

FINAL BRIEF OF APPELLANT
THE STATE OF SOUTH CAROLINA

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SC Court of Appeals

In the Court of Appeals [In the Supreme Court]

Appeal from Craig Molloy, Island group Inc. dba
Carolina Cleaning in the Court of Common pleas

Appellate Case No. 2018-002170

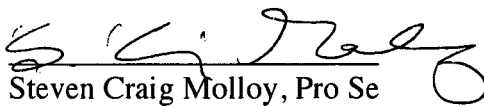
Lower Court Case No. 2016-CP-07-01825

Steven Craig Molloy
for Island Group Inc. dba Carolina CleaningAppellant

v.

Beaufort County Government, Gary Kubic, Individually, and as Beaufort County
Administrator; Josh Gruber, Individually and as former Beaufort County In-House
Attorney; Bryan Hill, Individually and as former Beaufort County Deputy Administrator.
Shannon Loper, Individually and as employee of the Beaufort County Parks
and Leisure; Stu Rodman, as Finance Chair of Beaufort County Council.
Dave Thomas, Procurement Director Beaufort County, SC. Beaufort County
Disabilities and Special Needs; Beaufort County DSN BoardRespondents

April 26 2021


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A. **STATEMENT OF ISSUES ON APPEAL**

That Lower Court erred in granting Summary Judgment on November 27, 2018.

1. The threshold of Preponderance of the Evidence was met by the Appellant and According to the threshold of Statute of Limitations this matter should not be “time-barred” in accordance with SC Torts Claim Act. (**ROA p. 157**)
2. That Prima Facie evidence is present (**ROA 157,156**)
3. That Genuine Issue of Material Facts is present (**ROA p.149**)
4. That a Breach of Contract Accompanied by a Fraudulent Act occurred (**ROA p.149, p.94,p.108**)
5. That Respondents failed under (Article 4 of Consolidated Procurement Code 19-445.2045) after receipt failed to safeguard the bid. (**ROA p.94**)
6. That Respondents failed in procedures under (19-445.2050 - Disclosure of Bid information. (**ROA p.94,149,p.108**)
7. That Appellants are entitled to Punitive Damages. (S.C. Code § 39-5-140)
8. Appellants Tort Claims were filed within the (2) year rule under Statute of Limitations pursuant to South Carolina Code of when the Appellant discovered after receipt of internal Beaufort County emails (in 9/2015) between the Procurement Director, Thomas and other respondents show more than scintilla of evidence of fraud perpetuated by Thomas and the others. In addition, when comparing the RFP required specifications with (all) of the various bids submitted it shows obvious additional violations by County Procurement have occurred, including, DSN’s competitive 2012 bid contained

confidential company information belonging to the Appellant's company, Carolina Cleaning. (ROA p. 157)

9. Appellants claim of SC Procurement violations remain Genuine Issues of Material Fact. (ROA p. p.149,p.32, p.33, p.40)
10. Appellants claim of Bid-Rigging of the 2012 Rfp. is in violation of SC Procurement are Genuine Issues of Material Fact. (ROA p.149, p. 137)
11. Respondents claim fails that Appellant failed in their administrative remedies by Appellants. (ROA p.156)
12. Appellants claim that Beaufort County Procurement Director, Beaufort County employees and the BCDSN Board violated SC Procurement by submitting the janitorial bid (late submittal allowed by BC Procurement) in an "open market" RFP (3) months after the March 22, 2012 deadline. (ROA p.137)
13. Appellants claim that Beaufort County Procurement Director, Beaufort County employees and the BCDSN Board violated SC Procurement by coordinating, discussing, collaborating together on the submittal of BCDSN's - 2012 janitorial bid in an "open market RFP (3) months after the March 22, 2012 deadline. (ROA p.149, p.94, p. 137)
14. Appellants claim that Beaufort County committed a fraudulent act in awarding the 2012 janitorial bid to Beaufort County using an "open market" Request for Proposal. Beaufort County used an "open market" Request for Proposal to award itself the 2012 janitorial bid after meeting, discussing and collaborating with BCDSN regarding the 2012 RFP. (ROA p.108 p.1 letter D, p.149, p.94,p.137)
15. Appellants claim of violations of SC Procurement Code where all Request for Proposal information of competitors are sealed bids and "confidential" including strict

protocols required to be followed and neglected by Respondents. (**ROA p.137, p. 149**)

16. Appellants claim that the Respondents did gain and use the Appellants confidential information in the Pre-Bid meetings. And after sealed bids provided by Steven Craig Molloy, DBA Carolina Cleaning were opened by Beaufort County. (**ROA p.137, p.149**)
17. Appellants claim of Respondents using “confidential” bid information found in the Beaufort County DSN Board bid for the 2012 RFP, copied and pasted directly from Appellants bid. (**ROA p.137**)
18. Appellants claim that a Breach of Contract by Beaufort County was accompanied by a fraudulent act, occurred by acts and omissions by respondents herein: *Peoples v. Orkin Exterminating Co.*, 244 S.C. 173, 135 S. E.2d 845 (1964) the theory of a breach of contract accompanied by a fraudulent act is identified as an action in contract. (**ROA p. 108 p.1, letter D, p. 149**)
19. A action for breach of contract accompanied by a fraudulent act is an action ex contract, *Cain v. United Insurance Company of America*, 232 S.C. 397, 102 S.E.2d 360; *Ross v. American Income Life Insurance Company*, 232 S.C. 433, 102 S.E.2d 743; however, it partakes of elements of both contract and tort.(*Peoples*, 244 S.C. at 178, 135 S.E.2d at 847). South Carolina has long recognized a plaintiff's right to recover punitive damages for breach of contract accompanied by a fraudulent act. (*Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985). (**ROA p. 108 p.1, letter D, p. 149**)
20. Appellants claim that Beaufort County DSN Board, and Beaufort County DSN are (is a) “third party entity” and were allowed to, and in fact did submit bids for contracts to provide janitorial services (although unqualified in every way) in 2012 in a “open market RFPs” for competitive bid contracts. (**Emphasis added**)

Emails between BCDSN Director, Wagner working with the BC Procurement Director, Thomas is prima facie evidence of fraud and supported by the FSLA documents and BC Director of Procurement Dave Thomas Affidavit. Beaufort County claims both BCDSN and the DSN Board is part of Beaufort County.

(ROA p. 108 p.1, letter D, p. 149)

21. Appellants claim that Judge Marvin Dukes has not recognized or placed proper value on the prima facie evidence and exhibits, the Timeline of FOIA and the internal Beaufort County emails showing violations were not received by Appellant until 9/2015 and show Respondent's conversations citing clear procurement violations and fraudulent acts. This suit filed 8/2016, well within the statute. **(Emphasis Added)**

(ROA p. 108 p.1, letter D, p. 149)

22. Appellant believes Judge Marvin Dukes has not considered or taken into account that the Appellant was not privy to the internal BC email conversations between BCs employees citing and highlighting (bid-rigging) of the 2012 RFP until after the internal emails were received (through 2015) via FOIA. There is no possible way for the Appellant to have known or could have known that the named Respondents had utilized the Appellants "proprietary" "confidential" bidding information in the BCDSN submitted 2012 RFP. These internal conversations of Beaufort County employees cite Bid-rigging and other subject matter found in the internal BC emails and communications demonstrated clear intent and fraudulent actions of / between BC employees. **(ROA p.162-314 – transcript of hearing 3/23/2018 – lower court failed to address)**

23. Appellant could not have known or should have known the content in the internal emails and its purpose until after receipt of FOIA through 9/2015. Under SC Torts, the Statute of Limitations of (2) years threshold has been met by Appellants where this suit was filed 8/2016 and clearly within the Statute of limitations. **(ROA p.157)**

A. STATEMENT OF THE CASE

1. Steven Craig Molloy, Island Group Inc. DBA Carolina Cleaning [Plaintiff's Company] was a professional janitorial company performing in Beaufort County and outlying area areas for 23 years with 18 years of awarded contracts with Beaufort, County cars Government. Other contracts and customers of Appellant included Sea Pines Company, Beaufort County Schools, Parris Island Marine, MCAS, The Technical College of the Low Country, USCB to name a few.

2. In 1997 - 2000 Plaintiff's company was awarded its first contract with Beaufort County and Subsequent competitive awards followed in 2000-2005, 2005-2010 and 2010-2015. The continual awards to Appellants company demonstrates the complete confidence, proven positive performance, professional service and financial viability was consistently the Best option for the Taxpayer and Beaufort County. The work required under this contract was quite cumbersome, geographically challenging, labor intensive (also challenging) and under a competitive type RFP pricing structure the necessary knowledge to perform successfully and manage the work would always be most beneficial to the Taxpayers for an experienced contractor familiar in all aspects of this industry, where Carolina Cleaning already had proven successful in the past 18 years servicing the Beaufort County and many other facilities.

3. The 2010 - 2015 award contract with (1) year renewals, (2010 RFP #. ... 0566) was awarded to Carolina Cleaning / Plaintiff's and Plaintiff provided services under this contractual agreement. The Respondents, Beaufort County, unfairly interfered and dismantled with intent the 2010 contract # ...0566 that had already been awarded to the Appellant's company.

4. During the 2010 – 2015 awarded contract to Appellant (2010 RFP# ... 0566) Beaufort County opened another separate RFP in 2012 (2012 RFP# ...0221) for “other/ separate” facilities with a closing date (deadline & all Bids due) of March 22, 2012.

5. Plaintiff (Appellant) received (2012 RFP # 0221) for services from BC Procurement Dave Thomas in the mail which included 10 small “previously closed” Beaufort County buildings in outlying areas of BC.
6. Plaintiff (Appellant) bid the 2012 RFP along with (2) other local professional janitorial service companies. Beaufort County DSN Board was kept secret from other bidders as a bidder (themselves) and service company on the “2012 Rfp” which was an open market public RFP”. (ROA p. 108, p.133, p. 149, p 134, p.137, p.160, p.156,)
7. Defendants [Respondents] requested several (**emphasis added**) meetings with Appellant to discuss pre-bid strategies contract details (for the 2012 RFP) and other confidential information and work plans with the Appellant.
Procurement Director, Thomas allowed the DSN Director (Wagner, Love and Loper) to attend these meetings with Appellant, while discussing confidential bid information. County Procurement Director, Dave Thomas and other Defendants did not make it known to any bidders, including the Appellant (kept secret) that the DSN Director, Wagner, Love and Loper were also competing bidders for the same 2012 RFP and contracted work at the time of and during these meetings.
these meetings.
Also present in these meetings were, County Facilities Director, Roseneau, Finance Director, Alicia Holland, DSN Director, Mitzi Wagner, Assistant DSN Director, Love and Beaufort County Parks Supervisor, Shannon Loper and Procurement assistant, Liz Wooten and Procurement Director, Dave Thomas, to these mee2012 RFP Pre-Bid meetings. (ROA p.156)

B. MATERIAL FACTS - ARGUMENTS

1. Respondents engaged in improper conduct, fraudulent acts with regard to the 2012 RFP# 3910/120221 and provided an unfair advantage to an internal Beaufort County Department (that was allowed to submit a bid) in order to allow the Beaufort County Department to be awarded a contract for services and the 2012 RFP.

Appellants claim of violations of SC Procurement Process are Genuine Issues of Material Fact, as Respondents A.) Provided an unfair advantage to a bidder; the BCDSN program made up of Beaufort County employees. B.) Respondents misused Appellants “confidential” and Rfp information and C.) Allowed BCDSN Director Mitzi Wagner and Bill Love to sit in Pre-Bid meetings with Appellant while discussing business strategies and work plans and confidential information. D.). Respondents kept secret and unknown to other bidders that BCDSN would be submitting a bid (and competing) in the “public open market” 2012 RFP # 3910/120221. (**ROA p.149, p.156, p. 114, p. 126. ROA Supp p. 112, p. 134, p. 85, 579, p. 595, p. 598)**

2. Beaufort County [Respondents] violated SC Procurement by revealing Appellants confidential information and utilizing said confidential information in the proposal submitted by BCDSN Board in the 2012 “open market”.

Respondents Dave Thomas allowed BC DSN Director Mitzi Wagner and Asst. Director Bill Love [bidders and competitors of Appellant on the 2012 RFP] and other County employees.

employees to attend Pre-Bid meetings between Appellant and Procurement Dave Thomas, hence giving Beaufort County DSN Board access to Appellants "confidential business, bid and RFP information, and an unfair advantage and Bid-Rigging by Beaufort County DSN. S.C. Code § 11-35-1810 (3) Right of Nondisclosure. Except as otherwise provided by law, information furnished by a bidder or offeror pursuant to this section shall not be disclosed outside of the offices of the board, the Office of the Attorney General, or the purchasing agency without prior written consent by the bidder or offeror. (ROA p.137, p. 134)

3. Beaufort County Procurement Dave Thomas kept secret from all other bidders (including Appellant) that the internal Beaufort County Department (BCDSN made up of BC employees] would [in fact] be bidding on the 2012 RFP for services and included Beaufort County employees. This was only learned by Appellant much later and after receipt of FOIA through 9/2015 showing the BC Procurement Director, Thomas’ internal email conversations with the BCDSN and County employees

“also bidding” coordinating the winning proposal for BCDSN.

(ROA p. 149, 134, p.32, p. 33, p.94,)

2012 RFP Due date (deadline for submission of the 2012 RFP) was March 22, 2012. BC Procurement Dave Thomas allowed BCDSN [Respondents) to utilize and gain access to competitors bids, copying and using Appellants confidential” 2012 RFP bid information and other information respondents learned in Pre bid meetings into the BC DSN Board submitted bid for the 2012 RFP The BC Procurement allowed BCDSN to submit their proposal on 6/18/2012; (3) months after the March 22, 2012. BC DSN was allowed access to Carolina Cleaning “confidential” information during the time frame between the 3/22/2012 due date and 6/18/2012 date, when all other bidders turned their bids in on or before the due date of 3/22/2012, BCDSN did not, and should have been disqualified. **(ROA p. 137, p.134, p. 156)**

4. *BC Procurements Director Dave Thomas violated procurement and allowed BCDSN to turn their bid in three months late, and where he personally changed the 2012 RFP specifications for BCDSN only, and allowed BCDSN to alter their bid to less than the minimum required specifications on the 2012 RFP, while all other bidders were required to follow the (greater) specifications provided in the 2012 RFP documents (Dave Thomas personally changed the 2012 RFP specifications specifically and only for BCDSN) JSC Code § 15-78-70 (2012) (b) (ROA p. 94)*

Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. S.C. Code § 15-78-200 “is the exclusive and sole remedy not for exceptions under the law, S.C. Code 15-78-60 (17) employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude

5. Procurement Director, Dave Thomas allowed BCDSN to submit a bid to a “open market” RFP from Beaufort County in violation of SC Code § 11-35-1520. (1)

Competitive sealed bidding and the failure of a bidder to indicate their contractor's license number or other evidence of licensure, except that a contract must not be awarded to the bidder unless and until the bidder is properly licensed under the laws of South Carolina. BCDSN and BCDSN Board holds no state or local licenses to provide services or bids for the contracted services in the 2012 RFP.

(ROA p.137, p. 134)

6. Respondents have claimed they were not required to provide a bid for services because they were “an in house” option. This argument fails completely because the respondents did in fact submit a bid in the “open market 2012 RFP”, and in addition followed through the entire bid process including submitting actual (labeled) bids and meetings to discuss their bids, to include full selection process and approval and signature by Council, the bid selection meetings and committee vote. (**ROA p. 32, p. 33, p. 134, p.137, p.140, p.149p.156, p. 157**)

7. Respondents were on the Bid selection committee to award themselves the 2012 Rfp., a violation. [If DSN was not required to submit a bid, why did they submit a bid for the 2012 RFP, there is no reasonable or logical reason for DSN to go through an entire RFP and bid process in 2012, including turning in bids labeled as, bids.] (**ROA p. 134, p.137, p.32, p. 33, p. 40**)

8. Appellants state Beaufort County DSN employees were in attendance during Pre-Bid meetings for the 2012 bid (invited by BC Procurement Director Dave Thomas) with Appellant [Steven Craig Molloy, Island Group Inc. DBA Carolina Cleaning] where respondents gained confidential bid information on cost, products, costs, man hours and full operational procedures, and techniques and later used this information in / for their bid [Bid-Rigging] all known and arranged by the Respondents in advance.
In addition, Respondents including BC Procurement Director Thomas kept secret during these meetings that the DSN personnel attending the meetings were in fact competing bidders on the 2012 RFP. This was kept from the Appellant and is a material fact in this matter and never addressed by the Lower Court.

9. Appellants in the bid-rigging claim, could not exhaust the protest remedies S.C. Code § 11-35-4210, as Appellant had no knowledge of the bid-rigging by Respondents until after receipt of the internal Beaufort County emails (FOIA) provided through 9/2015 and filed suit in 8/2016 which is within the statute of limitations. (ROA p. 157, p. 149, p.137, p.134)

10. Respondents (Defendants) have ignored, avoided and refused deposition requests “several” thus no Defendant depositions have been taken or compelled after the Appellant submitted request to the lower court. Respondents have avoided discovery questions and all inquiries regarding their own internal email conversations that show genuine issue of material facts exist and provide prima fascia evidence, preponderance of the evidence. “preponderance is based on the more convincing evidence and its probable truth or accuracy, and not on the amount of evidence, and prima facie, sufficient to establish a fact or raise a presumption unless disproved. (ROA supp p. 403 lower court never addressed)

11. An order to the Court to compel depositions of the Respondents has never been answered by or addressed by the Lower Court. Respondents [Defendants) have and will claimed their Affidavits submitted in this case are sufficient discovery and truthful, however the statements in their Affidavits have never been questioned or respondents compelled to questions. Respondents claim fails as each and every Affidavit submitted by the Respondents has erroneous and material untruths, unsupported claims including contradictions of statutes, procurement codes and fair trade. Respondents have refused depositions (and lower court has failed to compel or address) the respondents insufficient Affidavits. The Respondents depositions are necessary if truth, fact finding, and justice is to occur in this matter. (ROA Supp p. 403, p. 112 ; ROA p. 149, p.137, p. 134, p.94, p. 144)

12. *Gilmore v. Ivey* 290 S.C. 53, 348 S.E.2d 180 (1986) In determining whether a genuine issue of material fact exists, a court must consider everything in the record pleadings,

depositions, interrogatories, admissions on file, affidavits, etc. *Keiser v. Coliseum Properties, Inc.*, 614 F. (2d) 406 (5th Cir.1980). Like its federal counterpart, Rule 44 did not, and new Rule 56 does not, "distinguish between documents merely filed and those singled out by counsel for special attention the court must consider both before granting a summary judgment." [Emphasis added.] *Id.*, at 410. The lower court erred in granting Summary Judgment because there was no discovery, and the judge failed on the Motion to Compel the Respondents depositions.

13. Appellants commenced the lawsuit (8/2016) after the date of loss was discovered and within the (2) Year Statute of Limitations and date of injury of when Appellant should have known or could have known he had a claim under the discovery rule. *Joubert v. South Carolina Dept. of Soc. Services*, 341 S.C. 176, 190, 534 S.E.2d 1, 8(Ct. App.2000) Respondents claims fail that this action is time-barred. "According to the discovery rule, the statute of limitations begins to run when a cause of action reasonably ought to have been known or discovered." *Id.* [*The statute does not run from the date of the negligent act, but from when the injury resulting from the negligent act is discovered or may be discovered by the exercise of "reasonable diligence."*] *Id.*, 314 S.C. at 190-91. 534 S.E.2d at 8. Appellant was unaware and could not be aware of the actions taken by Procurement Director, Dave Thomas in his official capacity and individually until reception of FOIA "internal emails and subsequent BCDSN bids and documents for comparison" in 2015 and the internal emails of the respondents which was well within the (2) Statute of Limitation. Appellant was at the mercy of Beaufort County, FOIA office J. Nelson to respond to the FOIA with promptness, and completeness upon learning that Beaufort County used Appellants proprietary "confidential" 2012 RFP information in the BC 2012 RFP # ... 0221. (ROA p. 157, ROA Supp p. 3)

14. Procurement Director, Dave Thomas is when Appellant discovered the fraudulent acts by Beaufort County, and Procurement Director, Dave Thomas, BCDSN Director, Mitzi Wagner, and BCDSN Asst. Director Bill Love and others *Article 4 of Consolidated Procurement Code. 19-445.2045, Article 4 of Consolidated Procurement Code. 19-445.2050.* The Respondents actions with regard to the 2012 RFP negatively affected

Appellant's 2010 contract award that his company had successfully performed and had been awarded for the previous 18 years. The Respondents actions negatively affected the Appellants other remaining business and employees as well, this because of the necessity of cross-personnel scheduling of work between the Beaufort County work and other businesses serviced by the Appellant. (ROA p. 149)

15. In determining whether any triable issues of fact exist, the evidence and all reasonable inferences from it must **be viewed in the light most favorable to the party opposing summary judgment.** (*Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997))

16. S.C. Code § 39-5-140, Any person who suffer any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of an unfair or deceptive method, act or practice declared unlawful by S.C. Code § 39-5-20 may bring an action individually. (ROA Supp p. 3)

C. CONCLUSION

The lower court erred in granting Summary Judgment to Respondents'. Genuine issues of Material Fact exists, and the Appellant could have never known a legal action was available until after (9/2015) when FOIA was received and confirmed with receipt of the Defendants 2012 – 2013 internal email conversations showed their intent and further intentional actions. The statute of limitations should not determine this matter for these reasons.

D. TABLE OF AUTHORITIES

1. CASES


Joubert v. South Carolina Dept. of Soc. Services, 341 S.C. 176, 190, 534 S.E.2d 1, 8(Ct. App. 2000). Gilmore v. Ivey 290 S.C. 53, 348 S.E.2d 180 (1986).. Summer v. Carpenter, 328 S.C. 36, 42, 492 S.E. 2d 55, 58 (1997)....3

2. STATUTES

S.C. Code § 39-5-140.....
S.C. Code § 11-35-1520
S.C. Code § 11-35-1528 (2013)
S.C. Code § 15-78-70 (2012) (b).....
S.C. Code § 15-78-200.....
S.C. Code § 11-35-1810 (3)
S.C. Code § 11-35-4210.....
S.C. Code § 39-5-20..
Article 4 of Consolidated Procurement Code. 19-445.2045..
Article 4 of Consolidated Procurement Code, 19-445.2050.....

Respectfully submitted,

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