THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin Culbertson, Circuit Court Judge

Case No. 2017-CP-26-05913
(Appellant Case No. 2019-001556)

John Kennedy,……... . . . . . Appellant

v.

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

FINAL BRIEF OF APPELLANT

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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).

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).

STATEMENT OF THE CASE

As no discovery was done in this case, all facts must be gleaned from the facts alleged in Appellant's well pled Complaint which is documented below as follows.

Appellant originally began his employment with Respondent Myrtle Beach Police Department on or around 1980 becoming a full-time employee in March of 1982. (R. p. 92). Appellant served with distinction until on or around 2008, at which time he retired from service. (*Id*.). Subsequent to his retirement, on or around June 2008, Appellant was rehired with the Department in the position of Lieutenant over Respondent's Office of Professional Standards. (*Id*.).

At the time of Appellant's rehire with the Respondent the Chief of Police was Warren Gall, Chief of Police. (R. p. 93). Mr. Gall rehired Appellant with the Department on account of Appellant's excellent service track record. (*Id*.).

Throughout the course of Appellant's tenure with the Department as a rehired employee, Appellant again served the Respondent Police Department with distinction and honor. (*Id*.).

On or around January 2014, due to Appellant's excellent service record, Appellant was promoted to Captain over the Office of Support Services Division. Appellant continued to perform his job at a high level routinely going above and beyond the call of duty. (*Id*.).

On May 25, 2017, Mr. Gall's employment as Chief of Police ended. (*Id*.). Immediately following the end of Mr. Gall's tenure as Chief of Police on May 26, 2017, Respondent Amy Prock, Assistant Chief of Police (hereinafter referred to as "Prock") became the Interim Chief of Respondent Myrtle Beach Police Department. (*Id*.).

Shortly after Prock's promotion to Interim Chief of Police, Prock, in conjunction with Respondent John Pederson, City Manager (hereinafter referred to as "Pederson"), changed the qualification for promotion to Captain by eliminating the requirement that Captains within the Department possess a college degree. (*Id*.).

In addition to Prock's promotion to Interim Chief, Respondent Angela Kegler (hereinafter referred to as Kegler) became director of Respondent's Human Resources Department on or about early 2017. (*Id*.).

Respondent Prock remained the Interim Chief until July 3, 2017 at which time she was sworn in as the regular full time Chief of the Myrtle Beach Police Department. (*Id*.).

On or around the week of July 3, 2017, Appellant became aware, via the Police email system, of an internal job posting for Assistant Chief of the Myrtle Beach Police Department. (R. pp. 93-94). This position was only open to Captains within the Department. (R. p. 94) The position constituted a promotion from Plaintiff's position as Captain over the Office of Support Services Division and was a position for which Appellant was imminently qualified. (*Id*.). As a result, Appellant seized the opportunity to apply for the position and completed the employment application process on or around July 9, 2017. (*Id*.).

Due to Appellant's superior qualifications for the Assistant Chief position, during the week of July 10, 2017, the Respondent's Administrative Services Division scheduled Appellant to participate in an interview for the position on or around July 14, 2017. (*Id*.). Of the internal applicants who applied for the position, Appellant was the most qualified in accordance with Departmental standards. (*Id*.).

On the morning of July 14, 2017, prior to Appellant's scheduled interview for the Assistant Chief Position, Appellant was approached in his Office by Mrs. Prock. (*Id*.). During their

conversation, Prock indicated to Appellant that it was her and Pederson's desire to bring in "newer employees" and that as a result, Appellant employment with the Respondent Myrtle Beach Police Department would be ending. (*Id*.). Prock also retorted to Plaintiff during this conversation that there was no need to interview for the Assistant Chief of Police position because his interview was null and void. (*Id*.).

As Prock was the Chief of the Department and a part of the interview panel for the Assistant Chief position, Appellant was effectively prohibited from participating in his scheduled interview. (R. p. 95). Respondent's actions in doing such violated Appellant's contractual rights pursuant to Respondent's employment handbook and other contractual policies and procedures provided to Appellant by Respondent. (*Id*.).

During their conversation, Prock told Appellant that his services were no longer needed (in short, "you are fired"), and directed Appellant to contact Kegler regarding his termination. (*Id*.). Appellant did as directed and Kegler came to Appellant's Office on that morning. (*Id*.). Upon arriving at Appellant's Office, Kegler attempted to require Appellant to sign paperwork related to his termination from employment indicating that Appellant's employment would end on or about July 31, 2017, which Appellant refused to sign. (*Id*.).

On or around the morning of July 17, 2017, Appellant again spoke with Kegler, at which time he informed Kegler that Respondent's actions constituted age-based discrimination. Kegler retorted that she would bring the matter to the attention of her superiors. (*Id*.).

Shortly after his conversation with Kegler, Appellant was informed via email that Appellant's registration for a previously scheduled City Sponsored event in Washington, DC, for which Appellant was scheduled to attend on or around July 28, 2017, had been cancelled. (*Id*.). Appellant immediately called Kegler back and informed Appellant that the Respondent's actions

in cancelling the event was retaliation for his complaints of age-based discrimination earlier that day. (*Id*.). Kegler responded by indicating that she would look into the matter but that the City Attorney, the City Manager, Chief Prock, and herself knew about it, but they had been advised not to talk to Appellant any further. (*Id*.). This was a pretext as Appellant's Complaint was never addressed. (*Id*.).

On July 18, 2017, Appellant was called to meet with Pederson at Pederson's Office. Upon arriving at the Office of the City Manager, Appellant met with Pederson who indicated to Appellant that his (Plaintiff's) final day of employment would be July 31, 2017 and that he (Pederson) could not have Appellant stirring up any trouble. Appellant responded by indicating that he never stirred up any trouble within the Department. (*Id*.). During this meeting, Appellant questioned Pederson regarding the loss of his accrued comp time. Pederson responded by stating that Appellant could use his comp time until his termination on July 31, 2017. (R. pp. 95-96).

Later that day, while attending a Department Approved meeting in Columbia, Appellant realized that he was unable to access his Department email. (R. p. 96). The following day, July 19, 2017, Appellant was informed by Captain Marty Brown that he was locked out of all Department systems to include Department email, intranet system, and the Department Building and that if Appellant needed to finish cleaning out his office he could contact him (Brown) to gain access to the building for such purposes. In effect, Appellant was terminated on July 19, 2017. (*Id*.).

After cleaning out his Office, Appellant remained out of work on Comp time (as authorized by the City Manager) until his official July 31, 2017 termination from employment. (*Id*.).

Upon information and belief, Appellant was subsequently replaced by Joseph Crosby who is the boyfriend of Amy Kegler. (*Id*.). Appellant is aware that Respondent's Kegler, Pederson, and Prock conspired and took affirmative steps to terminate Appellant in an effort to ensure that Joseph

Crosby received his job despite the fact that Crosby is less qualified than Appellant and does not possess a college degree. (*Id*.). Respondent's actions have resulted in Appellant's termination from employment and Appellant incurring great physical and emotional distress. (*Id*.).

Due to Appellant's unlawful termination from employment, Appellant timely filed an internal grievance in accordance with Respondent's policies and procedures. Despite having fully complied with the Grievance Policies as outlined by the Respondent, the Respondent City of Myrtle Beach Police Department failed to timely provide Appellant with a Grievance Hearing. (R. pp. 96-97). Respondent's actions constitute a further breach of the contractual promises guaranteed to Appellant by Defendant City of Myrtle Beach Police Department. (R. p. 97)

As a result of Appellant's termination from employment, the denial of his right to compete for promotions which he was qualified to receive, and the denial of Appellant's right to a Grievance Hearing, Appellant has been devastated both emotionally and financially.

Following the filing of Appellant's initial Summons and Complaint on September 4, 2017, the parties participated in discovery up until the case was ultimately dismissed via Respondent's Motion to Dismiss which was filed on April 23, 2019. (R. pp. 7-9; R. pp.113-122). This Appeal followed upon denial of Appellant's timely filed Motion for Reconsideration. (R. p. 124).

ARGUMENTS

1. **Appellant can assert a breach of contract claim against a municipality governed by a council-manager form of municipal government as Appellant has pled that the City Manager, who statutorily has the power to dismiss City Employees, was central in establishing the contractual basis upon which Appellant's claims are based.**

The April 25, 2019 Order dismissing Appellant's Complaint indicates that the Court relied primarily 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. (R. pp. 11-16). A simple reading of the Complaint in this case clearly dictates that the City Manager was in fact centrally involved in the creation of Appellant's breach of contract claims, as, upon information and belief, the City Manager was involved directly in the termination of Appellant's employment and was also a central part of the creation and administration of the policies upon which Appellant relied upon during his employment and which were breached. (R. pp. 90-103).

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. "

Appellant'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."**

(R. p. 94). Thus, it is apparent that Appellant's Complaint indicates that Appellant's contract-based claims are not solely based upon the employment handbook and include contractual policies and procedures which were provided to Appellant by City Respondent. Even if Respondent claims that in order for the documents to be contractual in nature they must have been signed by the City Manager, the allegations in Appellant's Complaint cannot be refuted on a 12(b)(6) motion because Appellant has pled that such documents are contractual in nature, were provided to Appellant by Respondent, 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, Appellant repeatedly references the City Manager's intimate involvement with respect to Appellant's termination and employment and the City Manager was directly named as a Respondent in this case. Appellant 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 Respondent'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, Appellant'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 Appellant's legally cognizable theories upon which relief can be based as it relates to surviving the Respondent's Motion to Dismiss. The lower 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. Appellant does not dispute the statutory authority nor the validity of the properly cited case law. Appellant'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 Appellant has properly pled this novel theory of law, Appellant should have an opportunity to proceed to discovery to build the factual record necessary to support this theory of the case. The lower court's decision to dismiss Appellant's contract cause of action should therefore be reversed.

2. Appellant, as a public official, can assert a civil conspiracy claim against his coworkers responsible for his termination from employment as Appellant's suit is not against general members of the public, but rather is against Respondent's own agents and employees thus Appellant is not barred from suing Respondent's agents for Civil Conspiracy despite his status as a public official

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 Appellant, 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 Appellant cannot maintain a civil conspiracy cause of action against his employer because he is an employee "at will"; and (2) that Appellant cannot maintain a cause of action for civil conspiracy against the individual Respondents because he is a "public official". (R. pp. 11-16).

With respect to the lower court's ruling that Appellant is an employee "at will", Appellant has effectively objected to this argument in subpart 1 above. Appellant relies on such legal arguments against this ruling.

With respect to the lower court's ruling that Appellant cannot maintain a cause of action against the individual Respondents because he is a "public official", this ruling should be disregarded as it is erroneous. The cases quoted by the lower 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 general 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, Appellant 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 Appellant 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** these are not third parties or general interested members of society as contemplated by the *Angus* cases. Specifically, in the instant case, and as is stated in the Complaint, Appellant was replaced by Joseph Crosby who is the boyfriend of Amy Kegler. These Respondents are intimately involved in this case and not general members of the public as contemplated by the *Angus* cases. Kegler, Pederson, and Prock conspired and took affirmative steps to terminate Appellant in an effort to ensure that Joseph Crosby received his job despite the fact that Crosby is less qualified than Appellant and does not possess a college degree. This was a personal matter. Thus, the *Angus* cases which deal with less attenuated members of the public are just simply inapplicable, plain and simple, as his status as a public official has little to do with the intimate relationships governed by his employment.

In the instant case, the individual Respondents devastated him emotionally and are employees of the City with the power to directly affect his alleged contract for employment. They are not general members of the public as indicated in the quoted cases and as such are therefore perfectly suited for liability for civil conspiracy as pled in Appellant's well pled Complaint.

CONCLUSION

Therefore, Appellant requests, for all of the reasons stated above, that the lower court's order of April 25, 2019, be overruled and that this case remanded to the active trial roster of the Circuit Court.

Sincerely,

s/Donald Gist)

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February 10, 2021

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b), SCACR.

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