloy has not cited to any specific illegal action taken by any Defendant with regard to the use of BCDSN consumers for some janitorial work. As set forth throughout this Brief, Beaufort County had the ultimate contractual right to terminate Carolina Cleaning for any reason. Moreover, Beaufort County was free to use its own employees to perform work rather than contract with a third-party.

For all of the foregoing reasons, the trial judge properly granted Defendants summary judgment in this matter, as there was no legal or factual basis for Mr. Molloy's contention that

Defendants engaged in some sort of improper conduct with regard to the use of BCDSN consumers to perform janitorial work.

**2. There Is No Evidence That Any of the Defendants Acted Unconscionably or in Bad Faith (Mr. Molloy's Issue IV)**

With regard to his Issue IV, Mr. Molloy argues that Defendants violated a duty of good faith and fair dealing or violated the Unfair Trade Practice law. For the reasons that follow, these arguments miss the mark.

First, with regard to his argument concerning good faith, Mr. Molloy again incorrectly (and exclusively) relies upon the South Carolina Consolidated Procurement Act (specifically S.C. Code § 11-35-20(a)-(h) and § 11-35-30). Again, these statutes do not apply to this case, as this is a *county* procurement scenario. Additionally, as set forth above, while there is a common law covenant of good faith and fair dealing implied in every contract, "there is no breach of an implied covenant of good faith where a party to a contract has done what provisions of the contract expressly gave him the right to do." *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 653, 780 S.E.2d 263, 273 (Ct. App. 2015) (quoting *Adams v. G.J. Creel & Sons, Inc.*, 320 S.C. 274, 277, 465 S.E.2d 84, 85 (1995)); *Williams v. Riedman*, 339 S.C. 251, 274, 529 S.E.2d 28, 40 (Ct. App. 2000) (same); *First Fed. Sav. & Loan Ass'n of South Carolina v. Dangerfield*, 307 S.C. 260, 267, 414 S.E.2d 590, 594 (Ct. App. 1992) (same). Moreover, the implied covenant of good faith and fair dealing is not actionable as a separate cause of action apart from the contract. *See RoTec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Ct. App. 2004) ("[W]e conclude that the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract."). Beaufort County's conduct in terminating the Carolina Cleaning agreement cannot support a claim for breach of a duty of good faith and fair dealing or for violation of the Unfair Trade Practices Act.

Mr. Molloy next argues that Beaufort County (and potentially other Defendants) violated the South Carolina Unfair Trade Practices Act in their dealings with Carolina Cleaning. Under the South Carolina Unfair Trade Practices Act (SCUTPA), "[u]nfair methods of competition and

unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." See S.C. Code § 29-5-20. The terms "trade" and "commerce" are defined as including "shall include 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." See S.C. Code § 39-5-10(a). The elements of a claim under SCUTPA have been well-settled in South Carolina courts:

To recover in an action under the UTPA, 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)." *Wright v. Craft*, 372 S.C. 1, 23, 640 S.E.2d 486, 498 (Ct. App. 2006). "An act is 'unfair' when it is offensive to public policy or when it is immoral, unethical, or oppressive." *Gentry v. Yonce*, 337 S.C. 1, 12, 522 S.E.2d 137, 143 (1999). "An act is 'deceptive' when it has a tendency to deceive." *Id.*

See *Health Promotion Specialists, LLC v. South Carolina Bd. of Dentistry*, 403 S.C. 623, 638, 743 S.E.2d 808, 816 (2013). "To be actionable under the UTPA, the unfair or deceptive act or practice must have an impact upon the public interest. *Haley Nursery Co. v. Forrest*, 298 S.C. 520, 381 S.E.2d 906 (1989). An unfair or deceptive act or practice has an impact upon the public interest if the act or practice has the potential for repetition." *Id.* at 524, 381 S.E.2d at 908." *deBondt v. Carlton Motorcars, Inc.*, 342 S.C. 254, 270, 536 S.E.2d 399, 407 (Ct. App. 2000).

To be associated with trade or commerce, a defendant's acts must impact the public interest. *Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 493, 473 S.E.2d 47, 49 (1996). An impact on the public interest may be shown if the acts or practices have the potential for repetition. *Crary v. Djebelli*, 329 S.C. 385, 387, 496 S.E.2d 21, 23 (1998). The potential for repetition may be shown by proving that the same kind of actions occurred in the past or by showing that the procedures employed by the defendant create a potential for repetition of the deceptive practices. *Id.* at 388, 496 S.E.2d at 23.

See *Schnellmann v. Roettger*, 368 S.C. 17, 23, 627 S.E.2d 742, 746 (Ct. App. 2006), *aff'd as modified*, 373 S.C. 379, 645 S.E.2d 239 (2007).

As to the individual Defendants, they were not engaged in "trade" or "commerce" under the SCUTPA and therefore cannot be held liable thereunder. Far from being part of a consumer transaction involving the sale of a good or service, the individual Defendants had no contractual relationship with Mr. Molloy (or any other Plaintiff). Moreover, because actual fraud and malice are not requirements of a SCUTPA claim, the Tort Claims Act would bar any claim under that theory against the individual Defendants. *See* S.C. Code § 15-78-70(a) & (b). ("An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor" unless "the employee's conduct was not within the scope of his official duties or . . . constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude."). Plaintiff cannot state a claim against any individuals under the South Carolina Unfair Trade Practices Act.

Plaintiff Mr. Molloy's SCUTPA claim against the County fails because the County is not a "person" under SCUTPA. Under SCUTPA, a person is defined to "include natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations and any other legal entity." *See* S.C. Code § 39-5-10(a). As a political subdivision, the County does not fall within that definition of person under the SCUTPA.

Mr. Molloy's SCUTPA arguments also fail because he has not presented any evidence of an actual deceptive or misleading statement by any Defendant to him. Moreover, he has not presented any evidence that this case (aside from the fact that Beaufort County is a party) implicates the public interest or is capable of repetition. Giving Mr. Molloy the benefit of every doubt, he asserts a garden variety business tort claim. He does not assert a claim implicating the SCUTPA. As a result, Mr. Molloy's arguments under SCUTPA are misplaced.

Finally, as set forth multiple times herein, Beaufort County's decision to terminate all or part of Carolina Cleaning's contract was expressly permitted by that agreement. As a result, Plaintiff Mr. Molloy cannot now present any cognizable legal challenge.

**3. The Trial Judge Properly Granted Defendants Summary Judgment Because the BCDSN Is Not a Separate Entity, But Is a Department of the County (Mr. Molloy's Issue V)**

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Mr. Molloy's final argument focuses on his unsupported contention that Beaufort County was not entitled to summary judgment because it replaced Carolina Cleaning with consumers of the BCDSN, using a "separate" nonprofit entity, presumably the "Disabilities and Special Needs (NON-PROFIT)" referenced in the caption of Plaintiffs' second Amended Verified Complaint. Plaintiff Mr. Molloy relies on a hearsay document, entitled FLSA Narrative, for his belief that there is some separate nonprofit corporation affiliated with the BCDSN.<sup>4</sup>

The only relevant, competent evidence is that BCDSN is not a separate entity from Beaufort County. (*See* R. p. 597 ¶ 15). The BCDSN is not a nonprofit corporation and has never been incorporated as such. (*See* R. p. 597 ¶ 16 and 599 ¶ 10). BCDSN did not create a separate entity to provide janitorial services to Beaufort County. (*See* R. p. 599 ¶ 17). Plaintiff Mr. Molloy presents no evidence showing the existence of a separate improper nonprofit corporation.

The BCDSN is an advisory board that makes recommendations for the Beaufort County Disabilities and Special Needs Department. (*See* R. p. 596 ¶ 9). The BCDSN, as an advisory board, does not exercise and does not have the authority to enter into contracts on its own. (*See* R. p. 596 ¶ 10). The Beaufort County Disabilities and Special Needs Department is a true department of Beaufort County that does not have a separate legal existence apart from Beaufort County. (*See* R. p. 596 ¶ 11). Beaufort County may be the only county in the state whose disabilities and special needs department is a true County department, rather than a separate entity. (*See* R. p. 596 ¶ 12). The Beaufort County Disabilities and Special Needs Department

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<sup>4</sup> Mr. Molloy relies on a single, passing line from the FLSA Narrative for their assertion that a separate nonprofit entity existed. The FLSA Narrative does not explain the source for this statement and does not further elaborate upon it. The FLSA Narrative does not state that there is a nonprofit entity separate from Beaufort County. Defendants had no direct involvement with the United States Department of Labor's creation of the FLSA Narrative and did not author that sentence. This single reference in the FLSA Narrative does not create an issue of fact as to whether a separate nonprofit entity exists. The existence of a separate nonprofit entity would be a matter of public record. There is no evidence of the creation of a nonprofit entity by Beaufort County.

does not have the power to enter into contracts with outside entities; rather, all contracts are entered into by Beaufort County and signed by the Beaufort County Administrator. (*See* R. p. 596 ¶ 13).

The Executive Director of the Beaufort County Disabilities and Special Needs Department was hired directly by Beaufort County through a hiring process coordinated by the Beaufort County Employee Services Department. (*See* R. p. 596 ¶ 7). The Executive Director of the Beaufort County Disabilities and Special Needs Department serves as the staff liaison between the Beaufort County Disabilities and Special Needs Board and Beaufort County Council. (*See* R. p. 596 ¶ 8).

In the face of this clear evidence that *no* separate entity exists, Plaintiff Mr. Molloy failed to present a scintilla of direct evidence of such an entity (though such evidence would be readily available if that entity actually existed). Under the South Carolina Nonprofit Corporation Act, "One or more persons may act as the incorporator or incorporators of a corporation by delivering articles of incorporation to the Secretary of State for filing." *See* S.C. Code § 33-31-201. The articles of incorporation of a nonprofit corporation must include:

- (1) a corporate name for the corporation that satisfies the requirements of Section 33-31-401;
- (2) one of the following statements:
  - (i) This corporation is a public benefit corporation.
  - (ii) This corporation is a mutual benefit corporation.
  - (iii) This corporation is a religious corporation;
- (3) the street address of the corporation's initial registered office with zip code and the name of its initial registered agent at that office;
- (4) the name, address, and zip code of each incorporator;
- (5) whether or not the corporation will have members;
- (6) provisions not inconsistent with law regarding the distribution of assets on dissolution; and

(7) the address, including zip code, of the proposed principal office for the corporation which may be either within or outside South Carolina.

See S.C. Code § 33-31-302(a)(1)-(7). The "corporate existence" of a nonprofit corporation begins "when the articles of incorporation are filed." See S.C. Code § 33-31-203. Such articles of incorporation are public records that are available from the South Carolina Secretary of State and can be obtained the Secretary of State's website.<sup>5</sup>

Mr. Molloy has not produced articles of incorporation for the alleged nonprofit corporation. That is because the BCDSN has never filed articles of incorporation or other documents required for the creation of a separate private nonprofit corporate entity. (See R. p. 599 ¶ 12). If the Beaufort County Disabilities and Special Needs Department/Board (or anyone associated with Beaufort County) had, in fact, created a separate nonprofit corporation, Plaintiff Mr. Molloy would have been easily able to obtain such publicly available information, which can be searched for free at the Secretary of State's website. Plaintiff Mr. Molloy has not taken this simple step to investigate his baseless accusations; if he had done so, he would have discovered that *there are no articles of incorporation creating the claimed nonprofit corporation.*<sup>6</sup> (The Record does not include the website printout referenced in Respondents' Initial Brief). Plaintiff has presented no evidence showing the actual creation of a nonprofit corporation by or on behalf of Beaufort County or the BCDSN or Beaufort County Disabilities and Special Needs Department.

In reality, the Beaufort County Disabilities and Special Needs Department, with its advisory Board BCDSN, is part of Beaufort County, with the powers of a body corporate granted by statute. The BCDSN is not a nonprofit corporation, but is a statutorily-created advisory board to a department of Beaufort County.

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<sup>5</sup> <https://businessfilings.sc.gov/BusinessFiling/Entity/Search>

<sup>6</sup> A search of the Secretary of State's corporation website shows that numerous other South Carolina counties have created nonprofit corporations for their Disabilities and Special Needs Departments. However, Beaufort County has not done so. To the contrary, Beaufort County is one of the few counties to have its Disabilities and Special Needs board operate as a true department of the County. (The Record does not include the website printout referenced in Respondents' Initial Brief).

In addition, the procedures governing janitorial work by consumers of the Beaufort County Disabilities and Special Needs Department demonstrate that there was not some separate nonprofit corporation. The Beaufort County Disabilities and Special Needs Department consumers' provision of janitorial services to Beaufort County is not subject to procurement laws, because it does not involve contracting with an outside entity. (*See R. p. 597 ¶ 14*). When consumers of the Beaufort County Disabilities and Special Needs Board/Department are paid for janitorial work, they are paid by Beaufort County. (*See R. p. 599 ¶¶ 13-14*). Any amount Beaufort County "paid" for janitorial services in excess of consumers' wages would simply be internally credited to Beaufort County Disabilities and Special Needs Department in Beaufort County's accounting. (*See R. p. 599 ¶ 15*). Beaufort County never paid a separate entity for work performed by consumers of the Beaufort County Disabilities and Special Needs Department/Board. (*See R. p. 600 ¶ 18*).

Plaintiff Mr. Molloy has argued that the alleged separate entity has a specific Employer Identification Number ("EIN") of #57-6000311 and was formed in 2002. This EIN does not evidence some separate or secret nonprofit entity. (*See R. p. 598 ¶ 7*). To the contrary, that EIN is Beaufort County's general EIN. It is the EIN number used for all agencies, boards and departments which are part of Beaufort County (including the Disabilities and Special Needs Department and its advisory Board). (*See R. p. 599 ¶ 8*). Plaintiff Mr. Molloy's suggestion that Beaufort County or the Beaufort County Disabilities and Special Needs Department or its advisory Board has created a separate nonprofit corporation with its own EIN is without merit. The Beaufort County Disabilities and Special Needs Board "does not have (and has never had) its own EIN number." (*See R. p. 599 ¶ 10*). To the contrary, Beaufort County Disabilities and Special Needs Department is within the scope of the general county EIN, 57-60000311. (*See R. p. 599 ¶ 11*).

Because Mr. Molloy cannot present any competent evidence of the existence of a separate nonprofit corporation, it is again clear that the trial judge properly entered summary judgment in favor of the Defendants.

**E. Additional Grounds Supporting the Entry of Summary Judgment**

In addition to all of the foregoing arguments, there are numerous alternative bases supporting Judge Dukes' granting of summary judgment, all of which are apparent from the face of the record and require judgment as a matter of law.<sup>7</sup>

**1. Plaintiff Mr. Molloy's Claims Against the Individual Defendants Fail to the Extent They Are Premised Upon Contract**

"The elements for breach of contract are the existence of the contract, its breach, and the damages caused by such breach." *See Branche Bldrs., Inc. v. Coggins*, 386 S.C. 43, 48, 686 S.E.2d 200, 202 (Ct. App. 2009). South Carolina law is clear that a breach of contract claim may not be successfully asserted where there is no contractual privity between the plaintiff and defendant imposing contractual duties on the defendant:

It is undisputed that Windsor Green is not a named party to the rental agreement. "Generally, *one not in privity of contract with another cannot maintain an action against him in breach of contract*, and any damage resulting from the breach of a contract between the defendant and a third party is not, as such, recoverable by the plaintiff." *Bob Hammond Constr. Co. v. Banks Constr. Co.*, 312 S.C. 422, 424, 440 S.E.2d 890, 891 (Ct. App. 1994).

*See Windsor Green Owners Ass'n, Inc. v. Allied Signal, Inc.*, 362 S.C. 12, 17, 605 S.E.2d 750, 752 (Ct. App. 2004) (emphasis added), *cited in, Clardy v. Bodolosky*, 383 S.C. 418, 429-30, 679 S.E.2d 527, 533 (Ct. App. 2009) ("Though Land-Magnolia was a necessary party to the present action, it was not a party to the real estate contract at issue. Consequently, Land-Magnolia cannot now be responsible for attorney's fees given there is no privity of contract."). "[A]n individual who is not a party to a contract generally *cannot be liable for its breach*." *Trancik v. USAA Ins. Co.*, 354 S.C. 549, 553-54, 581 S.E.2d 858, 861 (Ct. App. 2003) (emphasis added) (*citing Holder v. Haskett*, 283 S.C. 247, 251, 321 S.E.2d 192, 194 (Ct.App.1984)). It is undisputed that the individual Defendants were not parties to the 2010 Contract, or any other

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<sup>7</sup> In his Counts 3-5, Plaintiff Mr. Molloy alleges numerous causes of action that are simply not recognized under any South Carolina law. It is unclear to Respondents exactly what Mr. Molloy is claiming under South Carolina law in these County. In any event, even if any of these Counts states a cognizable claim, these Counts nevertheless all fail for reasons discussed elsewhere in this Brief.

contract with Carolina Cleaning or any Plaintiff. The individual Defendants were not in privity with Carolina Cleaning, Mr. Molloy or any Plaintiff. As a result, Mr. Molloy's contract-based claims against the individual Defendants must fail.

**2. Plaintiff Mr. Molloy's Claims Against the Individual Defendants Fail to the Extent They Are Premised Upon Tort**

In addition to the foregoing, Mr. Molloy could not assert claims against the individual Defendants without violating the South Carolina Tort Claims Act. *See* S.C. Code § 15-78-70(c) (“On or after January 1, 1989, a person, when bringing an action against a governmental entity under the provisions of this chapter, shall name as a party defendant only the agency or political subdivision for which the employee was acting and is not required to name the employee individually, unless the agency or political subdivision for which the employee was acting cannot be determined at the time the action is instituted. In the event that the employee is individually named, the agency or political subdivision for which the employee was acting must be substituted as the party defendant.”). Under the South Carolina Tort Claims Act, claims against individual Defendants are permitted only in rare circumstances: “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.” *See* S.C. Code § 15-78-70(B). In the instant case, Mr. Molloy presents no evidence of any specific action by any particular individual Defendant that would permit an individual claim. Although he generally claims that some people made untrue statements, he does not show that any specific individual Defendant acted outside of the scope of their employment, engaged in actual fraud or malice, had intent to harm or committed a crime involving moral turpitude. Rather, he attempts through rhetoric to complicate what is (and should be) a garden-variety tort claim against Beaufort County and to improperly assert claims against state employees who are immune from suit under the South Carolina Tort Claims Act.

Therefore, this Court should affirm Judge Dukes' entry of summary judgment in favor of all individual Defendants in this matter.

**3. Plaintiff Mr. Molloy's Breach of Contract Accompanied by a Fraudulent Act Claim (Count 1) Fails As a Matter of Law**

In Count 1 of Plaintiffs' second Amended Verified Complaint, Mr. Molloy asserts a claim for breach of contract accompanied by a fraudulent act, the elements of which are as follows:

In order to state a claim for breach of contract accompanied by a fraudulent act, the plaintiff must plead facts establishing three elements: (1) a breach of contract; (2) *fraudulent intent relating to the breaching of the contract and not merely to its making*; and (3) a fraudulent act accompanying the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985). It is not necessary to allege the elements of common law fraud and deceit. *See Welborn v. Dixon*, 70 S.C. 108, 49 S.E. 232 (1904); *Sullivan v. Calhoun*, 117 S.C. 137, 108 S.E. 189 (1921). The fraudulent act is any act characterized by dishonesty in fact, unfair dealing, or the unlawful appropriation of another's property by design. *Id.*

*See Harper v. Ethridge*, 290 S.C. 112, 119, 348 S.E.2d 374, 378 (Ct. App. 1986) (emphasis added).

Under the South Carolina Tort Claims Act, a government entity may not be held liable for "employee conduct . . . which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." *See* S.C. Code § 15-78-60(17). As set forth above, actual fraudulent intent is a *sine qua non* of a claim for breach of contract accompanied by a fraudulent act. As a result, the Tort Claims Act expressly forbids such a claim against Beaufort County (the only entity with whom any Plaintiff had any contract).

At least two trial judges have concluded that a claim for breach of contract accompanied by a fraudulent act is barred by the South Carolina Tort Claims Act:

The cause of action for "breach of contract accompanied by fraudulent intent" requires a showing that the defendant acted with a fraudulent intent and the intent to injure the plaintiff. *See Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985); *Harper v. Ethridge & Fann*, 290 S.C. 12, 348 S.E.2d 374 (Ct. App. 1986). The Tort Claims Act provides that a governmental entity such as a school district cannot be held liable for "employee conduct ... which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. CODE ANN. § 15-78-60(17). Accordingly, the

cause of action alleging breach of contract accompanied by fraud is barred as a matter of law.

*See Smith v. Charleston County School District*, No. 03-CP-10-4751, 2006 WL 4037569 (S.C.Com.Pl. Mar. 16, 2006); *accord Bluestein v Town of Sullivan's Island*, No. 2010CP1005449, 2014 WL 12793068, at \*2 (S.C.Com.Pl. Dec. 04, 2014) ("The distinction between Breach of Contract and Breach of Contract Accompanied by Fraudulent Act is, of course, the presence of 'fraud.' The Tort Claims Act tells us that the government is immune from fraud claims.").

For the foregoing alternative reasons, this Court should affirm Judge Dukes grant of summary judgment on Mr. Molloy's claim for breach of contract accompanied by a fraudulent act.

**4. Plaintiff Mr. Molloy's Interference with Prospective Contract Claim (Count 2) Fails As a Matter of Law**

Plaintiff Mr. Molloy cannot assert this claim against the individual Defendants. "[I]ntent to injure is *not* an element of tortious interference." *See Broach v. Carter*, 399 S.C. 434, 442, 732 S.E.2d 185, 189 (Ct. App. 2012) (emphasis added). Because actual malice and intent to harm are not required elements of the claim, the Tort Claims Act bars Plaintiff Mr. Molloy's claim of tortious interference against the individual Defendants. *See* S.C. Code § 15-78-70(a) & (b). ("An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor" unless "the employee's conduct was not within the scope of his official duties or . . . constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude."); *Eldeco, Inc. v. Charleston Cty. Sch. Dist.*, 372 S.C. 470, 481, 642 S.E.2d 726, 732 (2007) (finding that S.C. Code § 15-78-60(10), which insulates government entities from claims where state employee acted with "intent to harm," was not triggered where element of tort did not require intent to harm).

Plaintiff Mr. Molloy's tortious interference claim against the County must also fail. "[A]n action for tortious interference protects the property rights of the parties to a contract against unlawful interference by third parties." *See Threlkeld v. Christoph*, 280 S.C. 225, 227,

312 S.E.2d 14, 15 (Ct. App. 1984). “Therefore, it does not protect a party to a contract from actions of the other party.” *See id.*

“It is generally recognized that when a contract is breached by a corporation as the result of the inducement of an officer or agent of the corporation acting on behalf of the corporation and within the scope of his employment, the inducement is privileged and is not actionable.” *Bradburn v. Colonial Stores, Inc.*, 273 S.C. 186, 188, 255 S.E.2d 453, 455 (1979). Thus, “[t]he actions of a principal's agent are afforded a qualified privilege from liability for tortious interference with the principal's contract.” [Citation omitted.] . . . The reason for this privilege is that holding an agent liable would be like holding the principal itself liable for the tort of interfering with its own contract, instead of holding the principal liable for breach of contract.” *CGB Occupational Therapy, Inc.*, 357 F.3d at 385. “The agent's privilege is qualified, however, because it applies only when the agent is acting within the scope of its authority.” *Id.*

*See Dutch Fork Dev. Grp. II, LLC v. SEL Properties, LLC*, 406 S.C. 596, 605, 753 S.E.2d 840, 844 (2012). Mr. Molloy claims, in essence, that the County (or its agents) interfered with its own contract with Carolina Cleaning. Plaintiff Mr. Molloy does not allege that Beaufort County interfered with a contract between any Plaintiff and a third-person. Therefore, Plaintiff Mr. Molloy cannot possibly succeed on his claim as a matter of law.

**5. Plaintiff Mr. Molloy's Unjust Enrichment Claim (Count 6) Fails As a Matter of Law**

The requirements for Plaintiffs' unjust enrichment claim are well-settled under South Carolina law:

The elements to recover for unjust enrichment based on *quantum meruit*, quasi-contract, or implied by law contract, which are equivalent terms for equitable relief, are: “(1) a benefit conferred by the plaintiff upon the defendant; (2) realization of that benefit by the defendant; and (3) retention of the benefit by the defendant under circumstances that make it inequitable for him to retain it without paying its value.” *Myrtle Beach Hosp., Inc. v. City of Myrtle Beach*, 341 S.C. 1, 8-9, 532 S.E.2d 868, 872 (2000).

*Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 257, 715 S.E.2d 348, 356 (Ct. App. 2011). Plaintiff does not plead a claim coming within the scope of this cause of action and cannot present a scintilla of evidence supporting such a claim. There is no evidence that Carolina Cleaning performed work for the County (or any Defendant) for which it was not paid.

This is not a claim for *quantum meruit*. There is no evidence whatsoever showing any of the elements of this claim.

Additionally, as to the County, this claim fails because any right to compensation for Plaintiffs must come from the 2010 Contract between the County and Carolina Cleaning. "If the tasks the plaintiff is seeking compensation for under a quantum meruit theory are encompassed within the terms of an express contract which has not been abandoned or rescinded, the plaintiff may not recover under *quantum meruit*." *Swanson v. Stratos*, 350 S.C. 116, 122, 564 S.E.2d 117, 120 (Ct. App. 2002).

For these additional reasons, Judge Dukes properly granted summary judgment as to Mr. Molloy's unjust enrichment claims.

**6. Plaintiff Mr. Molloy Has Not Preserved Any Issue as to His Taxpayer Standing (Count 9) Claim**

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Although Count 9 of Plaintiffs' second Amended Verified Complaint purports to allege a "claim" for taxpayer standing, Plaintiff Mr. Molloy did not fully and adequately present that "claim" to the trial judge and did not obtain a ruling on any issues relating to claims of "taxpayer standing." Under South Carolina law, an appellant must properly raise (and have the trial court rule upon) issues to preserve the right to appellate review:

[A] great number of reported cases in South Carolina for at least four generations, and more recently the appellate court rules and rules of civil procedure, have emphasized the importance and absolute necessity of ensuring that all issues and arguments are presented to the lower court for its consideration. Issues and arguments are preserved for appellate review *only when they are raised to and ruled on by the lower court*. *E.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."); *Long v. Dunlap*, 87 S.C. 8, 68 S.E. 801 (1910) (Supreme Court will not consider any point which was not presented and considered below unless it involves jurisdiction of the court); *Gaffney v. Peeler*, 21 S.C. 55 (1884) (question of law which was not presented to or passed upon by the trial court cannot be raised on appeal); Rule 210(c), SCACR (record on appeal shall not include matter which was not presented to lower court). . . . [O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. . . . A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

*See Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 23-24, 602 S.E.2d 772, 779-80 (2004) (emphasis added); *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to convince the lower court it is has ruled wrongly and then, if that effort fails, convince the appellate court that the lower court erred. This principle underlies the long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and obtain a ruling before an appellate court will review those issues and arguments."). Plaintiff Mr. Molloy — who was represented by counsel in the trial court — has not properly preserved for appellate review any issues relating to "taxpayer standing."

### **CONCLUSION**

For the reasons set forth above, this Court should reject Mr. Molloy's arguments on appeal and affirm the trial court's grant of summary judgment to Respondents.

August 25, 2020

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**Aug 25 2020**  
**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY  
In the Court of Common Pleas for the Fourteenth Judicial Circuit  
Hon. Marvin H. Dukes, III, Master in Equity

Appellate Case No. 2018-002170

Steven Craig Molloy and Island Group, Inc., d/b/a Carolina  
Cleaning ..... Plaintiffs

Of which Steven Craig Molloy is the ..... Appellant

v.

Beaufort County; Gary Kubic, Individually, and as Beaufort  
County Administrator; Josh Gruber, Individually and as former  
Beaufort County In-House Attorney; Bryan Hill, Individually and  
as former Beaufort County Deputy Administrator; Shannon Loper,  
Individually, and as Employee of the Beaufort County Parks and  
Leisure; Stu Rodman, as finance Chair of Beaufort County  
Council; and Dave Thomas, Procurement Director for Beaufort  
County, South Carolina; Disabilities and Special Needs (Non-  
Profit); and Beaufort County DSN Board,..... Respondents

**RULE 211 CERTIFICATE**

I hereby certify that this Final Brief of Respondents complies with Rule 211(b), S.C.A.C.R.

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