

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin Culbertson, Circuit Court Judge

RECEIVED
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SC Court of Appeals

Circuit Court Case No. 2017-CP-26-05913
Appellate Case No. 2019-001556

John Kennedy,..... Appellant

v.

Myrtle Beach Police
Department,..... Respondent.

RECORD ON APPEAL

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Judge Culbertson's July 31, 2018 Order filed on August 1, 2018

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF HORRY
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2017CP2605913

ELECTRONICALLY FILED - 2018-Aug 01 12:04 PM - HORRY - COMMON PLEAS - CASE#2017CP2605913

John Kennedy		Police Department Myrtle Beach Angela Kegler	John Pederson Amy Prock
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PLAINTIFF(S)	DEFENDANT(S)
Submitted by: Clerk Of Court	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):** Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

Defendant's Motion/Dismiss is GRANTED.

This order ends does not end the case.

Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge	2148	7/31/2018
	Judge Code	Date

For Clerk of Court Office Use Only

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on, to attorneys of record or to parties (when appearing pro se) as follows:

Aaron Vernon Wallace 4400 North Main Street Columbia, SC 29203
Donald Gist PO Box 30007 Columbia, SC 29230

Dirk L. Aydlette III 900 Elmwood Ave Suite 100 Columbia, SC 29201

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Court Reporter-Grace Hurley

Renee N. Elvis - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

RA 4



Horry Common Pleas

Case Caption: John Kennedy , plaintiff, et al VS Police Department Myrtle Beach ,
defendant, et al
Case Number: 2017CP2605913
Type: Order/Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2018-08-01 10:15:48 page 3 of 3

Judge Culbertson's Oct 3, 2018 Order filed Oct 4, 2018

STATE OF SOUTH CAROLINA
 COUNTY OF HORRY
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2605913

John Kennedy

City of Myrtle Beach
 Police Department, et al.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Benjamin H. Culbertson, Presiding Judge

Attorney for : Plaintiff Defendant
 or
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
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- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's Motion for Reconsideration is GRANTED to the extent that the Court's Form 4 Order granting the Defendants' Motion to Dismiss is set aside. The Defendants' Motion to Dismiss is to be rescheduled for another hearing, de novo. See page 2.

(This motion is decided on briefs without oral arguments.)

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	\$ N/A

If applicable, describe the property, including tax-map information and address, referenced in the order:

ELECTRONICALLY FILED - 2018 Oct 04 11:55 AM - HORRY - COMMON PLEAS - CASE#2017CP2605913



Horry Common Pleas

Case Caption: John Kennedy VS Police Department Myrtle Beach , defendant, et al
Case Number: 2017CP2605913
Type: Order/Other

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2018-10-03 11:52:23 page 3 of 3

ELECTRONICALLY FILED - 2018 Oct 04 11:55 AM - HORRY - COMMON PLEAS - CASE#2017CP2605913

ROA 9

Judge Culbertson's April 25, 2019 Order

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

John Kennedy,)

Plaintiff,)

vs.)

City of Myrtle Beach Police Department,)
and Amy Prock, Angela Kegler, and John)
Pederson (In their Individual Capacities),)

Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2017-CP-26-05913

**ORDER ON DEFENDANTS'
MOTION TO DISMISS**

This is an employment law action alleging breach of contract, breach of contract accompanied by fraud, and civil conspiracy. Plaintiff is a former police officer who was terminated by the City. The defendants filed a motion for judgment on the pleadings. The motion came before the court on April 23, 2019. Defense counsel was present. Additionally, both sides briefed the court on the relevant issues. Having considered the legal arguments of the parties, the court grants the motion and dismisses this action with prejudice.

All three of Plaintiff's claims – breach of contract, breach of contract accompanied by a fraudulent act, and civil conspiracy – turn on the issue of whether he was employed an at-will. Clearly he was. The City operates under a council-manager form of government. *Todd v. Smith*, 305 S.C. 227, 231, 407 S.E.2d 644, 646 (1991) (“the City of Myrtle Beach has elected to adopt the council/manager form of government”). Hiring and firing authority in a council-manager form of government rests in the City Manager under S.C. Code § 5–13–90(1). *Dew v. City of Florence*, 279 S.C. 155, 161, 303 S.E.2d 664, 667 (1983) (citing South Carolina Code § 5–13–90(1) which “allows the City Manager in a council-manager form of government to dismiss any City employee ‘for the good of the municipality’”). “Every court that has considered [§ 5–13–

90(1)] has held that this statutory provision means that employees in municipalities with the council-manager form of government serve at the will and pleasure of the City.” *Lamond v. City of Myrtle Beach*, 1991 WL 433750, at *1 (S.C. Com. Pl. Oct. 25, 1991) (collecting cases and specifically holding that City of Myrtle Beach employees are employed at-will); *Dew v. City of Florence*, 279 S.C. 155, 161-162, 303 S.E.2d 664 (1983); *Bunting v. City of Columbia*, 639 F.2d 1090, 1093-1094 (4th Cir. 1981) (under § 5-13-90(1) “city employees . . . hold their positions at the will and pleasure of the city”); *Mills v. Leath*, 709 F.Supp. 671, 674 (D.S.C. 1981) (“Courts have consistently interpreted [§ 5-13-90(1)] as providing only for at-will employment of municipal employees.”); *Bane v. City of Columbia*, 480 F.Supp. 34, 37-38 (D.S.C. 1979).

The plaintiff in *Lamond* made the same arguments Plaintiff makes here: that he could have a contract based on oral assurances or the City’s policies. *Lamond* rejected those arguments because “[a]ny [oral] assurance . . . was contrary to Section 5-13-90(1)” and held that even if the City’s policies could arguably alter at-will employment, “state statutory law and case law support the conclusion that employees of the city of Myrtle Beach are at-will employees” as a matter of law. *Id.* The City’s Code of Ordinances conform to state law. City of Myrtle Beach Code of Ordinances Section 2-81(b) (“The city has a policy that all employment status is ‘at will’, with the exception of judges under the unified court system.”). Thus, as a matter of law, City employees are employed at-will.

Turning then to Plaintiff’s claims, he clearly cannot assert breach of contract or breach with fraud because at-will employment cannot be the basis for such claims. *Allegro, Inc. v. Scully*, 418 S.C. 24, 35, 791 S.E.2d 140, 146 (2016), *reh’g denied* (Oct. 26, 2016) (where “there is nothing to suggest this was anything other than an at-will relationship,” there is “no contract on which [Plaintiff] can predicate [hi]s claims of breach of contract and breach of contract

accompanied by a fraudulent act.”); *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, 769, 259 S.E.2d 812, 813 (1979) (“The termination of employment at will by either party does not normally give rise to a cause of action for breach of contract.”).

Plaintiff’s conspiracy claim against the City and John Pederson is barred because an at-will employee cannot sue the entity that employed him or the decisionmaker who fired him. *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (2004) (dismissing former at-will county employee’s civil conspiracy claim brought against county council members in individual capacity who voted to terminate plaintiff’s employment because they cannot be sued for doing what the at-will doctrine gives them the right to do) (“Angus I”) (affirmed in pertinent part by *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 628 S.E.2d 261, 262 (2006) (“Angus II”)); accord, *Brailsford v. Wateree Cmty. Action, Inc.*, 135 F. Supp. 3d 433, 450 (D.S.C. 2015) (Angus I stands for the proposition “that an at-will employee cannot sue his employer, or anyone acting within his authority on behalf of his employer, for civil conspiracy arising out of his termination”); see also, S.C. Code § 5-13-90(1) (city manager empowered to terminate employees).

Moreover, as a police officer, Plaintiff was a public official. *State v. Bridgers*, 329 S.C. 11, 16, 495 S.E.2d 196, 198 (1997) (collecting cases and stating that “city police officers are . . . public officials”); *Saxton v. Town of Irmo Police Dep’t*, 2016 WL 1178201, at *3 (D.S.C. Mar. 28, 2016) (“it is clear that the [police officer] Plaintiff is in fact a public official”); *McClain v. Arnold*, 275 S.C. 282, 270 S.E.2d 124 (1980) (holding that a police officer is a public official); *Botchie v. O’Dowd*, 315 S.C. 126, 432 S.E.2d 458 (1993) (holding that a deputy sheriff was a public official); *Gause v. Doe*, 317 S.C. 39, 451 S.E.2d 408 (Ct. App. 1994) (noting that a police officer is a public official). As an at-will public official, Angus II bars his claim against all

defendants. *See, Saxton, supra* (dismissing termination-related conspiracy claim because Angus II held that “a public official cannot bring a civil conspiracy claim against a member of the public arising out of that public official's termination”); *Reed v. Town of Williston*, 2010 WL 1409427, at *10 (D.S.C. Feb. 26, 2010) (citing Angus II and stating that “[u]nder South Carolina law a public official who is employed at-will is prohibited from suing anyone for a civil conspiracy” relating to the termination of their employment), *report and recommendation adopted*, 2010 WL 1409425 (D.S.C. Mar. 31, 2010); *Brown v. City of Columbia*, 2011 WL 3654472, at *1 (D.S.C. June 16, 2011), *report and recommendation adopted*, 2011 WL 3654468 (D.S.C. Aug. 19, 2011) (citing Angus II and holding that “[an at-will] plaintiff who is a public official cannot maintain a civil conspiracy claim against non-employer third parties”). The fact that the remaining defendants are also City employees is irrelevant. They are also “non-employer third parties,” *Brown, supra*, because in their individual capacities they did not employ Plaintiff. The individual defendants here are citizens of Horry County sued in their individual capacities. Such suits are, as a matter of law, suits against members of the public for they seek to impose personal liability against the personal assets of these defendants. Because “a public official who is employed at-will is prohibited from suing anyone for a civil conspiracy” *Reed, supra*, Plaintiff's civil conspiracy claim fails because he was employed as an at-will public official. *See also, Hollis v. Fairfield Cty.*, 2014 WL 5840459, at *1 (S.C. Ct. App. Nov. 12, 2014) (Angus II barred at-will animal control officer's conspiracy claim over his termination because he was a public official).

Based on the foregoing, Defendants' motion is hereby granted and this action is dismissed with prejudice.

BENJAMIN H. CULBERTSON
FIFTEENTH JUDICIAL CIRCUIT

Conway, SC

Date: _____

ELECTRONICALLY FILED - 2019 Apr 25 8:54 AM - HORRY - COMMON PLEAS - CASE#2017CP2605913



Horry Common Pleas

Case Caption: John Kennedy VS Police Department Myrtle Beach , defendant, et al
Case Number: 2017CP2605913
Type: Order/Dismissal

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2019-04-24 16:15:03 page 6 of 6

Judge Culbertson's July 15, 2019 Order on Second Motion to
Reconsider

STATE OF SOUTH CAROLINA
COUNTY OF Horry
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017CP2605913

John Kennedy
PLAINTIFF(S)

Police Department Myrtle Beach et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's Motion For Reconsideration is DENIED.

This motion is decided on briefs without oral arguments.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/15/2019 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

07/15/19

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCF.



Horry Common Pleas

Case Caption: John Kennedy VS Police Department Myrtle Beach , defendant, et al
Case Number: 2017CP2605913
Type: Order/Electronic Form 4

Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2019-07-15 13:22:02 page 3 of 3

Defendant's Motion to Dismiss

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

John Kennedy,)

C.A. No. 2017-CP-26-05913

Plaintiff,)

**MOTION TO DISMISS
AND MEMORANDUM**

vs.)

City of Myrtle Beach Police Department,)
and Amy Prock, Angela Kegler, and John)
Pederson (In their Individual Capacities),)

Defendants.)

The defendants hereby move to dismiss this action on the grounds that, pursuant to City of Myrtle Beach Code of Ordinances § 2-81 (attached), City employees are employed at-will as a matter of law. *Id.* In addition to Plaintiff's at-will status barring his claims, his conspiracy claim fails because he has not properly pled his claim.

The adoption of an ordinance is a legislative function. *City of Myrtle Beach v. Juel P. Corp.*, 337 S.C. 157, 522 S.E.2d 153 (Ct. App. 1999). "Therefore, [a court should] review a[n] . . . ordinance to give it a 'practical, reasonable and fair interpretation consonant with the purposes, design, and policy of the lawmakers.'" *Id.* at 177, 522 S.E.2d at 164 (quoting *Restaurant Row Assocs. v. Horry County*, 327 S.C. 383, 391, 489 S.E.2d 641, 645 (Ct. App. 1997)). "As with statutes, the lawmakers' intent embodied in an ordinance 'must prevail if it can be reasonably discovered in the language used.'" *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 490, 536 S.E.2d 892, 897 (Ct. App. 2000) (quoting *Charleston Cty. Parks & Recreation Comm'n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)). An agency's "construction of its own ordinance, the enforcement of which it is charged with, should be given

some consideration and not overruled without cogent reason therefor.” *Purdy v. Moise*, 223 S.C. 298, 304-05, 75 S.E.2d 605, 608 (1953).

City of Myrtle Beach Code of Ordinances Section 2-81(a) provides, in pertinent part:

For the purpose of establishing general operational and administrative policies, procedures and regulations regarding employment, the manager may, from time to time within his discretion, promulgate a handbook for employees and may present the handbook for council's review. If promulgated, the handbook shall reflect the overall legislative policies set forth herein.

Thus, the City’s employment “policies, procedures and regulations” are found in the City’s handbook. Those policies must be in accordance with the legislative policies set forth in the City’s Code of Ordinances.

In the next subpart, the City establishes at-will employment as its official employment policy. City of Myrtle Beach Code of Ordinances Section 2-81(b) provides:

The city has a policy that all employment status is "at will", with the exception of judges under the unified court system. "At will" employment recognizes the right of the employee to resign at any time without providing a reason or explanation to the organization. "At-will" employment also recognizes the right of the city to terminate employment at any time without providing a reason or explanation to the employee. At will employment is terminable by either party at any time, for any reason or for no reason at all. Nothing in the manager's personnel handbook can change the at-will status of employment as set forth herein, or create an expectation of a contract or continued employment on the part of any employee. No one other than the city manager may make any promise or assurance or enter into any contract, whether oral or written, express or implied, that is any way inconsistent with the policy set forth herein. Any promise, assurance or purported contract or agreement shall be invalid and not binding upon the city unless adopted, endorsed or agreed to in writing by the city manager.

Id. (emphasis added). Thus, as a matter of law, City employees are employed at-will because all of the City’s employment policies and procedures must be set forth in its

handbook, which handbook must reflect the City's policy of at-will employment as a matter of law.

Plaintiff, a former City police officer, asserts three causes of action. The first two causes of action – breach of contract and breach of contract with fraudulent intent – require the existence of more than an at-will contract as an element of the cause of action. Our Supreme Court has made it clear that where “there is nothing to suggest this was anything other than an at-will relationship,” there is “no contract on which [Plaintiff] can predicate [hi]s claims of breach of contract and breach of contract accompanied by a fraudulent act.” *Allegro, Inc. v. Scully*, 418 S.C. 24, 35, 791 S.E.2d 140, 146 (2016), *reh'g denied* (Oct. 26, 2016); *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, 769, 259 S.E.2d 812, 813 (1979) (“The termination of employment at will by either party does not normally give rise to a cause of action for breach of contract.”).

Plaintiff alleges that he had “contractual rights pursuant to Defendant’s employment handbook and other contractual policies and procedures provided to Plaintiff by Defendant.” [Complaint ¶ 20] Pursuant to City Code § 2-81, if the City Manager elected to promulgate a handbook, it must reflect the City’s at-will employment policy. “Nothing in the manager’s personnel handbook can change the at-will status of employment as set forth herein, or create an expectation of a contract or continued employment on the part of any employee.” City Code §2-81(b). And if the City Manager promulgates a handbook – and the parties agree he has – it alone provides the policies, procedures and regulations regarding Plaintiff’s employment. Thus, Plaintiff has not alleged a viable claim that he was more than an at-will employee and his first two causes of action fail as a matter of law.

Plaintiff's third cause of action is for civil conspiracy. First, neither the City, nor the decisionmakers who terminated Plaintiff's employment, are subject to suit for civil conspiracy because Plaintiff was an at-will employee. *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (2004) (dismissing former at-will county employee's civil conspiracy claim brought against county council members in individual capacity who voted to terminate plaintiff's employment because they cannot be sued for doing what the at-will doctrine gives them the right to do) ("Angus I") (affirmed in pertinent part by *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 628 S.E.2d 261, 262 (2006) ("Angus II")); accord, *Brailsford v. Wateree Cmty. Action, Inc.*, 135 F. Supp. 3d 433, 450 (D.S.C. 2015) (Angus I stands for the proposition "that an at-will employee cannot sue his employer, or anyone acting within his authority on behalf of his employer, for civil conspiracy arising out of his termination") (quoting *Faile v. Lancaster Cnty.*, 2013 WL 786447 at *5 (D.S.C. Mar. 1, 2013) ("civil conspiracy claim by an at-will employee against an employer arising out of the employee's termination is barred"))).

The City operates under a council/manager form of government. *Todd v. Smith*, 305 S.C. 227, 231, 407 S.E.2d 644, 646 (1991) ("the City of Myrtle Beach has elected to adopt the council/manager form of government"). Hiring and firing authority in a council/manager form of government rests in the City Manager. *Dew v. City of Florence*, 279 S.C. 155, 161, 303 S.E.2d 664, 667 (1983) (citing South Carolina Code § 5-13-90 which "allows the City Manager in a council-manager form of government to dismiss any City employee 'for the good of the municipality'"). As plaintiff properly alleges, defendant Pedersen is the City Manager. Thus Angus I bars his civil conspiracy claim against both the City and Pedersen.

Moreover, as a police officer, Plaintiff was a public official. *McClain v. Arnold*, 275 S.C. 282, 270 S.E.2d 124 (1980) (holding that a police officer is a public official); *accord*, *Botchie v. O'Dowd*, 315 S.C. 126, 432 S.E.2d 458 (1993). “In *Angus II*, the Supreme Court held that *Ross* [*v. Life Insurance Co. of Virginia*, 273 S.C. 764, 259 S.E.2d 814 (S.C. 1979)] precluded an at-will public official from suing members of the press and public for civil conspiracy, because ‘a public official is answerable to the public.’” *Faile, supra*, 2013 WL at *5 n.9. *See also Hollis v. Fairfield Cty.*, 2014 WL 5840459, at *1 (S.C. Ct. App. Nov. 12, 2014) (affirming dismissal of at-will public official’s civil conspiracy claim pursuant to *Angus II*). Because Plaintiff was both a public official and employed at-will, his claim *as to all defendants* is barred by *Angus II*.

Plaintiff’s claim further fails because he has not properly alleged the elements of a claim of civil conspiracy. “To prove a claim for civil conspiracy, a plaintiff must show: ‘(1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage.’” *McCrief v. Wachovia Bank*, 2013 WL 6284435, at *4 (D.S.C. Dec. 4, 2013) (quoting *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871, 874 (Ct. App. 2009). Plaintiff’s allegations fail at the second and third prongs.

Plaintiff has failed to properly allege that the purported conspirators so conspired for the purpose of injuring him. Rather he alleges in his Complaint:

27. Upon information and belief, Plaintiff was subsequently replaced by Joseph Crosby who is the boyfriend of Amy Kegler. Plaintiff is aware that Defendants Kegler, Pederson, and Prock conspired and took affirmative steps to terminate Plaintiff *in an effort to ensure that Joseph Crosby received his job* despite the fact that Crosby is less qualified than Plaintiff and does not possess a college degree.

52. Defendants' [sic] conspired to have Plaintiff terminated and to deny Plaintiff a Grievance Hearing *so that Kegler's less qualified boyfriend could be hired into Plaintiff's position.*

[Complaint ¶¶ 27, 52 (emphasis added)] Thus, Plaintiff's assertion is that he was terminated to benefit Crosby, not to harm Plaintiff. Thus his conspiracy claim fails. *See Bivens v. Watkins*, 313 S.C. 228, 437 S.E.2d 132, 136 (Ct. App. 1993) (affirming trial court's finding that conspiracy claim failed because there was a "complete lack of evidence to establish that the purpose of the business of the parties was anything other than profit motivated" and was not intended to harm the plaintiff); *Reed v. Aiken Cty.*, 2010 WL 4238848, at *6 (D.S.C. Oct. 21, 2010) (where only evidence was that the object of the conspiracy was to protect one of his subordinates from him "[p]laintiff has not provided the court with sufficient evidence of an intent to harm").

Further, Plaintiff has failed to properly plead special damages. "Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct." *McCrief, supra* (quoting *Hackworth*). Plaintiff must both plead and prove special damages. *Little v. Brown & Williamson Tobacco Corp.*, 1999 WL 33291385, at *14 (D.S.C.1999); *Preferred Sav. Bank, Inc. v. Elkholy*, 303 S.C. 95, 99, 399 S.E.2d 19, 21 (Ct.App.1990) (special damages must "be specifically stated" to avoid surprise to the other party).

Merely invoking the phrase "special damages" is insufficient. Where a party has "failed to plead with specificity any special damages," a civil conspiracy claim necessarily fails. *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 650–51, 780 S.E.2d 263, 272. (Ct. App. 2015) ("circuit court properly dismissed Appellant's civil

conspiracy claim against Individual Respondents” for lack of specificity as to special damages).

Here, Plaintiff alleges that as a result of the alleged conspiracy, he: (1) “suffered a loss of earning capacity and the loss of his job” [Complaint ¶ 54]; (2) “suffer[ed] special damages and substantial damages for pecuniary losses, embarrassment, humiliation, pain and suffering, mental anguish, loss of enjoyment of life, and other non-pecuniary losses” [*Id.* ¶ 55]; (3) is “entitled to injunctive relief and/or civil damages suffered a loss of the opportunity to be promoted and suffered the loss of his job resulting in diminished earning capacity, diminished benefits, and diminished retirement” [*Id.* ¶ 56]; (4) is “entitled to injunctive relief and/or civil damages, back pay, and front pay” [*Id.* ¶ 57]; and “suffered a loss of the opportunity to be promoted and suffered the loss of his job resulting in diminished earning capacity, diminished benefits, and diminished retirement [and] is entitled to a judgment for actual and punitive damages.”

The damages alleged here are “‘exactly those damages that one would expect to flow from’ the alleged conspiracy to terminate him.” *James v. Pratt & Whitney*, 2005 WL 3440868, at *3 (D.S.C. Dec. 14, 2005) (finding plaintiff failed to allege special damages arising from a conspiracy to terminate his employment where he alleged only “damages for lost wages, lost benefits, consequential economic damages, emotional distress, and injury to reputation”). “Plaintiff merely alleges that he has suffered a myriad of damages ranging from lost wages to intentional infliction of emotional distress but has failed to point to actual special damages that he has suffered as a result of defendant's alleged actions.” *Id.* at *5. Accordingly, Plaintiff’s claim for civil conspiracy fails as a matter of law.

Based on the foregoing, Defendants respectfully request that this action be dismissed.

s/Derwood L. Aydlette III
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ATTORNEYS FOR DEFENDANTS

June 21, 2018

Certificate of Service

I hereby certify that on the above date, I caused to be served on counsel of record a true and correct copy of this document by mail or efileing.

s/Derwood L. Aydlette III
GIGNILLIAT, SAVITZ & BETTIS, L.L.P.

Plaintiff's Aug 8, 2018 motion to reconsider

3. On August 1, 2018, Oral Arguments on Defendant's Motion to Dismiss were heard before the Honorable Benjamin H. Culbertson. Although the hearing took place, Plaintiff's counsel was not present at the hearing, aware of the hearing and did not get proper notice that the hearing was to take place. In addition, despite Plaintiff counsel's previous conversations with Defense counsel, Defense counsel made no mention of the scheduled hearing. The day prior to the hearing, Plaintiff's counsel attempted to contact Defendant's counsel by both telephone and email to no avail. In addition, the only motion discussed between the parties was Defense counsel's request for protection.
4. On August 1, 2018, Judge Benjamin H. Culbertson entered an Order Granting Defendant's Motion to Dismiss without prejudice, dismissing Plaintiff's all of Plaintiff's Causes of Action against all Defendants.
5. Plaintiff contends that the Court erred by dismissing Plaintiff's Complaint and respectfully moves and requests that this Court reconsider its decision to dismiss Plaintiff's case without regard to Plaintiff's well plead complaint.
6. As Plaintiff's Complaint was dismissed without prejudice, Defendant will suffer no prejudice from the Court reconsidering its dismissal of Plaintiff's Complaint so that a just hearing on the merits of Plaintiff's legal defenses can be heard.

WHEREFORE, Plaintiff, respectfully requests this Court to reconsider its Order filed August 1, 2018 dismissing Plaintiff's Complaint and, alternatively, allow Plaintiff to amend the Complaint pursuant to Rule 15 of the South Carolina Rule of Civil Procedure.

Respectfully submitted,

By s/ Donald Gist
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August 8, 2018

Plaintiff's Aug 17, 2018 memo in support

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)
John Kennedy,)
)
) Plaintiff,)
)
)
)
) vs.)
)
)
)
City of Myrtle Beach Police Department,)
)
and Amy Prock, Angela Kegler, and)
)
John Pederson (In their Individual)
)
Capacitates),)
)
) Defendants .)
)
)

IN THE COURT OF COMMON PLEAS

CASE NO.: 2017-CP-26-05913

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
RECONSIDERATION AND IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS**

Plaintiff John Kennedy hereby files this motion for reconsideration on the merits of Plaintiff's Complaint in response to Defendant's Motion to Dismiss which was granted by the Court on August 1, 2018. In support of Plaintiff's motion, Plaintiff submits the following.

I. PROCEDURAL HISTORY

The current action was filed September 14, 2017 wherein Plaintiff alleged causes of action of breach of contract, breach of contract with fraudulent intent, and civil conspiracy against the Defendants named above.

Defendants filed an Answer on December 28, 2017 and on June 21, 2018 Defendants filed a motion to dismiss the Complaint. The Court granted this motion without prejudice and with leave for Plaintiff's to refile the Complaint on August 1, 2018. On August 8, 2018, Plaintiffs filed the instant motion to reconsider which is currently before the Court and to which Plaintiff hereby provides the below memorandum in opposition to Defendants' motion to dismiss the Complaint.

II. STANDARD OF REVIEW

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). The decision to grant a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. *Id.*; *Clearwater Trust v. Bunting*, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006). In deciding to grant the motion to dismiss, the court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Spence*, at 116, 628 S.E.2d at 874 (2006). A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. *Id.*; *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Spence*, at 116-17, 628 S.E.2d at 874. Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). A motion to strike under Rule 12(f), SCRCF, which challenges a theory of recovery in the complaint, is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCF. *McCormick v. England*, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct.App.1997).

Rule 8, SCRCF, mandates that a pleading contain “ultimate facts” rather than “evidentiary facts” to state a cause of action. “Ultimate facts fall somewhere between the verbosity of ‘evidentiary facts’ and the sparseness of ‘legal conclusions’.” *Watts v. Metro Security Agency*, 346 S.C. 235, 239, 550 S.E.2d 869, 871 (Ct. App. 2001). Further, a complaint must contain a ‘short and plain statement of the facts showing the pleader is entitled to relief.’ Rule 8(a)(2), SCRCF.

This requires a litigant to plead the ultimate facts which will be proven at trial, not evidence which will be used to prove those facts. *Clark v. Clark*, 293 S.C. 415, 416, 361 S.E.2d 328 (1987) (emphasis added).

Where allegations of the complaint give rise to competing inferences on a question of material fact, dismissal under Rule 12(b)(6) is not appropriate. *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 306 (1993). The Ruling on a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. Moreover, a 12(b)(6) motion should not be granted if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. The question to be considered is whether, when viewed in the light most favorable to the plaintiff, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail. *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752 (Ct. App. 2004) (emphasis added).

Plaintiff's Complaint recites the ultimate facts, which upon further litigation, will show the evidence which will be used to prove those ultimate facts. As such, the Defendant's Rule 12(b)(6) motion to dismiss must be denied. In the alternative, Plaintiff should be granted leave to amend his complaint.

III. LEGAL ARGUMENT

With respect to Defendant's claims that Plaintiff's causes of action for breach of contract, breach of contract with fraudulent intent, and civil conspiracy should be dismissed it is apparent that Defendant's selective quotes from Plaintiff's complaints and inadequate arguments, while diffident and crafty, are insufficient to defeat Plaintiff's properly drafted and well-pled complaint.

With respect to Defendant's claim that Plaintiff's causes of action should be dismissed these arguments fail for the reasons stated below.

1. The City Ordinance does not defeat Plaintiff's Contract Claims

In support of its allegation that Plaintiff's breach of contract claims are defeated by the Cities' ordinances, the Defendant proffers the following ordinances:

City of Myrtle Beach Code of Ordinances Section 2-81(a) provides, in pertinent part:

For the purpose of establishing general operational and administrative policies, procedures and regulations regarding employment, the manager may, from time to time within his discretion, promulgate a handbook for employees and may present the handbook for council's review. If promulgated, the handbook shall reflect the overall legislative policies set forth herein.

City of Myrtle Beach Code of Ordinances Section 2-81(b) provides:

The city has a policy that all employment status is "at will", with the exception of judges under the unified court system. "At will" employment recognizes the right of the employee to resign at any time without providing a reason or explanation to the organization. "At will" employment also recognizes the right of the city to terminate employment at any time without providing a reason or explanation to the employee. At will employment is terminable by either party at any time, for any reason or for no reason at all. Nothing in the manager's personnel handbook can change the at-will status of employment as set forth herein, or create an expectation of a contract or continued employment on the part of any employee. No one other than the city manager may make any promise or assurance or enter into any contract, whether oral or written, express or implied, that is any way inconsistent with the policy set forth herein. Any promise, assurance or purported contract or agreement shall be invalid and not binding upon the city unless adopted, endorsed or agreed to in writing by the city manager.

As an initial matter and without delving into the sufficiency of the ordinances themselves, Plaintiff's contract-based claims do not violate such ordinances. Specifically, paragraph 20 of the complaint states:

Defendant's actions in doing such violated Plaintiff's contractual rights pursuant to Defendant's employment handbook and **other contractual policies and procedures provided to Plaintiff by Defendant.**

Thus, it is apparent that Plaintiff's complaint indicates that Plaintiff's contract-based claims are not solely based upon the employment handbook and include contractual policies and procedures which were provided to Plaintiff by Defendant. Even if Defendant claims that in order for the documents to be contractual in nature they must have been signed by the City Manager, the allegations in Plaintiff's complaint cannot be refuted on a 12(b)(6) motion because Plaintiff has pled that such documents are contractual in nature, were provided to Plaintiff by Defendant, and

only an examination of the evidence at the Summary Judgment stage can delineate whether such documents are or are not sufficient in accordance with the ordinance.

In fact, throughout the complaint, Plaintiff repeatedly references the City Manager's intimate involvement with respect to Plaintiff's termination and employment and the City Manager was directly named as a defendant in this case. Plaintiff should have an opportunity to proceed with respect to this case so that the sufficiency of the Complaint and the referenced contractual documents can be tested by the fact finder.

Despite Defendant's stalwart reliance on the ordinances set forth above, pertinent language in the ordinance itself lends credence to Plaintiff's allegations as they reinforce Plaintiff's claims that the City Manager was intimately involved in both the creation of the contract which was breached as well as the Defendant's involvement in the breach. The language giving rise to such is clearly illustrated below.

No one other than the city manager may make any promise or assurance or enter into any contract, whether oral or written, express or implied, that is any way inconsistent with the policy set forth herein. Any promise, assurance or purported contract or agreement shall be invalid and not binding upon the city unless adopted, endorsed or agreed to in writing by the city manager.

Based on Defendant's own ordinance, all that is required is that the City Manager adopt or endorse the contractual documents in order for them to be contractual in nature. Although the ordinance allows the city manager to agree to such contract or agreement in writing, there is no requirement that he do such as the ordinance indicates that he can adopt or endorse a policy in order to make it contractual in nature. The ordinance does not require that such adoption or endorsement be agreed to in writing as that requirement only applies to agreements which must be in writing.

In the instant case, Plaintiff's contractual allegations cannot be refuted without a factual analysis into the extent that the policies and procedures were adopted or endorsed by the City Manager in accordance with the ordinance. Therefore, Defendant's allegations that Plaintiff's contract-based claims should fail at the 12(b)(6) stage must be dismissed and Plaintiff's well-pled Complaint should be allowed to proceed through the judicial process.

2. Plaintiff's Civil Conspiracy Claims are Well-Pled against the Individual Defendants

The tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct.App.1989). The difference between civil and criminal conspiracy is in criminal conspiracy, the gravamen of the offense is the agreement itself, whereas in civil conspiracy, the gravamen of the tort is the damage resulting to plaintiff from an overt act done pursuant to a common design. *Id.*; see also *Pye v. Estate of Fox*, 369 S.C. 555, 567-68, 633 S.E.2d 505, 511 (2006) ("The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se."). A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) rev'd on other grounds, 283 S.C. 155, 321 S.E.2d 602 (1984) quashed in part on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985). Moreover, because the quiddity of a civil conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action. *Vaught*, 300 S.C. at 209, 387 S.E.2d at 95. *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871, Court of Appeals of South Carolina, August 12, 2009.

In its memorandum, the Defendant has struggled to argue 1. That Plaintiff cannot maintain a civil conspiracy cause of action against his employer because he is an employee "at will", 2. That Plaintiff cannot maintain a cause of action for civil conspiracy against the individual defendants because he is a "public official" and 3. Plaintiff has failed to properly plead a cause of action for civil conspiracy.

With respect to Defendant's argument that Plaintiff is an employee "at will", Plaintiff has effectively fully refuted this argument in subpart 1 above. Plaintiff relies on such legal arguments against this claim.

With respect to Defendant's argument that Plaintiff cannot maintain a cause of action against the individual Defendants because he is a "public official", the Defendant's arguments are erroneous. The cases quoted by Defendant to include *Ross*, *Angus 1*, and *Angus 2*, (**Ross v. Life Ins. Co. of Virginia*, 273 S.C. 764, 259 S.E.2d 814 (S.C., 1979) and *Angus v. Burroughs & Chapin Co.*, 628 S.E.2d 261, 368 S.C. 167 (S.C., 2006)). Cumulatively the Defendant is correct based on these cases that a public official such as a police officer cannot maintain a cause of action against the public as a public official is answerable to the public the public is not considered to be a third-party interloper. *Angus v. Burroughs & Chapin Co.*, 628 S.E.2d 261, 368 S.C. 167 (S.C., 2006)). That is not the case here.

Specifically, Plaintiff has not brought a case against members of the general public such as was the case in *Angus 1* and *Angus 2*. He is not making a claim for civil conspiracy against a newspaper or public interest group as the plaintiff in that case, rather his civil conspiracy claims lie against individuals intimately connected to his employment with the power to directly affect his continued employment as well as his physical and emotional well-being. In the instant case, the individual defendants devastated him emotionally and are employees of the City. They are not

general members of the public as contemplated by the Defendant's quoted case and as such are perfectly able to be liable for civil conspiracy as pled in Plaintiff's well pled complaint.

With respect to Defendant's third argument that Plaintiff has failed to properly plead the second and third prong of the test for civil conspiracy specifically that the individual defendants conspired "for the purpose of injuring the plaintiff" and "caused plaintiff special damages", it is clear that Defendant's arguments must fail.

Plaintiff has specifically pled that the individual defendants' actions in conspiring was specifically to injure plaintiff. The purpose of the individual defendants' conspiracy was to cause harm to Plaintiff more so than his termination was designed to benefit Crosby. The specific allegations in the Complaint which give rise to this are:

27. Upon information and belief, Plaintiff was subsequently replaced by Joseph Crosby who is the boyfriend of Amy Kegler. Plaintiff is aware that Defendant's Kegler, Pederson, and Prock conspired and took affirmative steps to terminate Plaintiff in an effort to ensure that Joseph Crosby received his job despite the fact that Crosby is less qualified than Plaintiff and does not possess a college degree. **Defendants' actions have resulted in Plaintiff's termination from employment and Plaintiff incurring great physical and emotional distress.**

The allegations in Plaintiff's complaint with respect to Plaintiff's civil conspiracy claims are, at the very least, allegations which are best left to the purview of a jury rather than the Court on a Motion to Dismiss.

With respect to Defendant's argument that Plaintiff has failed to plead "special damages", the Defendant is, again, in error. In their memorandum the individual defendants have erroneously alleged that Plaintiff has failed to plead special damages. This allegation ignores the clear language in the Complaint. "[B]ecause the quiddity of a civil conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action. *Vaught*, 300 S.C. at 209, 387 S.E.2d at 95. *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871, Court of Appeals of South Carolina, August 12, 2009.

In its Motion, Defendant alleges that Plaintiff has based his civil conspiracy claim on the same allegations as other claims in Plaintiff's Complaint. A reading of Plaintiff's Complaint clearly indicates to the contrary as Plaintiff specifically indicates the basis of his conspiracy claim damages in Paragraph 55.

55. Defendant's civil conspiracy herein alleged has caused, continues to cause, and will cause Plaintiff to suffer special damages and substantial damages for pecuniary losses, embarrassment, humiliation, pain and suffering, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.

The damages alleged here are different from the other damages alleged in all other causes of action and special and germane to the act of the conspiracy against the Plaintiff. As a result, Plaintiff's Civil Conspiracy claim must be allowed to proceed and should not be dismissed at the 12(b)(6) juncture.

3. Plaintiff should have a right to amend his Complaint pursuant to SCRCP 15

It is Plaintiff's position that his Complaint conforms to the pleading requirements of the South Carolina Rules of Civil Procedure. If the Court decides that any part of Plaintiff's Complaint does not fully comport with these Rules, then the Plaintiff respectfully requests that he be granted leave to amend those portions of the Complaint.

The South Carolina Rules of Civil Procedure states in Rule 15(a):

(a) Amendments. A party may amend his pleading once as a matter of course at any time before or within 30 days after a responsive pleading is served or, if the pleading is one to which no responsive pleading is required and the action has not been placed upon the trial roster, he may so amend it at any time within 30 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within fifteen days after service of the named amended pleading, whichever period may be the longer, unless the court otherwise orders.

The Court dealt very specifically with this Rule in *Stanley v. Kirkpatrick*, 357 S.C. 169, 592 S.E.2d 296, Supreme Court of South Carolina, January 12, 2004. In that case, the Plaintiff

sought to amend his Complaint to add additional claims after two years had expired and the depositions had already been taken. The Supreme Court, giving a broad interpretation to the rule, found that the trial Court erred in denying Plaintiff's Motion to Amend holding that the City was not prejudiced because no new depositions would have to be taken and the City was essentially on notice of the Plaintiff's claims, since they arose out of the same facts. *Stanley v. Kirkpatrick*, 357 S.C. 169, 592 S.E.2d 296, Supreme Court of South Carolina, January 12, 2004

In the instant case, the Defendant will suffer no prejudice with regard to allowing Plaintiff to Amend his Complaint as neither Plaintiff nor Defendant have engaged in any extensive Discovery outside of written discovery nor taken any Depositions in this case. In addition, justice requires that Plaintiff be granted leave to amend his Complaint to avoid the dismissal of several of his Causes of Action.

IV. CONCLUSION

For the reasons stated herein, the Plaintiff in this case has pleaded specific facts for which relief may be granted. Plaintiff, respectfully requests this Court to reconsider its Order dismissing with Plaintiff's Complaint and, alternatively, allow Plaintiff to amend his Complaint pursuant to Rule 15.

Accordingly, for the foregoing reasons, Plaintiff's claims should succeed as a matter of law, and the Court should deny the Defendant's Motion to Dismiss.

[Signature on Following Page]

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ATTORNEYS FOR THE PLAINTIFF

August 17, 2018

ELECTRONICALLY FILED - 2018 Aug 17 4:38 PM - Horry - COMMON PLEAS - CASE#2017CP2605913

Def's Sept 6, 2018 response to motion to reconsider

STATE OF SOUTH CAROLINA)	
)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)	
)	
John Kennedy,)	C.A. No. 2017-CP-26-05913
)	
Plaintiff,)	
)	DEFENDANTS' RESPONSE TO
vs.)	MOTION TO RECONSIDER
)	
City of Myrtle Beach Police Department,)	
and Amy Prock, Angela Kegler, and John)	
Pederson (In their Individual Capacities),)	
)	
Defendants.)	

Introduction

Plaintiff argues that he is entitled to prove that he had a contract for more than at-will employment as an employee of the City of Myrtle Beach (“the City”), asserting that his contract was based on more than just the City’s employee handbook (“the handbook”) and that the City Manager could verbally offer him more than at-will employment. He also asserts that he has properly pled a claim of civil conspiracy. His arguments are unavailing.

Standard for Motions for Reconsideration

Since October 1, 2015, the Fifteenth Judicial Circuit has operated under the Civil Motions Pilot Program adopted by Order (“the Order”) of the South Carolina Supreme Court. *In re Civil Motions Pilot Program*, 414 S.C. 162, 163, 777 S.E.2d 546 (2015). The Order mandates:

A written motion shall be filed and served with a supporting memorandum of law. A supporting memorandum of law is not required if a full explanation of the motion is contained within the motion and a memorandum would serve no useful purpose.

Id. at ¶ 1 (emphasis added). That Order also requires that “an opposing memorandum of law shall be filed and served *not later than 30 days after service of the initial motion.*” *Id.* at ¶ 2 (emphasis added).

Defendants filed and served their motion and memorandum on June 28, 2018. Plaintiff neither filed nor served a memorandum in opposition within the time set in the Order. Instead, the first memorandum filed by Plaintiff was in support of his motion for reconsideration after this court’s order dismissing this action. It is well-settled in South Carolina that “[a] party cannot use a motion to reconsider, alter[,] or amend a judgment to present an issue that could have been raised prior to the judgment but was not.” *Tallent v. S.C. Dep't of Transp.*, 363 S.C. 160, 165, 609 S.E.2d 544, 546 (Ct.App.2005) *rev'd sub nom. on other grounds, Hardin v. S.C. Dep't of Transp.*, 371 S.C. 598, 641 S.E.2d 437 (2007). Plaintiff’s entire argument is an attempt “to present an issue that could have been raised prior to the judgment” and violates settled law. It should be disregarded and the motion to reconsider denied.

Assuming, *arguendo*, that the court should consider Plaintiff’s arguments, those arguments are without merit.

Argument

- I. Plaintiff was an at-will employee by City Ordinance and by statute, as the City’s ordinance merely reflects state law as to council-manager municipalities.

Plaintiff asserts that certain unidentified polices or procedures or verbal assurances of the City manager may have altered his at-will employment status. The plaintiff in *Lamond v. City of Myrtle Beach*, 1991 WL 433750, at *1 (S.C. Com. Pl. Oct. 25, 1991), just as here, asserted a claim for breach of an employment contract with the City. As set forth in Defendants’ initial motion, the City operates under a council-manager form of government. *Todd v. Smith*, 305 S.C. 227, 231, 407 S.E.2d 644, 646 (1991) (“the City of Myrtle Beach has elected to adopt the council/manager form

of government”). Hiring and firing authority in a council-manager form of government rests in the City Manager. *Dew v. City of Florence*, 279 S.C. 155, 161, 303 S.E.2d 664, 667 (1983) (citing South Carolina Code § 5-13-90 which “allows the City Manager in a council-manager form of government to dismiss any City employee ‘for the good of the municipality’”).

The *Lamond* court noted that under S.C. Code Ann. Section 5-13-90(1), a city manager “shall . . . when necessary for the good of the municipality, remove any appointive officer or employee of the municipality.” The court then stated:

Every court that has considered the issue has held that this statutory provision means that employees in municipalities with the council-manager form of government serve at the will and pleasure of the City. *Dew v. City of Florence*, 279 S.C. 155, 161-162, 303 S.E.2d 664 (1983); *Bunting v. City of Columbia*, 639 F.2d 1090, 1093-1094 (4th Cir. 1981); *Mills v. Leath*, 709 F.Supp. 671, 674 (D.S.C. 1981); *Bane v. City of Columbia*, 480 F.Supp. 34, 37-38 (D.S.C. 1979).

Lamond, supra.; accord, *Bordner v. Town of Atl. Beach*, 2017 WL 1190874, at *5 (D.S.C. Mar. 31, 2017) (interpreting § 5-13-90(1) and holding that “[c]ourts have interpreted this statute to provide for at-will employment of municipal employees”). The court in *Lamond* rejected the plaintiff’s arguments that he could have had a contract based on an oral assurance because “[a]ny such assurance . . . was contrary to Section 5-13-90(1), S.C. Code Ann., as construed by the courts and is therefore unenforceable.” *Id.* And while, for the sake of discussion, the *Lamond* court considered whether the City’s policies or procedures were even capable of altering a City employee’s at-will status, it ultimately returned to the fact that “state statutory law and case law support the conclusion that employees of the city of Myrtle Beach are at-will employees.” *Id.*

Further, Plaintiff’s strained reading of the City’s ordinance is ineffective. According to Plaintiff, the ordinance phrase, “Any promise, assurance or purported contract or agreement shall be invalid and not binding upon the city unless adopted, endorsed or agreed to in writing by the

city manager,” means that “all that is required [to alter a City employee’s at-will status] is that the City Manager adopt or endorse the contractual documents in order for them to be contractual in nature.” Plf. Mem. P. 5. In other words, Plaintiff believes that his at-will employment could be altered by a writing *or any other act of the City manager*, arguing that “[t]he ordinance does not require that such adoption or endorsement be agreed to in writing as that requirement only applies to agreements which must be in writing.” *Id.* Such a reading is nonsensical and contradicts the clear intent of the ordinance that “[t]he city has a policy that all employment status is ‘at will.’” Myrtle Beach Code of Ordinances § 2-81(b). Such contradiction cannot stand. *Vulcan Materials Co. v. Greenville Cty. Bd. of Zoning Appeals*, 342 S.C. 480, 490, 536 S.E.2d 892, 897 (Ct. App. 2000) (“As with statutes, the lawmakers’ intent embodied in an ordinance ‘must prevail if it can be reasonably discovered in the language used.’”), *quoting Charleston Cty. Parks & Recreation Comm’n v. Somers*, 319 S.C. 65, 67, 459 S.E.2d 841, 843 (1995)). Such a reading also contradicts § 5-13-90(1) which is “unambiguous: [City] employees are at-will employees.” *Bordner v. Town of Atl. Beach*, 2016 WL 11200713, at *7 (D.S.C. Dec. 28, 2016), *report and recommendation adopted*, 2017 WL 1190874.

State law, specifically § 5-13-90(1), mandates that City employees are employed at-will. City Ordinance § 2-81(b) reflects that same principle. In fact, to the extent the City’s ordinance violated the mandates of § 5-13-90(1), a reading Plaintiff is asking this court to give it, the ordinance would be void. Thus Plaintiff was employed at-will as a matter of law. *Dew, supra; Bordner, supra; Lamond, supra; Bunting, supra; Mills, supra; Bane, supra*. Accordingly, he cannot assert claims for breach of contract or breach of contract accompanied by fraud. *Allegro, Inc. v. Scully*, 418 S.C. 24, 35, 791 S.E.2d 140, 146 (2016), *reh’g denied* (Oct. 26, 2016) (“absent some alteration in at-will employment status” there was “no contract on which Allegro

can predicate its claims of breach of contract and breach of contract accompanied by a fraudulent act"); *see also*, *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, 769, 259 S.E.2d 812, 813 (1979) ("The termination of employment at will by either party does not normally give rise to a cause of action for breach of contract.").

II. Because Plaintiff was an at-will employee he cannot sue City Manager John Pedersen for civil conspiracy.

As set forth above, Plaintiff was an at-will employee as a matter of law. He is precluded from suing Pedersen, the City Manager empowered by S.C. Code § 5-13-90(1) to terminate Plaintiff's employment. *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (2004) (dismissing former at-will county employee's civil conspiracy claim brought against county council members in individual capacity who voted to terminate plaintiff's employment because they cannot be sued for doing what the law gives them the right to do) ("Angus I"), *affirmed in pertinent part*, *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 628 S.E.2d 261, 262 (2006) ("Angus II").

III. Because Plaintiff, a police officer, was also an at-will public official, he cannot sue anyone for civil conspiracy relating to the termination of his employment.

In Angus II, the court rejected a conspiracy claim brought against the county council members who voted to terminate the at-will plaintiff's employment, as well as a newspaper and a developer. The court held:

In our democratic society, a public official is answerable to the public; members of the public are not third-party interlopers. Because of Angus's status as a public official, we conclude her action for civil conspiracy cannot be maintained against any of these defendants.

Id. at 262. The court did not limit its holding to a particular class of "member of the public."

Plaintiff incorrectly argues that because the conspiracy defendants are City employees, the

Court's holding in Angus II is inapplicable. However, nothing in Angus II or the cases that followed recognize such a limitation.

The court in *Reed v. Town of Williston*, 2010 WL 1409427, at *10 (D.S.C. Feb. 26, 2010), cited Angus II and correctly stated that “[u]nder South Carolina law a public official who is employed at-will is prohibited from suing *anyone* for a civil conspiracy” relating to the termination of their employment. *Id.*, *report and recommendation adopted*, 2010 WL 1409425 (D.S.C. Mar. 31, 2010). And in *Brown v. City of Columbia*, 2011 WL 3654472, at *1 (D.S.C. June 16, 2011), *report and recommendation adopted*, 2011 WL 3654468 (D.S.C. Aug. 19, 2011), the court cited Angus II and held, “[An at-will] plaintiff who is a public official cannot maintain a civil conspiracy claim against non-employer third parties.”

In *Angus*, the plaintiff sought a judgment against a newspaper and a private business. The Court rejected that claim because the plaintiff was an at-will public official. The conspiracy defendants here are citizens of Horry County sued in their individual capacities. Such suits are, as a matter of law, suits against members of the public for they seek to impose personal liability against the personal assets of these defendants. The fact that these Horry County citizens are City employees is wholly irrelevant for purposes of an Angus II analysis because “a public official who is employed at-will is prohibited from suing *anyone* for a civil conspiracy. . . .” *Reed, supra*. They are also “non-employer third parties,” *Brown, supra*, because in their individual capacities they did not employ Plaintiff. Accordingly, under Angus II, Plaintiff's civil conspiracy claim fails because he was an at-will public official.

IV. Plaintiff's argument that he has pled a valid conspiracy claim fails because the object of the conspiracy was to help a third party, not harm Plaintiff, and because there is nothing special about the alleged damages he suffered.

Plaintiff argues that the purpose of the conspiracy “was to cause harm to Plaintiff more so than his termination was designed to benefit Crosby.” Plf. Mem. P. 8. However, the citation he then provides to his own Complaint proves otherwise:

27. Upon information and belief, Plaintiff was subsequently replaced by Joseph Crosby who is the boyfriend of Amy Kegler. Plaintiff is aware that Defendant’s Kegler, Pederson [sic], and Prock conspired and took affirmative steps to terminate Plaintiff *in an effort to ensure that Joseph Crosby received his job* despite the fact that Crosby is less qualified than Plaintiff and does not possess a college degree. Defendants’ actions have *resulted* in Plaintiff’s termination from employment and Plaintiff incurring great physical and emotional distress.

Id. (emphasis added). Thus, by Plaintiff’s own admission the object of the conspiracy was to create a vacancy for Crosby. The harm to Plaintiff was a result, or by-product, of that object because he had to lose his job for Crosby to get it. Such a civil conspiracy claim fails because the alleged intent was not to harm Plaintiff but to help Crosby. *See Bivens v. Watkins*, 313 S.C. 228, 437 S.E.2d 132, 136 (Ct. App. 1993) (affirming trial court’s finding that conspiracy claim failed because there was a “complete lack of evidence to establish that the purpose of the business of the parties was anything other than profit motivated” and was not intended to harm the plaintiff); *Reed v. Aiken Cty.*, 2010 WL 4238848, at *6 (D.S.C. Oct. 21, 2010) (where only evidence was that the object of the conspiracy was to protect one of plaintiff’s subordinates from him “[p]laintiff has not provided the court with sufficient evidence of an intent to harm” plaintiff).

Further, Plaintiff’s purported special damages are not special at all. Plaintiff claims he need only allege damages that “are different from the other damages alleged in all other causes of action.” Plf. Mem. P. 9. That is not the standard, but even if it was he has not met it.

Plaintiff claims he was terminated due to a conspiracy. He asserts that the damages he sustained from that conspiracy are that he: (1) “suffered a loss of earning capacity and the loss of his job” [Complaint ¶ 54]; (2) “suffer[ed] special damages and substantial damages for pecuniary losses, embarrassment, humiliation, pain and suffering, mental anguish, loss of enjoyment of life, and other non-pecuniary losses” [*Id.* ¶ 55]; (3) is “entitled to injunctive relief and/or civil damages suffered a loss of the opportunity to be promoted and suffered the loss of his job resulting in diminished earning capacity, diminished benefits, and diminished retirement” [*Id.* ¶ 56]; (4) is “entitled to injunctive relief and/or civil damages, back pay, and front pay” [*Id.* ¶ 57]; and “suffered a loss of the opportunity to be promoted and suffered the loss of his job resulting in diminished earning capacity, diminished benefits, and diminished retirement [and] is entitled to a judgment for actual and punitive damages.” *Id.* ¶ 58.

The damages alleged here are “‘exactly those damages that one would expect to flow from’ the alleged conspiracy to terminate him.” *James v. Pratt & Whitney*, 2005 WL 3440868, at *3 (D.S.C. Dec. 14, 2005) (finding plaintiff failed to allege special damages arising from a conspiracy to terminate his employment where he alleged only “damages for lost wages, lost benefits, consequential economic damages, emotional distress, and injury to reputation”). “Plaintiff merely alleges that he has suffered a myriad of damages ranging from lost wages to intentional infliction of emotional distress but has failed to point to actual special damages that he has suffered as a result of defendant's alleged actions.” *Id.* at *5.

Moreover, even if mere differentiation in damages between causes of action could somehow make them special, in his prayer for damages as to his claims of “breach of contract, breach of contract with fraudulent intent, and civil conspiracy” he collectively

seeks a judgment for “mental anguish, pain and suffering, harm to Plaintiff's economic opportunities, any back pay, front pay, travel hardships and travel expenses, and future earnings with cost of living adjustments, prejudgment interest, fringe benefits, and retirement benefits, reinstatement to his employment. . . .” Complaint P. 14 at ¶ 4. The only difference he offers as to the conspiracy claim is that he seeks “punitive and special damages.” *Id.* Merely invoking the phrase “special damages” is insufficient. “[S]pecial damages are those damages which are of a relatively unusual kind and which, without specific notice to the adversary, may not be understood to be part of the claim.” *James v. Pratt & Whitney*, 2005 WL 3440868, at *4 (D.S.C. Dec. 14, 2005). Where a party has “failed to plead with specificity any special damages,” a civil conspiracy claim necessarily fails. *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 650–51, 780 S.E.2d 263, 272 (Ct. App. 2015) (“circuit court properly dismissed Appellant's civil conspiracy claim against Individual Respondents” for lack of specificity as to special damages).

Plaintiff has neither differentiated between the damages as to his causes of action nor has he identified anything particularly special about the damages he claims to have sustained as a result of the alleged conspiracy. He is required to do both. Thus, his claim fails.

V. Amendment of the Complaint would be futile.

Plaintiff was an at-will employee and public official who cannot maintain any of the claims he asserts. Thus, any amendment of the Complaint would be futile. Plaintiff's request to amend should be denied. *Health Promotion Specialists, L.L.C. v. S.C. Bd. of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 812–13 (2013) (affirming the circuit court's denial of a party's motion to amend its complaint when amendment would be futile).

Conclusion

Plaintiff failed to comply with requirements of the Civil Motions Pilot Program established by the South Carolina Supreme Court. Only after judgment has he presented any response to Defendants' motion to dismiss. His arguments should be rejected by the court because they are both untimely and without merit. Defendants respectfully request that Plaintiff's motion for reconsideration be denied.

s/Derwood L. Aydlette III
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ATTORNEYS FOR DEFENDANTS

September 6, 2018

Certificate of Service

I hereby certify that on the above date, I caused to be served on counsel of record a true and correct copy of this document by mail and efileing.

s/Derwood L. Aydlette III
GIGNILLIAT, SAVITZ & BETTIS, L.L.P.

Plaintiff's Sept 18, 2018 Reply

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
)

C/A No.: 2017-CP-26-05913

John Kennedy,

Plaintiff,

vs.

) **PLAINTIFF'S REPLY IN OPPOSITION**
) **TO DEFENDANTS' RESPONSE TO**
) **PLAINTIFF'S MOTION FOR**
) **RECONSIDERATION**
)

City of Myrtle Beach Police Department,
and Amy Prock, Angela Kegler, and John
Pedersen (In their Individual Capacities),)

Defendants.

I. INTRODUCTION

Plaintiff, John Kennedy, by and through his undersigned attorneys respectfully submits this Memorandum of Law in Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion to Reconsider. For the reasons set forth in Plaintiff's Motion to Reconsider and as stated below in this Reply, Defendants' Motion to Dismiss should be denied and Plaintiff's Motion to Reconsider should be granted.

II. LEGAL ARGUMENT

A. Defendants' Argument that this Court cannot vacate its prior decisions should be rejected.

The Defendants' Response to Plaintiff's Motion to Reconsider begins by questioning the authority and power of this Court to render decisions based upon considerations of judicial economy and fundamental fairness to the parties as it relates to your Honor allowing Plaintiff's Motion for Reconsideration to be heard.

The decision of the Court to initially dismiss this case **without prejudice** gives credence to the necessity that Plaintiff's Motion to Reconsider be reviewed. The wisdom of this Court in

doing such potentially saves all parties and the Court the requirement to revisit these arguments under the purview of a subsequent Complaint. The jurisprudence of this Court in this regard cannot be disputed despite Defendants' erroneous and futile attempts to do such. This Court certainly has the power to alter, amend, vacate, or affirm its own decisions as it sees fit to do so. Defendants' arguments that this Court cannot do so shows a fundamental misunderstanding regarding the authority of this Court.

This Court specifically stated that it would entertain, on the briefs, a reconsideration of its decision to dismiss this action. This is not a reconsideration after a trial or summary judgment, but rather it is a reconsideration of a Motion to Dismiss without prejudice. The Defendant apparently fails to recognize the distinction. Unlike the cases erroneously cited by the Defendant, there was no decision on the merits in this case. This was a Motion to Dismiss as opposed to one for Summary Judgment; the Court can certainly reconsider its decision; no actual judgment or decision on the merits was rendered. The Defendant oversteps its bounds by asserting that this Court cannot do so. Plaintiff's Motion for Reconsideration should therefore be granted.

B. Defendants' argument that Plaintiff's clear reading of the Municipalities' Ordinances is strained and that SC Statutes bar Plaintiff's claims must fail.

The Defendants' argument that Plaintiff's contract claims are barred by South Carolina Statute, specifically those provisions in Section 5-13-90 which deal with roles and responsibilities of a City Manager is nonsensical. The Defendants' entire argument on this issue implies that Plaintiff must be an employee at will based on the statute, but its clear even from Defendants' own ordinances that the City Manager has the authority to enter into contractual relationships with employees. "No one **other than the city manager** may make any promise or assurance or enter into any contract, whether oral or written, express or implied, that is any way inconsistent with the

policy set forth herein.” City Ordinances Section 2-81(b). The Defendant cannot have it both ways. Even if the default status of City Employees is non-contractual (as it generally is in SC), that status can be altered by the City Manager. This is the argument espoused by Plaintiff. Defendants’ argument that South Carolina law prohibits contracts within municipalities must, therefore, fail.

As stated in Plaintiff’s original motion for reconsideration, despite Defendants’ stalwart reliance on the ordinances set forth above, pertinent language in the ordinance itself lends credence to Plaintiff’s allegations as they reinforce Plaintiff’s claims that the City Manager was intimately involved in both the creation of the contract which was breached as well as the Defendants’ involvement in the breach. The language giving rise to such is clearly illustrated below.

“No one other than the city manager may make any promise or assurance or enter into any contract, whether oral or written, express or implied, that is any way inconsistent with the policy set forth herein. Any promise, assurance or purported contract or agreement shall be invalid and not binding upon the city unless adopted, endorsed or agreed to in writing by the city manager.” City Ordinances Section 2-81

In Plaintiff’s argument that, based on Defendants’ own ordinance, all that is required is that the City Manager adopt or endorse the contractual documents in order for them to be contractual in nature. There is no requirement that he do such as the ordinance indicates that he can adopt or endorse a policy in order to make it contractual in nature. The ordinance does not require that such adoption or endorsement be agreed to in writing as that requirement only applies to agreements which must be in writing. Defendant declares in its Response that this reading is incorrect, but it is Plaintiff’s position that this difference in interpretation is sufficient to establish that this action should not be dismissed at this juncture and that Plaintiff should be allowed to participate in discovery and to depose the witnesses in this case to support his reading of the statute.

A factual analysis into the extent that the policies and procedures were adopted or endorsed by the City Manager in accordance with the ordinance is required. Therefore, Defendants' allegations that Plaintiff's contract-based claims should fail at the 12(b)(6) stage must be dismissed and Plaintiff's well-pled Complaint should be allowed to proceed through the judicial process. Plaintiff's Motion for Reconsideration should therefore be granted.

C. Plaintiff can sue the individual defendants for Civil Conspiracy

Defendants' argument that Plaintiff's Civil Conspiracy claim must fail is based initially on Defendants' erroneous argument that Plaintiff was an at-will employee. Thus, for the reasons stated above regarding Plaintiff's contract claims, this argument fails.

As it relates to Defendants' argument that a public official cannot maintain a Civil Conspiracy claim against non-employer third parties, the Plaintiff stands by his arguments raised in his Motion for Reconsideration. The Defendants' rehashing of their initial memorandum does not change that. Defendants' arguments that *Angus I* and *Angus 2* bar Plaintiff's claims as a public official against his fellow employees simply fails as such employees are not members of the general public (i.e. public interest groups) as contemplated by the *Angus* cases. *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (2004) and *Angus v. Burroughs & Chapin Co.*, 398 S.C. 167, 628 S.E.2d 261, 262 (2006) ("Angus II"). These employees had direct decision-making authority due to their acts and omissions and are thus ripe for Civil Conspiracy claims which affect Plaintiff's contractual employment with Defendant City. Plaintiff's Motion for Reconsideration should therefore be granted.

D. Plaintiff has pled Special Damages

Defendant states in its memorandum that there is nothing special about Plaintiff's damages and that Defendants' conspiracy was not to cause harm to Plaintiff. It is quite ridiculous for

Defendant to allege that Plaintiff's case is not centered around the harm caused to him. This flies in face of the entire Complaint.

The specific allegations in the Complaint which demonstrates this is:

27. Upon information and belief, Plaintiff was subsequently replaced by Joseph Crosby who is the boyfriend of Amy Kegler. Plaintiff is aware that Defendants' Kegler, Pederson, and Prock conspired and took affirmative steps to terminate Plaintiff in an effort to ensure that Joseph Crosby received his job despite the fact that Crosby is less qualified than Plaintiff and does not possess a college degree. **Defendants' actions have resulted in Plaintiff's termination from employment and Plaintiff incurring great physical and emotional distress.**

The Defendants' argument that this language does not support Plaintiff's position that his Complaint is centered around harm caused to him clearly fails.

The allegations in Plaintiff's complaint with respect to Plaintiff's civil conspiracy claims are, at the very least, allegations which are best left to the purview of a jury rather than the Court on a Motion to Dismiss.

As it relates to Defendants' argument that Plaintiff's Civil Conspiracy does not result in an allegation of special damages to Plaintiff, Plaintiff's Complaint states:

55. Defendants' civil conspiracy herein alleged has caused, continues to cause, and will cause Plaintiff to suffer special damages and substantial damages for pecuniary losses, embarrassment, humiliation, pain and suffering, mental anguish, loss of enjoyment of life, and other non-pecuniary losses.

The damages alleged here are different from the other damages alleged in all other causes of action and special and germane to the act of the conspiracy against the Plaintiff. As a result, Plaintiff's Civil Conspiracy claim must be allowed to proceed and should not be dismissed at the 12(b)(6) juncture as Plaintiff has pled special damages. Plaintiff's Motion for Reconsideration should therefore be granted.

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III. CONCLUSION

Plaintiff reasserts and requests that for the above reasons, Plaintiff's Motion for Reconsideration be granted and that this case be immediately placed back upon the active roster of cases in this jurisdiction.

Respectfully submitted,

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September 18, 2018

Defendant's Feb 28, 2019 Memo in Support of Motion to Dismiss

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

John Kennedy,)

Plaintiff,)

vs.)

City of Myrtle Beach Police Department,)
and Amy Prock, Angela Kegler, and John)
Pederson (In their Individual Capacities),)

Defendants.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2017-CP-26-05913

**DEFENDANTS' MEMORANDUM
IN SUPPORT OF
MOTION TO DISMISS**

This is an employment law action alleging breach of contract, breach of contract accompanied by fraud, and civil conspiracy. Plaintiff is a former police officer who was terminated by the City. The City has filed a motion to dismiss. This memorandum is in support of that motion.

I. Plaintiff's claims fail because he was an at-will employee as a matter of law.

Plaintiff asserts that certain unidentified polices or procedures or verbal assurances of the City manager may have altered his at-will employment status. What those procedures or assurances are is irrelevant because as a matter of law he could only have been an at-will City employee.

The City operates under a council-manager form of government. *Todd v. Smith*, 305 S.C. 227, 231, 407 S.E.2d 644, 646 (1991) ("the City of Myrtle Beach has elected to adopt the council/manager form of government"). Hiring and firing authority in a council-manager form of government rests in the City Manager under S.C. Code § 5-13-90(1). *Dew v. City of Florence*, 279 S.C. 155, 161, 303 S.E.2d 664, 667 (1983) (citing South Carolina Code § 5-13-90(1) which "allows the City Manager in a council-manager form of government to dismiss any City employee

‘for the good of the municipality’”). Every court that has considered § 5-13-90(1) has held that employees who work in council-manager municipalities are employed at-will.

The plaintiff in *Lamond v. City of Myrtle Beach*, 1991 WL 433750, at *1 (S.C. Com. Pl. Oct. 25, 1991), asserted a claim for breach of an employment contract against the City, just as here. The *Lamond* court noted that under S.C. Code Ann. Section 5-13-90(1), a city manager “shall . . . when necessary for the good of the municipality, remove any appointive officer or employee of the municipality.” The court then stated:

Every court that has considered the issue has held that this statutory provision means that employees in municipalities with the council-manager form of government serve at the will and pleasure of the City. *Dew v. City of Florence*, 279 S.C. 155, 161-162, 303 S.E.2d 664 (1983); *Bunting v. City of Columbia*, 639 F.2d 1090, 1093-1094 (4th Cir. 1981); *Mills v. Leath*, 709 F.Supp. 671, 674 (D.S.C. 1981); *Bane v. City of Columbia*, 480 F.Supp. 34, 37-38 (D.S.C. 1979).

Lamond, supra.; accord, Bordner v. Town of Atl. Beach, 2017 WL 1190874, at *5 (D.S.C. Mar. 31, 2017) (interpreting § 5-13-90(1) and holding that “[c]ourts have interpreted this statute to provide for at-will employment of municipal employees”). The *Lamond* court rejected the plaintiff’s arguments that he could have had a contract based on an oral assurance because “[a]ny such assurance . . . was contrary to Section 5-13-90(1), S.C. Code Ann., as construed by the courts and is therefore unenforceable.” *Id.* And while, for the sake of discussion, the *Lamond* court considered whether the City’s policies or procedures were even capable of altering a City employee’s at-will status, it ultimately returned to the fact that “state statutory law and case law support the conclusion that employees of the city of Myrtle Beach are at-will employees” as a matter of law. *Id.* Thus, as a matter of state law, § 5-13-90(1) mandates that City employees are employed at-will. *See also, Mills, supra* (“Courts have consistently interpreted [§ 5-13-90(1)] as providing only for at-will employment of municipal employees.”), *citing Bunting*, 639 F.2d at

1093-94 (under § 5-13-90(1) "city employees . . . hold their positions at the will and pleasure of the city").

City Ordinance § 2-81(b) merely reflects the at-will principle established in § 5-13-90(1).

City of Myrtle Beach Code of Ordinances Section 2-81(a) provides, in pertinent part:

For the purpose of establishing general operational and administrative policies, procedures and regulations regarding employment, the manager may, from time to time within his discretion, promulgate a handbook for employees and may present the handbook for council's review. If promulgated, the handbook shall reflect the overall legislative policies set forth herein.

Thus, the City's employment "policies, procedures and regulations" are found in the City's handbook. Those policies must be in accordance with the legislative policies set forth in the City's Code of Ordinances and with § 5-13-90(1). In the next subpart, the City establishes at-will employment as its official employment policy. City of Myrtle Beach Code of Ordinances Section 2-81(b) provides:

The city has a policy that all employment status is "at will", with the exception of judges under the unified court system. "At will" employment recognizes the right of the employee to resign at any time without providing a reason or explanation to the organization. "At will" employment also recognizes the right of the city to terminate employment at any time without providing a reason or explanation to the employee. At will employment is terminable by either party at any time, for any reason or for no reason at all. Nothing in the manager's personnel handbook can change the at-will status of employment as set forth herein, or create an expectation of a contract or continued employment on the part of any employee. No one other than the city manager may make any promise or assurance or enter into any contract, whether oral or written, express or implied, that is any way inconsistent with the policy set forth herein. Any promise, assurance or purported contract or agreement shall be invalid and not binding upon the city unless adopted, endorsed or agreed to in writing by the city manager.

Id. (emphasis added). Thus, as a matter of law, City employees are employed at-will because all of the City's employment policies and procedures must be set forth in its handbook, which handbook must reflect the City's policy of at-will employment as a matter of law.

Plaintiff, a former City police officer, asserts three causes of action. The first two causes of action – breach of contract and breach of contract with fraudulent intent – require the existence of more than an at-will contract as an element of the cause of action. Our Supreme Court has made it clear that where “there is nothing to suggest this was anything other than an at-will relationship,” there is “no contract on which [Plaintiff] can predicate [hi]s claims of breach of contract and breach of contract accompanied by a fraudulent act.” *Allegro, Inc. v. Scully*, 418 S.C. 24, 35, 791 S.E.2d 140, 146 (2016), *reh'g denied* (Oct. 26, 2016); *Hudson v. Zenith Engraving Co.*, 273 S.C. 766, 769, 259 S.E.2d 812, 813 (1979) (“The termination of employment at will by either party does not normally give rise to a cause of action for breach of contract.”).

Plaintiff alleges that he had “contractual rights pursuant to Defendant's employment handbook and other contractual policies and procedures provided to Plaintiff by Defendant.” [Complaint ¶ 20] By state law, that cannot be the case since § 5-13-90(1) establishes at-will employment as a matter of law in the City, as well as in other council-manager municipalities. Plaintiff's claim that he had more than an at-will contract is “contrary to Section 5-13-90(1), S.C. Code Ann., as construed by the courts and is therefore unenforceable.” *Lamond, supra*. Further, City Code § 2-81 must be read as in compliance with § 5-13-90(1), or it too is unenforceable and void. *Lamond*. Thus, Plaintiff has not alleged a viable claim that he was more than an at-will employee and his first two causes of action fail as a matter of law.

Plaintiff's third cause of action is for civil conspiracy against the individual defendants. First, neither the City, nor the decisionmaker who terminated Plaintiff's employment, are subject

to suit for civil conspiracy because Plaintiff was an at-will employee. *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (2004) (dismissing former at-will county employee's civil conspiracy claim brought against county council members in individual capacity who voted to terminate plaintiff's employment because they cannot be sued for doing what the at-will doctrine gives them the right to do) ("Angus I") (affirmed in pertinent part by *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 628 S.E.2d 261, 262 (2006) ("Angus II")); *accord, Brailsford v. Wateree Cmty. Action, Inc.*, 135 F. Supp. 3d 433, 450 (D.S.C. 2015) (Angus I stands for the proposition "that an at-will employee cannot sue his employer, or anyone acting within his authority on behalf of his employer, for civil conspiracy arising out of his termination") (quoting *Faile v. Lancaster Cnty.*, 2013 WL 786447 at *5 (D.S.C. Mar. 1, 2013) ("civil conspiracy claim by an at-will employee against an employer arising out of the employee's termination is barred")). Accordingly, Plaintiff cannot sue John Pedersen, the City Manager empowered by S.C. Code § 5-13-90(1) to terminate Plaintiff's employment. *Angus I*.

Moreover, as a police officer, Plaintiff was a public official. In *Angus II*, the court rejected a conspiracy claim brought against the county council members who voted to terminate the at-will plaintiff's employment, as well as a newspaper and a developer who complained about the plaintiff's performance. The court held:

In our democratic society, a public official is answerable to the public; members of the public are not third-party interlopers. Because of Angus's status as a public official, we conclude her action for civil conspiracy cannot be maintained against any of these defendants.

Id. at 262. The court did not limit its holding to a particular class of "member of the public."

Thus, the fact that the other defendants are also City employees is of no moment.

The court in *Reed v. Town of Williston*, 2010 WL 1409427, at *10 (D.S.C. Feb. 26, 2010), cited Angus II and correctly stated that “[u]nder South Carolina law a public official who is employed at-will is prohibited from suing *anyone* for a civil conspiracy” relating to the termination of their employment. *Id.* (emphasis added), *report and recommendation adopted*, 2010 WL 1409425 (D.S.C. Mar. 31, 2010). And in *Brown v. City of Columbia*, 2011 WL 3654472, at *1 (D.S.C. June 16, 2011), *report and recommendation adopted*, 2011 WL 3654468 (D.S.C. Aug. 19, 2011), the court cited Angus II and held, “[An at-will] plaintiff who is a public official cannot maintain a civil conspiracy claim against non-employer third parties.”

In Angus II, the plaintiff sought a judgment against a newspaper and a developer. The Court rejected that claim because the plaintiff was an at-will public official. The conspiracy defendants here are citizens of Horry County sued in their individual capacities. Such suits are, as a matter of law, suits against members of the public for they seek to impose personal liability against the personal assets of these defendants. The fact that these Horry County citizens are City employees is wholly irrelevant for purposes of an Angus II analysis because “a public official who is employed at-will is prohibited from suing anyone for a civil conspiracy. . . .” *Reed, supra*. They are also “non-employer third parties,” *Brown, supra*, because in their individual capacities they did not employ Plaintiff. Accordingly, under Angus II, Plaintiff’s civil conspiracy claim fails because he was employed as an at-will public official.

II. Plaintiff’s civil conspiracy claim also fails because he has not properly alleged the elements of such a claim.

Plaintiff’s claim further fails because he has not properly alleged the elements of a claim of civil conspiracy. “To prove a claim for civil conspiracy, a plaintiff must show: ‘(1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage.’” *McCrief v. Wachovia Bank*, 2013 WL 6284435, at *4

(D.S.C. Dec. 4, 2013) (quoting *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871, 874 (Ct. App. 2009). Plaintiff's allegations fail at the second and third prongs.

Plaintiff has failed to properly allege that the purported conspirators so conspired for the purpose of injuring him. Rather he alleges in his Complaint:

27. Upon information and belief, Plaintiff was subsequently replaced by Joseph Crosby who is the boyfriend of Amy Kegler. Plaintiff is aware that Defendants Kegler, Pederson, and Prock conspired and took affirmative steps to terminate Plaintiff *in an effort to ensure that Joseph Crosby received his job* despite the fact that Crosby is less qualified than Plaintiff and does not possess a college degree.

52. Defendants' [sic] conspired to have Plaintiff terminated and to deny Plaintiff a Grievance Hearing *so that Kegler's less qualified boyfriend could be hired into Plaintiff's position.*

[Complaint ¶¶ 27, 52 (emphasis added)] Thus, Plaintiff's assertion is that he was terminated to benefit Crosby, not to harm Plaintiff. Thus his conspiracy claim fails. *See Bivens v. Watkins*, 313 S.C. 228, 437 S.E.2d 132, 136 (Ct. App. 1993) (affirming trial court's finding that conspiracy claim failed because there was a "complete lack of evidence to establish that the purpose of the business of the parties was anything other than profit motivated" and was not intended to harm the plaintiff); *Reed v. Aiken Cty.*, 2010 WL 4238848, at *6 (D.S.C. Oct. 21, 2010) (where only evidence was that the object of the conspiracy was to protect one of plaintiff's subordinates from him "[p]laintiff has not provided the court with sufficient evidence of an intent to harm" him).

Further, Plaintiff has failed to properly plead special damages. "Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of the defendant's conduct." *McCrief, supra* (quoting *Hackworth*). Plaintiff must both plead

and prove special damages. *Little v. Brown & Williamson Tobacco Corp.*, 1999 WL 33291385, at *14 (D.S.C.1999); *Preferred Sav. Bank, Inc. v. Elkholy*, 303 S.C. 95, 99, 399 S.E.2d 19, 21 (Ct.App.1990) (special damages must “be specifically stated” to avoid surprise to the other party).

Merely invoking the phrase “special damages” is insufficient. Where a party has “failed to plead with specificity any special damages,” a civil conspiracy claim necessarily fails. *Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC*, 414 S.C. 635, 650–51, 780 S.E.2d 263, 272 (Ct. App. 2015) (“circuit court properly dismissed Appellant's civil conspiracy claim against Individual Respondents” for lack of specificity as to special damages).

Here, Plaintiff alleges that as a result of the alleged conspiracy, he: (1) “suffered a loss of earning capacity and the loss of his job” [Complaint ¶ 54]; (2) “suffer[ed] special damages and substantial damages for pecuniary losses, embarrassment, humiliation, pain and suffering, mental anguish, loss of enjoyment of life, and other non-pecuniary losses” [*Id.* ¶ 55]; (3) is “entitled to injunctive relief and/or civil damages suffered a loss of the opportunity to be promoted and suffered the loss of his job resulting in diminished earning capacity, diminished benefits, and diminished retirement” [*Id.* ¶ 56]; (4) is “entitled to injunctive relief and/or civil damages, back pay, and front pay” [*Id.* ¶ 57]; and “suffered a loss of the opportunity to be promoted and suffered the loss of his job resulting in diminished earning capacity, diminished benefits, and diminished retirement [and] is entitled to a judgment for actual and punitive damages.”

The damages alleged here are “exactly those damages that one would expect to flow from’ the alleged conspiracy to terminate him.” *James v. Pratt & Whitney*, 2005 WL

3440868, at *3 (D.S.C. Dec. 14, 2005) (finding plaintiff failed to allege special damages arising from a conspiracy to terminate his employment where he alleged only “damages for lost wages, lost benefits, consequential economic damages, emotional distress, and injury to reputation”). “Plaintiff merely alleges that he has suffered a myriad of damages ranging from lost wages to intentional infliction of emotional distress but has failed to point to actual special damages that he has suffered as a result of defendant's alleged actions.” *Id.* at *5. Accordingly, Plaintiff’s claim for civil conspiracy fails as a matter of law.

Based on the foregoing, Defendants respectfully request that this action be dismissed.

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February 28, 2019

Certificate of Service

I hereby certify that on the above date, I caused to be served on counsel of record a true and correct copy of this document by mail or efileing.

s/Derwood L. Aydlette III
GIGNILLIAT, SAVITZ & BETTIS, L.L.P.

Plaintiff's May 2 Motion to Reconsider

the “good of the municipality”. The statute gives this power to the City Manager, in accordance with Plaintiff’s correct interpretation of the statutory guidance, to create contracts as it provides wide discretion for the City Manager. This is central to Plaintiff’s Complaint as Plaintiff has alleged that the City Manager sanctioned his contractual relationship with the Defendant. Plaintiff should therefore have an opportunity to present this case to a jury to test the veracity of Plaintiff’s arguments as Plaintiff’s complaint pleads his theory of the case sufficiently to meet the 12(b)(6) standard.

5. In regard to the Court’s dismissal of Plaintiff’s civil conspiracy claim against the individual defendants (to include the City Manager), the Court bases its decision to dismiss these claims due to the argument that 1.) Plaintiff is an at-will employee and therefore is prevented from bringing a civil conspiracy action as “they cannot be sued for doing what the ‘at-will’ doctrine gives them the right to do.”, and 2.) as a public official”, Plaintiff cannot sue anyone for a “civil conspiracy” related to the termination of his employment.
6. As is fully stated above, Plaintiff was not an “at-will” employee so the Court’s reasoning is incorrect on this point. With respect to the Court’s secondary reasoning that Plaintiff, as a public official, cannot sue anyone for his termination, this reasoning is flawed because unlike the litany of cases that the Court relies upon, the persons the Plaintiff is suing were involved in making decisions relating to his termination as opposed to being general individuals in the community. Therefore, Plaintiff’s civil conspiracy claims should be allowed to go forward to a jury as Plaintiff has adequately pled this cause of action in accordance with the provisions of SCRCP 12(b)(6).

7. Alternatively, should the Court not reconsider its April 25, 2019 decision and deny Defendant's Motion to Dismiss, Plaintiff requests a hearing on this motion and / or the right to amend his complaint based upon SCRCP 15 which allows for liberal amendment of pleadings.

WHEREFORE, Plaintiff, respectfully requests this Court to reconsider its Order filed April 25, 2019, dismissing Plaintiff's Complaint, a request for a hearing and, alternatively, to allow Plaintiff to amend the Complaint pursuant to Rule 15 of the South Carolina Rule of Civil Procedure.

Respectfully submitted,

GIST LAW FIRM, P.A.

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April 29, 2019

Plaintiff's June 13 Memo in Support

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY)	FOR THE FIFTEENTH JUDICIAL CIRCUIT
)	
John Kennedy,)	
)	
Plaintiff,)	
)	C/A No.: 2017-CP-26-05913
vs.)	
)	Plaintiff's Memorandum in
City of Myrtle Beach Police Department,)	Support of Plaintiff's Motion for
and Amy Prock, Angela Kegler, and John)	Reconsideration
Pedersen (In their Individual Capacities),)	
)	
Defendants.)	
_____)	

Plaintiff John Kennedy hereby files this motion for reconsideration on the merits of Plaintiff's Complaint in response to Defendant's Motion to Dismiss which was granted by the Court on April 25, 2019. In support of Plaintiff's motion, Plaintiff submits the following.

I. PROCEDURAL HISTORY

The current action was filed September 14, 2017 wherein Plaintiff alleged causes of action of breach of contract, breach of contract with fraudulent intent, and civil conspiracy against the Defendants named above. Defendants filed an Answer on December 28, 2017 and on June 21, 2018 Defendants filed a motion to dismiss the Complaint. The Court ultimately granted this motion on April 25, 2019.

II. STANDARD OF REVIEW

Under Rule 12(b)(6) of the South Carolina Rules of Civil Procedure a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). The decision to grant a Rule

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12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. *Id.*; *Clearwater Trust v. Bunting*, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006). In deciding to grant the motion to dismiss, the court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *Spence*, at 116, 628 S.E.2d at 874 (2006).

A motion to dismiss under Rule 12(b)(6) should not be granted if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory. *Id.*; *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Spence*, at 116-17, 628 S.E.2d at 874. Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible from them, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007).

A motion to strike under Rule 12(f), SCRCP, which challenges a theory of recovery in the complaint, is in the nature of a motion to dismiss under Rule 12(b)(6), SCRCP. *McCormick v. England*, 328 S.C. 627, 632, 494 S.E.2d 431, 433 (Ct.App.1997). Rule 8, SCRCP, mandates that a pleading contain “ultimate facts” rather than “evidentiary facts” to state a cause of action. “Ultimate facts fall somewhere between the verbosity of ‘evidentiary facts’ and the sparseness of ‘legal conclusions.’” *Watts v. Metro Security Agency*, 346 S.C. 235, 239, 550 S.E.2d 869, 871 (Ct. App. 2001). Further, a complaint must contain a ‘short and plain statement of the facts showing the pleader is entitled to relief.’ Rule 8(a)(2), SCRCP.

This requires a litigant to plead the ultimate facts which will be proven at trial, not evidence which will be used to prove those facts. *Clark v. Clark*, 293 S.C. 415, 416, 361 S.E.2d 328 (1987) (emphasis added).

Where allegations of the complaint give rise to competing inferences on a question of material fact, dismissal under Rule 12(b)(6) is not appropriate. *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 306 (1993). The Ruling on a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. Moreover, a 12(b)(6) motion should not be granted if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. The question to be considered is whether, when viewed in the light most favorable to the plaintiff, the complaint states any valid claim for relief. Further, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail. *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 606 S.E.2d 752 (Ct. App. 2004) (emphasis added).

Plaintiff's Complaint recites the ultimate facts, which upon further litigation, will show the evidence which will be used to prove those ultimate facts. As such, the Defendant's Rule 12(b)(6) motion to dismiss must be denied. In the alternative, Plaintiff should be granted leave to amend his complaint.

III. LEGAL ARGUMENTS

With respect to the Court's Order dated April 25, 2019, Plaintiff believes that the Court improperly dismissed his Complaint based upon the cogent arguments stated below:

1. **Plaintiff's Breach of Contract Claim should not be dismissed as Plaintiff has pled that the City Manager, who statutorily has the power to dismiss City Employees, was central in establishing the contractual basis upon which Plaintiff's claims are based.**

The April 25, 2019 Order dismissing Plaintiff's Complaint indicates that the Court relieved upon the premise that the hiring and firing authority within a council-manager form of municipal

Government prescribes that the City Manager has the statutory authority to hire and fire at will. As simple reading of the Complaint in this case clearly dictates that the City Manager was in fact centrally involved in the creation of Plaintiff's breach of contract claims, as, upon information and belief, the City Manager was involved directly in the termination of Plaintiff's employment and was also a central part of the creation and administration of the policies upon which Plaintiff relied upon during his employment and which were breached.

City of Myrtle Beach Code of Ordinances Section 2-81(a) provides, in pertinent part: For the purpose of establishing general operational and administrative policies, procedures and regulations regarding employment, the manager may, from time to time within his discretion, promulgate a handbook for employees and may present the handbook for council's review. If promulgated, the handbook shall reflect the overall legislative policies set forth herein.

City of Myrtle Beach Code of Ordinances Section 2-81(b) provides: The city has a policy that all employment status is "at will", with the exception of judges under the unified court system. "At will" employment recognizes the right of the employee to resign at any time without providing a reason or explanation to the organization. "At will" employment also recognizes the right of the city to terminate employment at any time without providing a reason or explanation to the employee. At will employment is terminable by either party at any time, for any reason or for no reason at all. Nothing in the manager's personnel handbook can change the at-will status of employment as set forth herein, or create an expectation of a contract or continued employment on the part of any employee. No one other than the city manager may make any promise or assurance or enter into any contract, whether oral or written, express or implied, that is any way inconsistent with the policy set forth herein. Any promise, assurance or purported contract or agreement shall be invalid and not binding upon the city unless adopted, endorsed or agreed to in writing by the city manager.

Plaintiff's contract-based claims do not violate such ordinances. Specifically, paragraph 20 of the complaint states:

Defendant's actions in doing such violated Plaintiff's contractual rights pursuant to Defendant's employment handbook and other contractual policies and procedures provided to Plaintiff by Defendant.

Thus, it is apparent that Plaintiff's complaint indicates that Plaintiff's contract-based claims are not solely based upon the employment handbook and include contractual policies and procedures which were provided to Plaintiff by Defendant. Even if Defendant claims that in order for the documents to be contractual in nature they must have been signed by the City Manager, the allegations in Plaintiff's complaint cannot be refuted on a 12(b)(6) motion because Plaintiff has pled that such documents are contractual in nature, were provided to Plaintiff by Defendant, and only an examination of the evidence at the Summary Judgment stage can delineate whether such documents are or are not sufficient in accordance with the ordinance.

In fact, throughout the complaint, Plaintiff repeatedly references the City Manager's intimate involvement with respect to Plaintiff's termination and employment and the City Manager was directly named as a defendant in this case. Plaintiff should have an opportunity to proceed with respect to this case so that the sufficiency of the Complaint and the referenced contractual documents can be tested by the fact finder.

The ordinances indicated that "No one other than the city manager may make any promise or assurance or enter into any contract, whether oral or written, express or implied, that is any way inconsistent with the policy set forth herein. Any promise, assurance or purported contract or agreement shall be invalid and not binding upon the city unless adopted, endorsed or agreed to in writing by the city manager."

Based on Defendant's own ordinance, all that is required is that the City Manager adopt or endorse the contractual documents in order for them to be contractual in nature. Although the ordinance allows the city manager to agree to such contract or agreement in writing, there is no requirement that he do such as the ordinance indicates that he can adopt or endorse a policy in order to make it contractual in nature.

In the instant case, Plaintiff's contractual allegations cannot be refuted without a factual analysis into the extent that the policies and procedures were adopted or endorsed by the City Manager in accordance with the ordinance.

All that is required is the adequate pleading of Plaintiff's legally cognizable theories upon which relief can be based as it relates to surviving the Defendant's Motion to Dismiss. The Court relied on a series of cases suggesting that City of Myrtle Beach employees are employed "at-will" and employed at the pleasure of the City Manager. Plaintiff does not dispute the statutory authority nor the validity of the properly cited case law. Plaintiff's theory of the case is unique. The instant case raises the novel theory that the City of Manager, who has the statutory authority to hire and fire City employees "at will", likewise has the power to abrogate this power in favor of contractually binding the city. As Plaintiff has properly pled this novel theory of law, Plaintiff should have an opportunity to proceed to discovery to build the factual record necessary to support this theory of the case. The Court's decision to dismiss Plaintiff's contract cause of action should therefore be reconsidered and denied. Alternatively, Plaintiff should have an opportunity to amend his complaint based on the assertions above and SCR 15 which allows for liberal amending of the Complaint in the interests of justice.

2. Plaintiff is not barred from suing Defendant's agents for Civil Conspiracy as despite being a public official, Plaintiff's suit is not against general members of the public, but rather is against Defendant's own agents and employees.

The tort of civil conspiracy has three elements: (1) a combination of two or more persons, (2) for the purpose of injuring the plaintiff, and (3) causing plaintiff special damage. *Vaught v. Waites*, 300 S.C. 201, 208, 387 S.E.2d 91, 95 (Ct.App.1989). The difference between civil and criminal conspiracy is in criminal conspiracy, the gravamen of the offense is the agreement itself, whereas in civil conspiracy, the gravamen of the tort is the damage resulting to plaintiff from an

overt act done pursuant to a common design. *Id.*; see also *Pye v. Estate of Fox*, 369 S.C. 555, 567–68, 633 S.E.2d 505, 511 (2006) (“The gravamen of the tort of civil conspiracy is the damage resulting to the plaintiff from an overt act done pursuant to the combination, not the agreement or combination per se.”). A claim for civil conspiracy must allege additional acts in furtherance of a conspiracy rather than reallege other claims within the complaint. *Todd v. S.C. Farm Bureau Mut. Ins. Co.*, 276 S.C. 284, 293, 278 S.E.2d 607, 611 (1981) rev'd on other grounds, 283 S.C. 155, 321 S.E.2d 602 (1984) quashed in part on other grounds, 287 S.C. 190, 336 S.E.2d 472 (1985). Moreover, because the quiddity of a civil conspiracy claim is the special damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action. *Vaught*, 300 S.C. at 209, 387 S.E.2d at 95. *Hackworth v. Greywood at Hammett, LLC*, 385 S.C. 110, 682 S.E.2d 871, Court of Appeals of South Carolina, August 12, 2009.

In its Order, the Court indicates 1. That Plaintiff cannot maintain a civil conspiracy cause of action against his employer because he is an employee “at will”, and 2. That Plaintiff cannot maintain a cause of action for civil conspiracy against the individual defendants because he is a “public official”.

With respect to the Court’s ruling that Plaintiff is an employee “at will”, Plaintiff has effectively objected to this argument in subpart 1 above. Plaintiff relies on such legal arguments against this ruling.

With respect to the Court’s ruling that Plaintiff cannot maintain a cause of action against the individual Defendants because he is a “public official”, this ruling should be reconsidered as it is erroneous. The cases quoted by the Court include *Ross, Angus 1*, and *Angus 2*, (**Ross v. Life Ins. Co. of Virginia*, 273 S.C. 764, 259 S.E.2d 814 (S.C., 1979) and *Angus v. Burroughs & Chapin Co.*, 628 S.E.2d 261, 368 S.C. 167 (S.C., 2006)). Cumulatively the Court is correct based on these

cases that a public official such as a police officer cannot maintain a cause of action against the public as a public official is answerable to the public the public is not considered to be a third-party interloper. *Angus v. Burroughs & Chapin Co.*, 628 S.E.2d 261, 368 S.C. 167 (S.C., 2006)). That is not the case here.

Specifically, Plaintiff has not brought a case against members of the general public such as was the case in *Angus 1* and *Angus 2*. He is not making a claim for civil conspiracy against a newspaper or public interest group as the plaintiff in that case, rather his civil conspiracy claims lie against individuals intimately connected to his employment with the power to directly affect his continued employment as well as his physical and emotional well-being.

In the instant case, the individual defendants devastated him emotionally and are employees of the City. They are not general members of the public as indicated in the quoted cases and as such are perfectly able to be liable for civil conspiracy as pled in Plaintiff's well pled complaint.

Therefore, the Court's Order of April 25, 2019 should be reconsidered and overruled. Alternatively, Plaintiff should have an opportunity to amend his Complaint accordingly as allowed by SCRCP 15.

IV. CONCLUSION

For the reasons stated herein, the Plaintiff in this case has pleaded specific facts for which relief may be granted. Plaintiff, respectfully requests this Court to reconsider its Order dismissing with Plaintiff's Complaint and, alternatively, allow Plaintiff to amend his Complaint pursuant to Rule 15. Accordingly, for the foregoing reasons, Plaintiff's claims should succeed as a matter of law, and the Court should deny the Defendant's Motion to Dismiss.

Respectfully,

/s/ Donald Gist

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June 13, 2019

Def's June 24, 2019 Memo in Opposition to Motion to Reconsider

STATE OF SOUTH CAROLINA)

) IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

John Kennedy,)

C.A. No. 2017-CP-26-05913

Plaintiff,)

**DEFENDANTS' RESPONSE
TO PLAINTIFF'S SECOND
MOTION TO RECONSIDER**

vs.)

City of Myrtle Beach Police Department,)
and Amy Prock, Angela Kegler, and John)
Pederson (In their Individual Capacities),)

Defendants.)

This is an employment law action alleging breach of contract, breach of contract accompanied by fraud, and civil conspiracy. Plaintiff is a former police officer who was terminated by the City. This action was dismissed in August 2018 and restored on Plaintiff's motion to reconsider in October 2018, which restoration included a requirement for a second hearing on Defendants' motion to dismiss. The motion to dismiss was then heard a second time in April 2019. The court again granted the motion to dismiss. For the second time, Plaintiff has asked this court to reconsider its ruling.

As this court held in its order dismissing this case, all three of Plaintiff's claims – breach of contract, breach of contract accompanied by a fraudulent act, and civil conspiracy – turn on the issue of whether he was employed an at-will. Clearly he was. As Plaintiff offers no legitimate reason for this court to reverse its order dismissing this action, his motion should be denied.

In his motion to reconsider, Plaintiff concedes that as a matter of state law he was an at-will employee, stating:

Plaintiff does not dispute the statutory authority nor the validity of the properly cited case law. Plaintiff's theory of the case is unique. The instant case raises the novel theory that the City of Manager, who has the

statutory authority to hire and fire City employees “at will”, likewise has the power to abrogate this power in favor of contractually binding the city. As Plaintiff has properly pled this novel theory of law, Plaintiff should have an opportunity to proceed to discovery to build the factual record necessary to support this theory of the case.

[Plf. Mem. p. 6] However, Plaintiff’s theory is not at all novel as the South Carolina Supreme Court has rejected an identical argument before.

The City operates under a council-manager form of government. *Todd v. Smith*, 305 S.C. 227, 231, 407 S.E.2d 644, 646 (1991) (“the City of Myrtle Beach has elected to adopt the council/manager form of government”). Hiring and firing authority in a council-manager form of government rests in the City Manager under S.C. Code § 5–13–90(1). *Dew v. City of Florence*, 279 S.C. 155, 161, 303 S.E.2d 664, 667 (1983) (citing South Carolina Code § 5–13–90(1) which “allows the City Manager in a council-manager form of government to dismiss any City employee ‘for the good of the municipality’”). “Every court that has considered [§ 5–13–90(1)] has held that this statutory provision means that employees in municipalities with the council-manager form of government serve at the will and pleasure of the City.” *Lamond v. City of Myrtle Beach*, 1991 WL 433750, at *1 (S.C. Com. Pl. Oct. 25, 1991) (collecting cases and specifically holding that City of Myrtle Beach employees are employed at-will); *Dew v. City of Florence*, 279 S.C. 155, 161-162, 303 S.E.2d 664 (1983); *Bunting v. City of Columbia*, 639 F.2d 1090, 1093-1094 (4th Cir. 1981) (under § 5-13-90(1) “city employees . . . hold their positions at the will and pleasure of the city”); *Mills v. Leath*, 709 F.Supp. 671, 674 (D.S.C. 1981) (“Courts have consistently interpreted [§ 5-13-90(1)] as providing only for at-will employment of municipal employees.”); *Bane v. City of Columbia*, 480 F.Supp. 34, 37-38 (D.S.C. 1979).

In *Botchie v. O'Dowd*, 315 S.C. 126, 129–30, 432 S.E.2d 458, 460 (1993), a former sheriff’s deputy argued that he had an implied contract for more than at-will employment which

he contended was created by the sheriff “adopting certain procedures and performing routine evaluations. . . .” The Court noted that under S.C. Code Ann. § 23–13–10, just as § 5-13-90(1) which governed Plaintiff’s employment, “[a] deputy serves at the sheriff’s pleasure.” *Id.* at 460 (citing *Heath v. County of Aiken*, 295 S.C. 416, 368 S.E.2d 904 (1988)). The court then rejected the plaintiff’s contract claim, holding that “a sheriff may not compromise his statutory authority to discharge deputies at his discretion.” *Id.* (citing *Jenkins v. Weatherholtz*, 909 F.2d 105 (4th Cir. 1990)). “To hold otherwise renders the language of § 23–13–10 meaningless and eviscerates the sheriff’s ability to discharge deputies at his ‘pleasure.’” *Id.* Thus, just as here, the Supreme Court held that where a statute provides for at-will employment, it cannot be altered by an employer’s actions or policies.

Since *Botchie*, other courts have reaffirmed its logic. *See, Fields v. Richland Cty. Sheriff’s Dep’t*, 2018 WL 4001830, at *4 (D.S.C. Aug. 22, 2018) (dismissing under *Botchie* and *Jenkins* because “[e]ven an employee handbook containing a grievance procedure is insufficient to overcome the dictates of a statute such as § 23–13–10”); *Harris v. Beaufort Cty. Sheriff’s Dep’t*, 2011 WL 11733052, at *1 (S.C. Ct. App. Feb. 1, 2011) (quoting *Botchie* and affirming summary judgment on contract claim because a “sheriff may not compromise his statutory authority to discharge deputies at his discretion”). Notably, in *Thompson v. Dorchester Cty. Sheriff’s Dep’t*, 2007 WL 5681972, at *5 (D.S.C. May 4, 2007), *aff’d*, 280 F. App’x 328 (4th Cir. 2008), the court both quoted and expounded upon *Botchie*, stating, “Included in the power to terminate deputies is the principle that ‘[a] sheriff may not compromise his statutory authority to discharge deputies at his discretion,’ meaning that the at-will nature of a sheriff’s deputy’s employment cannot be altered.” *Id.* (emphasis added) (quoting *Botchie*).

Moreover, as this court noted in its order dismissing this action:

The plaintiff in *Lamond*[, *supra*,] made the same arguments Plaintiff makes here: that he could have a contract based on oral assurances or the City's policies. *Lamond* rejected those arguments because "[a]ny [oral] assurance . . . was contrary to Section 5-13-90(1)" and held that even if the City's policies could arguably alter at-will employment, "state statutory law and case law support the conclusion that employees of the city of Myrtle Beach are at-will employees" as a matter of law. *Id.*

Thus, the court in *Lamond* reached the exact same conclusion that the Supreme Court in *Botchie* and the trial courts in *Fields*, *Harris* and *Thompson* reached: where at-will employment is mandated by state law, an employer "may not compromise his statutory authority to discharge . . . at his discretion," meaning that the at-will nature of [the employee's] employment cannot be altered." *Thompson*. Accordingly, not only is Plaintiff's theory not novel, it was specifically proffered and rejected in *Lamond*, and rejected under identical circumstances in *Botchie* and its progeny.

Because Plaintiff was an at-will employee as a matter of law, and because he was also a public official, this court correctly held that all three of his claims are barred. *Allegro, Inc. v. Scully*, 418 S.C. 24, 35, 791 S.E.2d 140, 146 (2016), *reh'g denied* (Oct. 26, 2016) (where "there is nothing to suggest this was anything other than an at-will relationship," there is "no contract on which [Plaintiff] can predicate [hi]s claims of breach of contract and breach of contract accompanied by a fraudulent act."); *Angus v. Burroughs & Chapin Co.*, 358 S.C. 498, 596 S.E.2d 67 (2004) (dismissing former at-will county employee's civil conspiracy claim brought against county council members in individual capacity who voted to terminate plaintiff's employment because they cannot be sued for doing what the at-will doctrine gives them the right to do) ("Angus I"); *Angus v. Burroughs & Chapin Co.*, 368 S.C. 167, 628 S.E.2d 261, 262 (2006) ("Angus II") (a public official who is employed at-will is prohibited from suing anyone for a civil conspiracy).

Plaintiff asks that he be allowed to amend his complaint. He made this same request in the motion to reconsider that he filed following this court's first dismissal of this action in August 2018. Since that time, he has been on notice that this court considers his pleadings deficient. Despite the fact that this court has twice now dismissed this action for failure to state a claim, Plaintiff has made no attempt to file a motion to amend, provide the court with a proposed amended complaint, or otherwise advise the court as to what a possible amended complaint might contain that would not still be subject to dismissal under § 5-13-90(1). Instead, he has simply restated the same argument he made in his first motion to reconsider, i.e., that despite § 5-13-90(1) and the cases interpreting it, and despite the fact that he "does not dispute the statutory authority nor the validity of the properly cited case law," his case should somehow be allowed to proceed where the plaintiffs in *Lamond, Dew, Bunting, Bane* and *Mills* (and similarly *Botchie, et al.*) failed. No opportunity to amend is necessary where any amendment would be futile. *Health Promotion Specialists, L.L.C. v. S.C. Bd. of Dentistry*, 403 S.C. 623, 632, 743 S.E.2d 808, 812-13 (2013). That is the case here as the plethora of "properly cited case law" establishes.

Based on the foregoing, Defendants respectfully request that Plaintiff's motion to reconsider be denied.

June 24, 2019

Certificate of Service

I hereby certify that on the above date, I caused to be served on counsel of record a true and correct copy of this document by mail or efileing.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

Respectfully Submitted,

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November 4, 2020

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