THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
L. Casey Manning, Circuit Court Judge

Case No. 2011-CP-40-07134

Glenda R Couram,..... Appellant,

v.

Lula N. Davis, Shirley Rivers, Constance "Connie" Rhett, Marcia Adams, Steven Walker, Tosha Autry, Dottie Blankenship and SC Department of Motor Vehicles in their individual and official capacities, ... Respondent.

INITIAL BRIEF APPELLANT

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JURISDICTION

As for appellate jurisdiction, Richland County circuit court Judge entered its order to dismiss with prejudice on or about November 7, 2012. Appellant timely filed Notices of Appeal on or about November 10, 2012 and filed a Motion to Reconsider it was denied on or about January 7, 2013.

SERVICE OF PROCESS

Appellant initiated the circuit court proceeding by suing all Defendants both in their official and individual capacities each Defendant was served personally, via the SC Attorney General Office and to the South Carolina Department of Motor Vehicles (hereafter "SCDMV) registered Agent and Attorney Eugene Matthews, Esq., since November 13, 2008, pursuant to SCRCP 4 and 5.

BACKGROUND

A. EXHAUSTING REQUIRED ADMINSTRATIVE REMDIES[1]

1. This matter was initially filed as a claim for discrimination. In compliance with state and federal law Appellant filed an Intake Questionnaire with the Equal Employment Opportunity Commission (hereafter "EEOC") and South Carolina Human Affairs Commission (hereafter "SCHAC) on or about October 29, 2008.

2. The verified discrimination charge, was signed under penalty[2] of perjury on or about November 13, 2008, the discrimination charge was filed to SCDMV on or about November 18,

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[1] South Carolina is a "deferral state" is one which has a state law "prohibiting the unlawful employment practice alleged" and a state or local agency authorized "to grant or seek relief" from the practice. See id. §2000e-5(c).

[2] This Court would be hard pressed to take issue with the EEOC's position after deciding, in Becker v. Montgomery, 532 U. S. 757, 765(2001), that a failure to comply with Federal Rule of Civil Procedure 11's signature requirement did not require dismissal of a timely filed but unsigned notice of appeal because nothing prevented later cure of the signature defect. There is no reason to think that relation back of the oath here is any less reasonable than relation back of the signature in Becker.

2008, under the signature of Patricia Fuller which the EEOC[3] addressed to Marcia Adams outlining the actions that must be taken by December 8, 2008 as a result of the discrimination charges filed.

3. A copy of the "Right to Sue" letter was sent to Appellant on or about October 9, 2009, informing Appellant that the claim was disallowed by SCDMV and its registered agent. A copy of the "Right to Sue" letter was also sent to Matthews. Appellant was told she must file a civil action in federal or state court within 90 days. Appellant timely filed federal and state-law claims on or about January 4, 2010 in federal court.

B. APPELLANT'S EMPLOYMENT HISTORY:

Plaintiff/Appellant began working for South Carolina Department of Motor Vehicles on or about October 2004 as a temporary and was hired as a permanent employee on or about July 17, 2006. Appellant gained standing on or about July 17, 2007 which basically means that the Appellant had grievance rights and the Defendants must provide progressive discipline as outlined by the SC Budget and Control Board and SCDMV Polices and Procedure before termination. Appellant completed five years of employment and is vested.

C. JUDGE PERRY FEDERAL COURT PROCEEDINGS

On March 2011, US Chief Federal District Judge Matthew Perry (hereafter "Judge Perry") dismissed Appellant's discrimination claims with prejudice and declined to exercise supplemental jurisdiction over the state pendant law claims pursuant 28 USC 42 §1447. Defendants filed a Motion to Reconsider Judge Perry's decision to dismiss the state claims without prejudice Judge Perry denied the motion on May 2011.

After dismissal of the state pendant law claims *without prejudice* the Appellant timely refiled the state pendant claims in Richland County state circuit court for violation of her constitutional rights under state law, gross negligence, civil conspiracy, defamation and intentional infliction of emotional distress, (outrage) etc., timely on or about October 25, 2011. Pursuant to 28 USC 42 §1367.

D. OCTOBER 25, 2011 PROCEEDINGS

After refiling on October 25, 2011, the Defendants filed a Notice of Removal dated on or about November 21, 2011 and an Answer on or about November 29, 2011 on the grounds of res judicata and collateral estoppel. Appellant filed a motion to remand and disclaimer stating she was not refiling federal causes of action. After about a year the Appellant's state claims were remanded back to state court by Order of US Chief District Judge Margaret B. Seymour (hereafter "Judge Seymour").

E. NOVEMBER 5, 2012 STATE COURT PROCEEDINGS:

After remand on August 21, 2012 a protracted hearing on November 5, 2012 the case was dismissed by the circuit court Judge Manning on or about November 7, 2012 and the Motion to Reconsider was denied on or about February 7, 2013.

STANDARD OF REVIEW

A. MOTION TO DISMISS

"In deciding a motion to dismiss pursuant to SCRCP 12(b)(6), the trial court should consider only the allegations set forth on the face of the plaintiff's complaint. A 12(b)(6) motion should not be granted if 'facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case.' The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states

any valid claim for relief. Further, the complaint should not be dismissed merely because the *court doubts the plaintiff will prevail in the action.*" Plyler v. Burns, 373 S.C. 637, 645 (2007) (internal citations omitted).

In considering such a motion, the trial court must base its ruling solely on allegations set forth in the complaint. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on *any* theory, then the grant of a motion to dismiss for failure to state a claim is improper. Baird v. Charleston County, 333 S.C. 519, 511 S.E.2d 69 (1999).

See Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987). The circuit court must base its ruling solely upon the allegations set forth on the face of the complaint. Doe v. Greenville County Sch. Dist., 375 S.C. 63, 66–67, 651 S.E.2d 305, 307 (2007). The motion may not be sustained if the facts alleged in the complaint and the inferences drawn therefrom would entitle the plaintiff to relief under any theory. Id. "[P]leadings in a case should be construed liberally and the Court must presume all well pled facts to be true so that substantial justice is done between the parties." Overcash v. S.C. Elec. & Gas Co., 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005) (citing Stroud v. Riddle, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973)). See Gentry v. Yonce, 337 S.C. 1, 522 S.E.2d 137 (1999).

B. STANDARD FOR SUMMARY JUDGMENT

In deciding a summary judgment motion, the court, or judge, reviews the pleadings, any depositions, any answers to interrogatories, any admissions on file, and any affidavits. Summary judgment should be granted only when there is no genuine issue as to any material fact. A material fact is a fact that could affect the outcome of the case. An issue of fact is genuine if the evidence would justify a verdict for the party opposing the summary judgment motion. All

inferences drawn from the evidence presented and all ambiguities must be resolved in favor of the party who opposes the summary judgment motion. Am. Home Assurance Co. v. United Space Alliance, LLC, 378 F.3d 482, 486 (5th Cir. 2004).

In the Fifth Circuit that court held: In reviewing this decision, we use the same standards as the district court. Pegram v. Honeywell, Inc., 361 F.3d 272, 278 (5th Cir. 2004). In other words, we ask whether the movant has shown the nonexistence of any genuine issues of material fact and that he is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).

"When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to SCRCP 56(c)."Fleming, 350 S.C. at 493, 567 S.E.2d at 860 (citing Peterson v. West Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct. App. 1999)). If triable issues exist, those issues must go to the jury." Young v. S.C. Dep't of Corr., 333 S.C. 714, 717, 511 S.E.2d 413, 415 (Ct. App. 1999).

In Vermeer Carolina's Inc. v. Wool/Chuck Chipper Corp., 336 S.C. 53, 59, 518 S.E.2d 301, 305 (Ct. App. 1999) the court held: "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law."[4] See Fed. R. Civ. P. 56(c)(e) The moving party has the burden of proving that summary judgment is appropriate.

The court in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) held "In deciding whether there is a genuine issue of material fact exist the evidence of the non-moving party *is to be believed* and all justifiable inferences must be drawn in favor of the non-moving party. .

[4] In Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) that court held: Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Moreover, summary judgment is a drastic remedy that should be cautiously invoked to ensure no person is improperly deprived of a trial of disputed factual issues. Lanham v. Blue Cross & Blue Shield of S.C., 349 S.C. 356, 363, 563 S.E.2d 331, 334 (2002).

If triable issues exist, those issues must go to the jury. Rothrock v. Copeland, 305 S.C. 402, 409 S.E.2d 366 (1991).

C. PRO SE STANDARD

The Defendants takes exception to the fact that the Appellant is *pro se* and ask the court to treat Couram in the same manner as a learned attorney such as himself and stated that the claims against the Defendants are "ridiculous." The Appellant's causes of action or complaint before this court has at no time been determined to have been frivolous or without merit, therefore the conclusion of the defense that her claims are "self serving." The fact is the Appellant is pro se and Judge Manning and Barber was under well established law to not treat as a learned attorney and allow her to be taken advantage of because of *her pro* se status.

The Courts are charged with liberally construing a pleading filed by a *pro se* litigant to allow for the development of a potentially meritorious claim. See Boag v. MacDougall, 454 U.S. 364, 365 (1982). In Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990) the court held: Although the legal theories within a *pro se* complaint are (maybe added) difficult to discern, courts traditionally view civil rights complaints, particularly those brought pro se, with "special judicial solicitude." See e.g., Harrison v. U.S. Postal Service, 840 F.2d 1149, 1152 (4th Cir.1988); and Gordon Leeke, 574 F.2d 1147, 1151 (4th Cir.), cert. denied, 439 U.S. 970, 99 S.Ct. 464, 58 L.Ed.2d 431 (1978).

Thus, before the circuit court granted the dismissal it was incumbent on Judge Manning to apply the standards of White v. Bloom, 621 F.2d 276 (8th Cir. 1980)[5] were it states the Court has a higher standard when faced with a motion to dismiss a pro se complaint instead the Judge he allowed the Defendants to introduce dates already fully adjudicated and dismissed by Judge Perry and take advantage of the *pro se* and become the "master" of the Appellant's pleading. (T. Pg. 31 Line 19-25, T. Pg. 32, Line 1-6)

D. "RELATE BACK" DOCTRINE

Dismissal of a complaint does not bar a subsequent action brought before expiration of the statute of limitations if the dismissal is based merely on the insufficiency of the complaint. Sealy v. Dodge, 289 S.C. 543, 347 S.E.2d 504 (1986); See also Hennegan v. Atlantic Coast Line R. Co., 211 S.C. 357, 45 S.E.2d 331 (1947). Appellants state pendant claims has never been fully adjudicated on their merits.

E. DOCTRINE OF RES JUDICATA (T. Pg. 29)

"To establish a res judicata defense, a party must establish: a final judgment on the merits in a prior suit, an identity of the cause of action in both the earlier and the later suit, and an identity of parties or their privies in the two suits." Jones v. SEC, 115 F.3d 1173, 1178 (4th Cir.1997) (internal quotation marks omitted), cert. denied, 523 U.S. 1072, 118 S.Ct. 1512, 140 L.Ed.2d 666 (1998).

LEGAL ANALYSIS

ARGUMENT

I. DID THE CIRCUIT COURT JUDGE ERR AND ABUSE ITS DISCRETION BY GOING BEYOND THE FOUR CORNERS OF THE APPELLANT'S PLEADING

[5] See Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972). See Erickson v. Pardus, 551 U.S. 89, 94 (2007). See Bonner v. Circuit Court of St. Louis, 526 F.2d 1331, 1334 (8th Cir. 1975) (quoting Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974

ASSUMING FACTS NOT ALLEGED IN THE PLEADING TO FACILIATE AND GRANT THE DEFENDANTS' MOTION TO DISMISS?

Appellant preserved her rights to the common law action on November 5, 2012 (T. Pg. 17, 18, 19, 20, 21, 22 23 L 3-23, L 1-8, L 5-9 & L1-24) and evidentiary dates of injury.[6]

> Also, it goes on to state that as far as the common law claims are concerned, Mr. Matthews said that there was a two-year statute of limitations and from what I understand that is not true. Section 15-3-530 says that there is a three year statute of limitations.
>
> THE COURT: He was referring to a two-year statute in connection with suing a state agency, I believe.
>
> COURAM: Excuse me?
>
> THE COURT: Go ahead
>
> COURAM: Okay
>
> THE COURT: Don't let me stop you.
>
> COURAM: According to Section 5 – 15-3-530 – there is a three year statute of limitation for civil conspiracy claims, for gross negligence and so forth and for common law claims which I was well within and I had timely filed for that in this Court.
>
> So my – my Amended Complaint would not be futile as Mr. Matthews is claiming it would be because I have not missed any of the statue of limitations according to the sections and the code of law by the State of South Carolina.
>
> And, again I object going over the Motion to Dismiss at this time because I didn't have (time) to type up or prepare anything to submit to the Court as I should have been allowed.

A. The circuit court abuse its discretion when it denied the Appellant's Request to Amend stating that to do so would be an act of futility under because her claims are barred by the Statue of Limitations S.C. Code Ann. §15-3-530(4)(5) and pursuant to SRCRP 15(c).

[6] Discovery was completed November 2010, dispositions, affidavits, copies of personal files, interrogatories, production, etc., all a matter of record.

Allowing the Appellant to amend her complaint would not have been futile even if the Appellant had brought claims under the SCTCA. Nowhere on the face of the pleading are their allegations of discrimination. Those claims were dismissed with prejudice on March 2011.

The Appellant brought actions of gross negligence, civil conspiracy, outrage and defamation that is clear on the face of her complaint these claims fall under the common laws of the State of South Carolina S.C. Code Ann. §15-3-530(4)(5) and has a three statute of limitations they were timely filed in January 4, 2010 and they do "relate back." The Appellant timely refiled within the three years of statute of limitations on October 25, 2011.

Even if the Appellant had brought claims or the claims under the SCTCA were before Judge Manning the Appellant's claims were also timely pursuant to 28 USC 42 §1367. As the statue statute of limitations were "stopped" or suspended while this matter was pending in federal court and it was not dismissed until March 2011.

II. DID THE CIRCUIT COURT ERR AND ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST TO AMEND STATING TO AMEND PURSUANT TO RULE 15(c)?

The Defendants claim that to have allowed the Appellant to Amend would have been futile because her common law state pendant law claims are barred under SCTCA two year.

The South Carolina Rule of Civil Procedure 15(a) requires that leave to amend a complaint "be freely given if justice so requires...." Our Courts have interpreted this rule liberally. "Leave to amend pleadings pursuant to SCRCP 15(a), shall be liberally and freely given when justice so requires and does not prejudice any other party." Crestwood Golf Club, Inc. v. Potter, 328 S.C. 201, 493 S.E.2d 826 (1997); Pruitt v. Bowers, 330 S.C. 483, 499 S.E.2d 250 (S.C. App. 1998). "This rule strongly favors amendments and the Court is encouraged to

freely grant leave to amend." Jarrell v. Seaboard Sys. R.R., 294 S.C. 183, 363 S.E.2d 398 (S.C. App. 1987).

The prejudice SCRCP 15 envisions is a *lack of notice* that the new issue is to be tried and a lack of opportunity to refute it. *Id.* The only one who was prejudice was the Appellant. See Foggie v. CSX Transp., Inc., 315 S.C. 17, 22, 431 S.E.2d 587, 590 (1993). The "prejudice" in question is lack of notice that a new issue is going to be tried and lack of opportunity to refute it. Staubes v. City of Folly Beach, 339 S.C. 406, 413, 529 S.E.2d 543, 546 (2000).

The questions that was before Judge Manning was if the Defendants had all the information they presented for the first time on November 5, 2012, why did they file a motion to remove? There was no reason for them to have removed this matter back federal court, paid the filing fee and allow it to remain in federal court for a year. The federal court had authority to dismiss the claims based if the information in the Defendants "brief" were factual. (T. Pg. 25 L 23)

Finally, the request to amend was not futile. The courts have held: for a motion to amend to be futile, it must be clearly be insufficient or frivolous on its face. Johnson v. Oroweat Foods Co., 785 F.2d 503, 510 (4th Cir. 1986). See Nolte v. Capital One Financial Corp., 390 F.3d 311 (4th Cir. 2004) (amendment denied as futile when it does not cure deficiencies previously identified by the Court). Appellant cured all deficiencies prior to remand by Judge Seymour when she said according to the Defendants (T Page 13 L 1-4):

> MATTHEWS:.....And on August 21, in response to that motion[7] Judge Seymour was the one who said I'll lift this Complaint, I don't think they are federal claims and I'm not going to exercise jurisdiction over them and you're going back to state court.

[7] The Defendants August 9, 2012 Motion to Dismiss.

The courts have stated: "When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted. Potter, Prescott, Jamieson & Nelson, P.A. v. Campbell, 708 A.2d 283, 286-87 (Me. 1998) (trial court acted within its discretion in dismissing case with prejudice pursuant to SCRCP 12(b)(6) where plaintiff was unable to show how he would cure defects in his complaint if granted leave to amend it); Barkley v. Good Will Home Assn., 495 A.2d 1238 (Me. 1985) (in absence of bad or dilatory motives on the part of plaintiff or undue prejudice to defendant, the trial court abused its discretion by denying the plaintiff an opportunity to amend her complaint after it was dismissed pursuant to Rule 12(b)(6)).[8]

Rule 15(c) of the Federal Rules of Civil Procedure governs amendments to pleadings. Fed. R. Civ. P. 15(c)(1)(B) provides: "An amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction or occurrence set out . . . in the original pleading." Id. Mylan Laboratories, Inc. v. Matkari, F.3d 1130, 1134 (4th Cir. 1993) (citations omitted). [9]

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[8] She also filed a Motion to Reconsider along with exhibits that clearly shows the dates of injury and only state pendant claims were remanded.

[9] It is black-letter law that a plaintiff may amend his complaint in the absence of bad faith, unfair prejudice or futility. Foman v. Davis, 371 U.S. 178, 182 (1962; Nolte v. Capital One Financial Corp., 390 F.3d 311 (4th Cir. 2004); HCMF Corp. v. Allen, 238 F.3d 273, 276 (4th Cir. 2001); *Edwards v. City of Goldsboro*, 178 F.3d 231, 242 (4th Cir. 1999)). None of these barriers to amendment existed.

The Defendants argued the amendment prejudices them because the statute of limitations on the tort claims had passed.[10] Why would the Defendants have allowed Judge Seymour have remanded this matter back to the state court if the statute of limitations had run, as a Federal Judge, Judge Seymour had the authority to dismiss, but the Defendant at no time while this matter was in federal court made allegation until after remand. Therefore, the Defendants argument of prejudice it appears to the *pro se* is without merit.[11]

III. DID THE CIRCUIT COURT ERR IN GRANTING THE DEFENDANTS' MOTION TO DISMISS CONCLUDING THAT APPELLANT'S GROSS NEGLIGENCE CLAIMS ARE BARRED UNDER THE TWO YEAR STATUTE OF LIMITATIONS UNDER SC CODE ANN §15-78-70 AND §15-78-80 ET SEQ.?

The defendants are all government employees as defined under the South Carolina Tort Claims Act ("SCTCA"). *See* S.C. Code Ann. § 15-78-30(c). All were or and are currently employed with the SCDMV. The SCTCA constitutes the exclusive remedy for torts committed by a government employee acting within the scope of his official duties. S.C. Code Ann. § 15-78-70(a)(c) et. seq. In such a case, the agency or political subdivision for which the employee was acting is the proper party defendant.

The Appellant as the Defendants and the court attest brought claims against the Defendants in their "individual capacities" for gross negligence "in more detail" she alleges the defendants' actions were "intentional, gross and malicious and in complete disregard of her constitutional rights and wellbeing." The SCTCA does not grant an employee "immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his

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[10] Preserved Argument November 5, 2012 - The complaint remanded on August 21, 2011, does not show a claim under SCTCA but under the common laws of the State of South Carolina with a three year statute of limitations – causes of action for gross negligence, civil conspiracy, defamation, outrage (IIED). Nor are there any claims under §1983

[11] It is said that a person representing himself or herself is a fool, it is a "black letter" day when the fool, in this case the pro se Appellant, earned her day in court by meeting all legal requirements, following all civil procedure and still is denied her day in court because the court clearly accepted as true everything the defense counsel said.

official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. §15-78-70(b)

In such a case, a government employee can be held individually or personally liable. The SCTCA statute of limitations would not apply to these claims as outlined by Judge Manning. The statute of limitations for gross negligence claim is three years, and therefore these claims would be timely. §15-3-530(5) given this information the circuit was in error when dismissed the Appellant's claims with prejudice and this court should overturn that dismissal and remand for full adjudication.

Defendants and Judge Manning quote Joubert v. South Carolina Dep't of Soc. Servs., 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000) as the controlling case to prove the Appellant's claims are barred §15-78-80. The Appellant argued that she had filed a verified claim the court and Defendants said that she was "mistaken" based on disputed[12] dates of injury submitted to the state court, not federal for the first time in the "brief" of the Defendants dated October 29, 2012. These dates are not on the face of the Appellant's pleading (Third or Fourth) nor on the approved and remanded pleading nor in the evidentiary record that was before Judge Manning). (T. Pg. 14 L 5-25)

> MATTHEWS: ... factual allegations they occur almost entirely on or before December of 2008.

As the Appellant made known to Judge Manning during his questioning her claims are inclusive of the dates of December 2008 thus she had no need to refile her claims to the EEOC or SCHAC. The evidentiary record would have proven her dates of demotion to Data Entry. (T. Pgs. 17 -18) more importantly, as will be discussed later, the claims came out of the same facts and circumstances and all "relate back" to the original complaint pursuant to SCRCP Rule

[12] Genuine triable issue of material fact.

15(a)(b)(c), SCRCP 8, FRCP 8 and Title VII.2000(e) 5 §706 Because the claims related back the Appellant was still within the applicable two year statute of limitations as the remaining statute had stopped running on January 4, 2010, while the federal claims were pending in federal court and did not start running again until March 2011 and 30 days after that date.[13] See Edelman v Lynchburg.

IV. DID THE CIRCUIT COURT ERR WHEN IT DISMISSED THE APPELLANT'S CLAIMS WHEN IT SAID THE APPELLANT WAS "MISTAKEN" WHEN SHE STATED SHE HAD FILED A VERIFIED CLAIM TRIGGERING THE THREE STATUTE OF LIMITATIONS UNDER THE SCTCA BASED ON THE US SUPREME COURT DECISION IN EDELMAN V LYNCHBURG COLLEGE, 535 US 106 99-2408 (2002). (§15-78-110)?

> "A complaint to the EEOC starts the agency down the road to investigation, conciliation, and enforcement, and it is no small thing to be called upon to respond. As we said before, the verification provision is meant to provide some degree of insurance against catchpenny claims of disgruntled, but not necessarily aggrieved, employees. In requiring the oath or affirmation, however, Congress presumably did not mean to affect the nature of Title VII as "a remedial scheme in which laypersons, rather than lawyers, are expected to initiate the process." EEOC v. Commercial Office Products Co., 486 U. S. 107, 124 (1988); Love v. Pullman Co., 404 U. S. 522, 527 (1972). Construing § 706 to permit the relation back of an oath omitted from an original filing ensures that the lay complainant, who may not know enough to verify on filing, will not risk forfeiting his rights inadvertently. At the same time, the EEOC looks out for the employer's interest by refusing to call for any response to an otherwise sufficient complaint until the verification has been supplied.
>
> Construing § 706 to permit the relation back of an oath omitted from an original filing ensures that the lay complainant, who may not know enough to verify on filing, will not risk forfeiting his rights inadvertently. At the same time, the EEOC *looks out for the employer's interest by refusing to call for any response to an otherwise sufficient complaint until the verification has been supplied.* This Court would be hard pressed to take issue with the EEOC's position after deciding, in Becker v. Montgomery, 532 U. S. 757, 765, that a failure to comply with Federal Rule of Civil Procedure 11's signature requirement did not require dismissal of a timely filed but unsigned notice of appeal because nothing prevented later cure of the signature defect. There is no

[13] Pursuant to 28 USC 42 §1367, There were nine months remaining in the original two year statute of limitations and twenty one months remaining under the common law statute of limitations §15-3-530(4)(5). The stature of limitations is an affirmative defense that must be proven by the defendants.

> reason to think that relation back of the oath here is any less reasonable than relation back of the signature in *Becker*. See Edelman v. Lynchburg. Leonard No. 99-2408. Argued June 8, 2000. "At the same time, the EEOC *looks out for the employer's interest by refusing to call for any response to an otherwise sufficient complaint until the verification has been supplied.*"
>
> Footnote 9 says: The general practice of EEOC staff members is to prepare a formal charge of discrimination for the complainant to review and to verify, once the allegations have been clarified. See Brief for United States et al. as *Amici Curiae* 24. The complainant must submit a verified charge before the agency will require a response from the employer. See Brief for United States et al. as *Amici Curiae* on Pet. for Cert. 16. Respondent argues that the employer will be prejudiced by these procedures because "there would be no deadline for verifying a charge." Brief for Respondent 34, n. 26. But this is not our case, which simply challenges relation back *per se*, and our understanding is that the EEOC's standard practice is to caution complainants that if they fail to follow up on their initial unverified charge, the EEOC will not proceed further with the complaint. See App. 57; Brief for United States et al. as *Amici Curiae* on Pet. for Cert. 17."

Appellant preserved the fact that her claims before the state court were claims filed and on October 2008 and was officially filed on November 2008, to include discrimination charges of demotion to data entry as the evidentiary record beside Judge Manning would have proven. (T. Pg. 7 L 16-24, P. 17-18, Pg. 25 L 23)

V. DID THE CIRCUIT COURT ERR OR ABUSE ITS DISCRETION WHEN IT DISMISSED APPELLANT'S CLAIMS BASED ON THE SC APPEALS COURT RULING IN *FLATEAU V HARRELSON* STATING "THE TWO YEAR STATUTE LIMITATIONS APPLIES TO THE INDIVIDUAL DEFENDANTS AS WELL, REGARDLESS OF WHETHER THEY ACTED WITHIN THE SCOPE OF THEIR OFFICIAL DUTY"?

Defendants and Judge Manning concluded that Appellant's claim of gross negligence, civil conspiracy and outrage are barred by the two-year statute of limitations under the SCTCA pursuant to the SC Supreme Court decision in Flateau v. Harrelson, 355 S.C. 197, 204, 584 S.E.2d 413, 416 (S.C. Ct. App. 2003) applies to the defendants in their individual capacities.

The Flateau decision by the SC Court of Appeals does not support the dismissal of the Appellant's claims against the Defendants in their individual capacities as claimed by the Defendants and Judge Manning (See Footnote Pg 7).[14]

As explained by a decision from the Fourth District US Chief District Federal Judge Henry Floyd in Smith v. City of Greenwood, etc., 8:2009cv02061 (2010) who discussed at length the SC Supreme Court ruling in Flateau the end results was that the SCTCA applies only when the complaint alleges actions falling *within* the scope of a governmental employee's official duties, actions for which the employee would be immune from liability under the SCTCA.[15]

Judge Floyd discussed as follows in confirming the decision of the magistrate denying the Defendants Motion to Dismiss:

> "Defendants claim that the SCTCA statute of limitations, S.C. Code Ann. §15-78-110, applies to Plaintiff's civil conspiracy claim regardless of whether Defendants' conduct was within or outside the scope of their official duties. Buttressing their claim, Defendants rely on the following statement in Flateau:
>
> "We rule the two-year [SCTCA] statute of limitations applies even if the [individual defendants] acted outside the scope of their official duties or if their actions constituted fraud, actual malice, intent to cause harm, or a crime of moral turpitude." Flateau, 355 S.C. at 209.
>
> ..... *The court* ***never*** *needed to reach the limitations issue as to acts occurring outside the scope of employment because it concluded that the Defendants' actions were within the scope of their official duties and were thus immune from liability under the SCTCA. Flateau, 355 S.C. at 206.*
>
> To the extent the court's discussion of the application of the SCTCA's limitations provision was therefore unnecessary to the determination of the rights of the parties, it was dicta.[16] See New England Mut. Life Ins. Co. v. Mitchell, 118 F.2d 414, 420 (4th

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[14] Or, gross negligence.

[15] Unlike in the decision in Flateau the Appellant clearly allege that the Defendants acted outside the scope of their official duty Judge Manning and the Defendants said that the Defendants did so "fulsomely".

[16] The Law Dictionary Featuring *Black's Law Dictionary* Free Online Legal Dictionary 2nd Ed., says the meaning of ***Dicta*** are opinions of a judge which do not embody the resolution or determination of the court, and made without argument, or full consideration of the point, are not the professed deliberate determinations of the judge himself. See

Cir. 1941) ("[T]his court . . . has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties.") (quoting Carroll v. Carroll, 57 U.S. 275, 287 (1853. Even in diversity cases, federal courts are not bound by dicta from state court opinions. *Id.* at 419 ("[M]ere dicta have never been received as conclusive evidence of the law of any state, and clearly they ought not be followed when opposed to what we regard as the sound and reasonable rule arising out of the common law of the state."). Powell v. Maryland Trust Co., 125 F.2d 260, 269 (4th Cir. 1942).

(b.) Defendants' interpretation of Flateau's limitations conclusion ignores its context.

Even if Flateau's conclusion on the Act's limitations period carried the weight Defendants would attribute it ..... Flateau's statement that the limitations period applies regardless of whether an employee's actions fall within or outside the scope of his official duties ***appears only after*** the court concludes that the SCTCA applies in the first instance because of the allegations of the complaint:

We hold the *complaints* [of the plaintiffs] allege torts committed by the Board members *while acting within the scope of their official Duty.* The [SCTCA] provides the exclusive remedy for torts committed by an employee of a governmental entity *while acting with the scope of the employee's official duty. See* S.C. Code Ann. §15-78-200 (Supp. 2002). Thus, the claims of [the plaintiffs] are governed by the [SCTCA].

Flateau, 355 S.C. at 208 (emphasis added)." Thus, whether the alleged actions fall within or outside the scope of an employee's official duties is a threshold issue in determining if the SCTCA applies. Id. at 204 ("The Act is intended to cover those actions committed by an employee *within the scope of the employee's official duty.*") (*citing* S.C. Code Ann. §15-78-20(f)) (emphasis added).

The court in Flateau begins its analysis of whether the Act applies by observing that "nowhere in their complaints do [the plaintiffs] *allege that the Board members' actions were outside the scope of their official duty.*" *Id.* (emphasize added)

..... *Therefore, the Flateau court concluded, because the complaints allege actions falling within the scope of the employees' official duties, "[w]e find the claims [of the plaintiffs] are subject to the Tort Claims Act." Id. at 206.* (emphasize added)

..... The court states that § 15-78-70(b), which "***lifts the immunity normally* enjoyed by governmental employees if they act outside the scope of their employment or their actions constitute**" intentional torts, is subject to the two-year

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ltohrbach v. Insurance Co.,62 N. Y. 47, 58, 20 Am. Rep. 451. See Railroad Co. v. Schutte,103U. S. 118, 143, 26 L. Ed. 327; In re Woodruff (D. C.) 96 Fed. 317; Hart v. Stribling. 25Fla. 433, 6 South. 455; Buchner v. Railroad Co., 60 Wis. 264, 19 N. W. 56; Rush v.French, 1 Ariz. 99, 25 Pac. 816; State v. Clarke, 3 Nev. 572.

limitations period because § 15-78-70(b) is "part of the general Tort Claims Act statutory scheme." *Id.* (emphasize added)

Section 70(b) provides, "(b) *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 Ann. § 15-78-70(b).

Though § 15-78-70(b) is a "part of the general statutory scheme," it does not follow, as Defendants suggest, that the provision brings within the ambit of the SCTCA claims against individual governmental employees whose actions fall *outside* the scope of their official duties. See Frazier v. Badger , 361 S.C. 94, 101, 603 S.E.2d 587 (2004) (noting that immunity under § 15-78-70(a)-(b) is "***an affirmative defense that must be proved by the defendant at trial.***"). (emphasize added)

Further, while the drafters intended to limit the liability of governmental entities, they did not intend to extend similar ***immunity to individual employees who commit intentional torts outside the scope of their employment***. S.C. Code. Ann. § 15-78-70(b); S.C. Code Ann. §15-78-60(17). (emphasize added)

Judge Floyd went on to say: If this Court were to adopt Defendants' interpretation of Flateau, so that any intentional tort committed by a governmental employee would be subject *to a two-year limitations period merely by virtue of the identity of his employer*, it would contravene[17] (definitions added) the express purpose of the SCTCA. Because the SCTCA seeks to limit the liability of governmental entities, rather than for governmental employees who act outside the scope of their employment, the statutory scheme would not be offended by subjecting Defendants to a longer limitations period.

.....decision in Flateau to conclude that the SCTCA's limitations provision *does not apply* where a complaint alleges actions by governmental employees that fall outside the scope of their official duties or constitutes intentional torts. The Magistrate Judge's failure to adopt Defendants' interpretation of Flateau does not amount to a disregard of state law.

..... *Because the Act does not create a cause of action against government employees for conduct that falls outside the scope of the employee's official duties*, the standards that determine whether a governmental entity is liable for the actions of its employees under the Act also govern in determining whether a claim against an individual employee is brought pursuant to the SCTCA in the first instance. *See Flateau*, 355 S.C. at 206 ("[T]he efficacy of the Tort Claims Act is protection of governmental employees acting in the scope of official duties.").

[17] flout, breach, disobey, disregard

> While the Court interprets Flateau to maintain that the SCTCA and, accordingly, its statute of limitations provision do not apply to complaints alleging actions performed in a governmental employee's individual capacity and which go beyond the scope of the employee's official duties, it makes no determination at this time on whether Defendants' actions were, in fact, outside the scope of their employment. (emphasizes added)

As Judge Floyd explained or made clear and in harmony with his Order it is clear the Appellant's pleading clearly alleges the Defendants acted *outside the scope of their official duties* and she was suing them in *their individual capacities* as is clear on the face of the pleading and in the caption.[18]

Flateau does not support the (footnote on Page 7) were the court and the Defendants' state "the two year statute of limitations applies to the individual defendants regardless whether they acted within the scope of their official duty."[19]

Each Defendant is named individually and are governed *not* under SCTCA for discrimination but the pleading remanded from federal court applies to §15-3-530(5) and §15-3-535, which has a three year statute of limitations and as shown on the face of the pleading and the ruling from the US Supreme Court in Jinks accepted by SC Supreme Court the Appellant refiled her complaint well within that original statute of limitations and her common law claims per Judge Perry's Order dismissing the state pendant claims without prejudice do" relate back" and they have not been fully adjudicated on their merit.

See also US Court of Appeals ruling in Andrews v. Daw, 98-6329 (4th Cir. 2000): "In sum, we hold that a government employee in his official capacity is not in privity with himself in his individual capacity for purposes of res judicata, and, therefore, the district court erred in

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[18] Unlike in the decision in Flateau the Appellant clearly allege that the Defendants acted outside the scope of their official duty Judge Manning and the Defendants said in their Motion to Dismiss that the Appellant did so "fulsomely".

[19] Appellant's is suing each of the Defendants in their individual capacities, (NOT in their "individual official capacities" as worded by the Defendants and Judge Manning). As clearly shown it the caption

dismissing Andrews's suit on that ground. Accordingly, we reverse the district court's dismissal of Andrews's suit and remand for further proceedings."

The circuit court was to accept as true Plaintiff's allegations that the Defendants' actions were performed "in their individual capacities" and were "outside the course and scope of their employment."

VI. DID THE CIRCUIT COURT ERR IN DISMISSING APPELLANT'S CLAIMS FILED UNDER THE COMMON LAWS OF SOUTH CAROLINA §15-3-530(5) SAYING THAT THE CLAIMS WERE BARRED UNDER THE SCTCA TWO YEAR STATUTE OF LIMITATIONS BASED ON JOUBERT V. SOUTH CAROLINA DEP'T OF SOCIAL SERVS., 341 S.C. 176, 534 S.E.2D 1 (CT. APP. 2000), JINKS V RICHLAND COUNTY See **JINKS V. RICHLAND COUNTY 538 U.S. 456, 123 S.CT. 1667, 155 L.ED.2D 631 (2003)?**

A. The Defendants and the court misapplied and misinterpreted the SC Appeals Court decision in Joubert which discusses filing of a verified claim pursuant to S.C. Code Ann. § 15-78-110.

Unlike Joubert the Appellant did comply with the SCTCA verified claim requirement in fact, the written claim was filed to SCDMV and its registered Agent Eugene Matthews on or about November 18, 2008 by the EEOC.

Unlike in Joubert Appellant filed a statement regarding "the extent of the loss, the time and place the loss occurred, the names of all persons involved as known, and the amount of the loss sustained" as required by S.C. Code Ann. § 15-78-80. The loss is statutory as set by state and federal law. Appellant by statute could not file claims in both federal and state court that would be "splitting."

SCHAC §1-13-10 "Any action brought under this chapter shall be promptly dismissed if an action alleging essentially the same facts and seeking relief for the same complainant is brought in any federal court."

Accordingly, as stated above if the current pleading was under SCTCA there can be no question that Appellant complied with this statutory mandate triggering the three year statute of

limitations and she was in full compliance when she refiled her claims on or about October 25, 2011 and within both statute of limitations. Otherwise, the Defendants would have requested dismissal on failure to exhaust all administrative remedies.

The Appellant's claims directly "relate back" to the discrimination actions filed November 13, 2008, the state pendant claims are coming from that same occurrence, and the very same set of circumstances, and it is clear that the claims relate back to that date and none other.

SCRCP §15 and 42 U.S.C. § 2000e-5 §706 to permit the relation back of an oath omitted from an original filing ensures that the lay complainant, who may not know enough to verify on filing, will not risk forfeiting his rights inadvertently. At the same time, the EEOC looks out for the employer's interest by refusing to call for any response to an otherwise sufficient complaint until the verification has been supplied. See Becker v. Montgomery, 532 U. S. 757, 765(2001).

If the Appellant complied with the federal and state regulations as to the dates and claims on the face of her complaint there is no reason to conclude that if there were additional discrimination acts she would not have done so.

B. The Defendants and the court misapplied and misinterpreted the US Supreme Court decision in Jinks v Richland County, 538 U.S. 456 (April 2003) pursuant to 28 USC 42 §1367 and Respondents and court's misapplication of SC Supreme County decision in Jinks v Richland County (2002). (Page 2 footnote Order of Dismissal and Defendants "brief/supplement")

The Defendants contend that the Appellant's claims do not "relate back" to either the January 4, 2010 initial filing were the state claims were dismissed without prejudice (civil conspiracy and outrage/IIED) or to the October 25, 2011 with causes of action gross negligence, civil conspiracy, defamation and outrage/IIED).

In the SC Court of Appeals ruling in Gause v. Smithers, No. 4566 (2009); that court provides under SCRCP 8 "Whenever the claim or defense asserted in the amended pleading

arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment 'relates back' to the date of the original pleading.

Appellant's initial complaint was timely filed on January 4, 2010, this matter falls under SCRCP 15(c) and Fed.R.Civ.P. 15(c) "relation back" doctrine, SCRCP Rule 8(c) and Title VII; as the original complaint was timely, and it "acts as a lifeline for a later complaint for the claims which it contained." See Williams v. Lampe, No. 04-1497 (7th Cir Ct. 2005). See Johnson v. Oroweat Foods Co., 785 F.2d 503, 510 (4th Cir. 1986).

The Court in Davis v. Piper Aircraft Corporation, 615 F. 2d 606 ((4th Cir. 1980) held: Finally we turn to the relation back question itself. If the district court could rightly have concluded that this amendment, if allowed, would not relate back under Fed.R.Civ.P. 15(c), its futility in face of the limitation bar would be clear and denial might properly have been based upon this factor. The district court could not so conclude, because under the federal rule the amendment would clearly relate back. It obviously meets the test of the rule that it allege matter arising out of the same occurrence as that set forth in the original pleading, thereby insuring that the defendant knew of the action's commencement and of its nature in time to avoid any prejudice to his defense on the merits. See Tiller v. Atlantic Coast Line Railroad, 323 U.S. 574, 65 S.Ct. 421, 89 L.Ed. 465 (1945); 6 Wright & Miller, Federal Practice & Procedure: Civil § 1501, at 526-27.

"A ***removed action*** proceeds as if it had originally been brought in federal court in the state court after remand." See First Republic Bank Fort Worth v. Norglass, Inc., 958 F.2d 117, 119 (5th Cir.1992.

The circuit court's reliance on the ruling in Jinks 2002 in dismissing Appellant's pleading is an abuse of discretion as that case was reversed and remanded in the Appellant's favor by the US Supreme Court. See Jinks v. Richland County, 538 U.S. 456 (April 2003).

Confirmed by the footnote in Jinks v. Richland County, No. 25690 (August 2003) were the SC Supreme Court said in a footnote:

> "Originally, the Court issued an opinion in this matter addressing County's claim that Jinks failed to file this action within the statute of limitations. The Court held the federal statute tolling the applicable state statute of limitations violated the Tenth Amendment to the United States Constitution in Jinks v. Richland County, 349 S.C. 298, 563 S.E.2d 104 (2002). The United States Supreme Court reversed and remanded this matter to the Court for further proceedings." Jinks v. Richland County, ___ U.S. ___, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003).

There is no question the Appellant timely refiled her state law claims under SCTCA, even if that section of law were applicable in this matter, contrary to the ruling by the circuit court and Defendants the "outrage and civil conspiracy claims" do 'relate back' because they arose out of the same set of facts and circumstances. And, the claims were not fully adjudicated on its merits. The claims filed on October 25, 2011, gross negligence, civil conspiracy, defamation, outrage also came out of the same set of facts and circumstances and related back to the original complaint.

"The running of the limitations period was suspended during the time that the claim was pending in federal court and for 30 days after the federal district court dismissed the claim." This is consistent with the US Supreme Court ruling in Jinks 2003.

In Wojcicki v. Aiken Technical College, No. 08-1469 (4th Cir. 2010) (unpublished): "the defendants moved to dismiss the amended complaint on the ground that the plaintiff, Wojcicki, had failed to file any new administrative charges with either the Equal Employment

Opportunity Commission ("EEOC") or the South Carolina Human Affairs Commission ("SCHAC") for the alleged acts of discrimination that post-dated resolution of his prior lawsuit.

This is basically the same situation in this matter before this court. The Defendants and the lower court concluded the Plaintiff never reported discrimination on their dates of injury to the Budget and Control Board or SCDMV (see page 6) §15-78-80, "she cannot say that she did" this comment is true because the evidentiary record nor face of the pleading show any injury on the December dates supplied by the Defendants and accepted as true by the lower court in the Defendants' "brief". (T. Pg. 25 L 23).

Accepting the disputed dates as true the lower court accepted the Defendants' conclusion that Plaintiff was not entitled to the three year statute of limitations under SCTCA §15-78-110. Even if this stature applied to the complaint remanded to the lower court.

The lower court abused its discretion in refusing to accept the evidence of exhaustion and the actual dates of injury provided to the court in the Motion to Reconsider and testimony by the Appellant on November 5, 2012 telling the court she did file a verified claim and her claims not only were brought timely under SCTCA but because the only claims before the court were state pendant common law claims also filed timely within the mandated three year statute of limitations for §15-3-530(4)(5) and §15-3-535. Preserved on (T. Pg. 20, L-15 ROA)

It appears the circuit court neglected to accept the fact that the Appellant's claims were common law state pendant claims as she implied in her pleading,[20] if the court had applied the pro se standard brought actions of gross negligence, civil conspiracy, outrage (intentional infliction of emotional distress), etc., all legitimate claims brought under §15-3-530(4)(5) which as it states in:

[20] While the Appellant did not use the correct common law statute she did preserve her rights by stating the correct statute before the circuit court on November 5, 2012

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) "The doctrine of qualified immunity protects government officials "from liability for civil suit damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."

Also , Wood v. Strickland, 420 U.S. 308, 322, the US Supreme Court stated "aspect of qualified or "good faith" immunity -- whereby such immunity is not available if the official asserting the defense "took the action with the malicious intention to cause a deprivation of constitutional rights or other injury."

VII. DID THE LOWER COURT ABUSE ITS DISCRETION AND ALLOW THE APPELLANT TO BE BLINDSIDED OR "BUSHWHACKED BY THE DEFENDANTS ON NOVEMBER 5, 2012?

On November 5 2012, the Defendants introduced new affirmative defenses and dates of injury for the first time in a "brief" that the Appellant received three days before the November 5, 2012 hearing to Amend.

Appellant Objected (T. Pg. 5 L 1-3, L 24, Pg. 6 L 8) and explained to the court that she had just received the "brief" on or about November 2, 2012. This was the first the Appellant knew of the injury dates and the affirmative defenses based on those dates and asked the court for time to respond, her request was denied. The Defendants claimed that allegation not on the face of the pleading command dismissal because the Appellant did not file new charges of discrimination based on their dates of December 8, 2008 to December 8, 2009 therefore her claims were barred by SCTCA two year statute of limitations the court Defendants cited S.C. Code Ann §15-78-80 and S.C. Code Ann §15-78-110.

In Venters v. City of Delphi, 123 F.3d 956 (7th Cir.1997) that court held, "Appellant was prejudiced by the defendants' delay as the delay effectively "deprived [her] of any reasonable

opportunity to address that defense." Id. "By permitting the defendants to raise the issue at the "eleventh hour" and giving the plaintiff no time to respond, the court concluded the district court had "bushwhacked" the plaintiff." See Id. at 969. (T Pg 5 L 21-25, T Pg. 20 L 25)

A. RULE 8(c) SCRCP

The purpose of Rule 8(c) is to give the opposing party notice of the affirmative defense and a chance to rebut it. See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found., 402 U.S. 313, 350, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971). See Brinkley v. Harbour Recreation Club, 180 F.3d 598, 612 (4th Cir.1999)

The lower court refused to allow the Appellant time to respond to the new defenses effectively blindsiding her. Appellant informed the court that she had filed discrimination charges to the EEOC and that her claims fell also under §15-3-530(4)(5) and not governed by the SCTCA and if they were she had filed verified claim for the dates she was injured on which was the only matter that was before the court.

This was a genuine issue of triable material fact that precluded granting of dismissal and summary judgment. (T. Pgs. 17, 18, 19, 20, 21, 22 23 L 3-23, L 1-8, L 5-9 & L1-24).

VIII. DID THE CIRCUIT COURT ERR WHEN IT DISMISSED APPELLANT'S CLAIMS BASED APPARENTLY ON THE DOCTRINE OF RES JUDICATA ON THE BELIEF THAT APPELLANT'S STATE PENDANT CLAIMS HAD BEEN FULLY HEARD BY THE "CIRCUIT COURT AND SEVERAL FEDERAL COURTS?"

> MATTHEWS: -- In terms, of not having her day in court I'll simply say that she's been suing the department one way or another since January of 2010. That's almost three years; I've actually been recalled to Iraq and come back since she's been suing us. [21] The Complaint that she's not been hard by this court or several federal courts is ridiculous[22]

[21] Point in fact the defense counsel lied and the circuit court and the Defendants rubber stamped the lie because they were dealing with a *pro se litigant.* Instead of settling this matter and admitting their mistakes they corrupted the judicial process, violated federal and state laws and the Defendants allowed this and they are Public Officials of the State of South Carolina who are supposed to be above reproach, who persecute people for such unethical behavior. I would be hard pressed to refer to any Judge as honorable except perhaps Perry and Seymour While the Defendants violated federal and state law and retaliated against the Plaintiff letting her know she will always suffer the

The Defendants claim that the Appellant had been fully heard by the circuit court and "several" federal courts, and requested Rule 12(6) Motion to Dismiss, when in fact Appellant has not been fully heard because her state pendant law claims has not been fully heard in either circuit (lower) court or in the "several" Federal courts. The only claims heard were the federal and state discrimination claims.

On January 4, 2010 both federal and state causes of actions were filed. The federal causes were dismissed with prejudice by Judge Perry on March 2011. Judge Perry dismissed the state pendant law causes of action *without* prejudice and denied the SCDMV/Defendants Motion to Reconsider and dismiss the state causes of action with prejudice. By doing so Judge Perry left the Appellant the right to refile the state pendant causes of action for full adjudication their merit in state court.

On October 25, 2011, well within the two and three year statute of limitations the Appellant refiled her state pendant laws claim in circuit court. The Defendants as stated earlier, removed the compliant to federal court on November 21, 2011 and filed an answer November 29, 2011, asking the federal court to dismiss on the basis of res judicata and collateral estoppel.

The Appellant timely filed a Motion to Remand were this matter remained until August 21, 2012, when it was remanded by Judge Seymour in her approval and acceptance of the third Amended complaint that removed all federal/discriminatory causes of action and left on state law claims.

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consequences of engaging in a protected activity the Richland County court violated the same laws and civil rights they are charged to uphold

[22] Appellant as been heard in federal court on the discrimination claims only. Attorney Matthew was gone to Iraq for about three months after completion of Discovery November 2010, and returned sometime after Judge Perry denied the Motion to Reconsider on May 2011 to dismiss the state causes of action with prejudice allowing the plaintiff time to refile in state court to have the state claims heard . Appellant's state claims has not been heard in either court and or fully adjudicated in either court. The Defendants also should look to themselves for keeping the action in court "almost "three years and three years is hardly a long period of time civil cases go on for a lot longer than three years.

> MATTHEWS: "And on August 21, in response to that motion, Judge Seymour was the one who said "I'll lift this Complaint, I don't think they are federal claims and I'm not going to exercise jurisdiction over them and you're going back to state court." (Appellant was invited to meeting with the Judge(s) and Defendant's attorney either).

The question on appeal in Andrews v Daw, No. 98-6329 (4th C.App. 2000); argues that the district court's Rule 12(b)(6) dismissal of his complaint on the ground of res judicata was erroneous because a prior lawsuit against an individual in his official capacity does not bar later relitigation of claims against that same individual in his personal capacity.

The District court agreed and held that a government employee in his official capacity is not in privity with himself in his individual capacity for purposes of res judicata.

Under the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." Montana v. United States, 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979).

"To establish a res judicata defense, a party must establish: (1) a final judgment on the merits in a prior suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." Jones v. SEC, 115 F.3d 1173, 1178 (4th Cir.1997) (internal quotation marks omitted), cert. denied, 523 U.S. 1072, 118 S.Ct. 1512, 140 L.Ed.2d 666 (1998).

"[a] party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity." Restatement (Second) of Judgments § 36(2) (1982).

Within the statute of limitations

Appellant timely refiled the state claims in state court; the Defendants moved back to federal court were it remained for a year until the state claims were remanded back by Judge

Seymour - August 21, 2012. The state claims to this date has not be fully adjudicated on their merit and if there is any blame it is the Defendants not the pro se Appellant who has had this matter in the court for "almost three years.

> The United States Supreme Court has made it clear that "the plaintiff is the master of the complaint . . . and that the plaintiff may, by eschewing federal law, choose to have the cause heard in state court." Caterpillar, Inc. v. Williams, 482 U.S. 386, 398-99 (1987).

See Enochs v Lampasas County, No. 10-50029 (4th Cir. 2011) and Guzzino v. Felterman, 191 F.3d 588, 595 (5th Cir.1999) (agreeing with the district court that "plaintiffs get to pick their forum and pick the claims they want to make unless they are blatantly forum shopping").

The fact that this matter has been in the courts for "almost three years" is not because of the Appellant. Appellant legally and ethically earned her day in court and it is the Defendants that have abused the legal process instead of allowing this matter to proceed and end either in the favor of Appellant or the Defendants.

IX. DID THE CIRCUIT COURT ERR AND ABUSE ITS DISCRETION WHEN IT DISMISSED THE APPELLANT'S COMMON LAW OUTRAGE/INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIMS BASED ON WILL V MICHIGAN POLICE DEPARTMENT (§1983) AND THE WORKERS COMPENSATION ACT (WCA) EXCLUSIVITY?

The Defendants and Judge Manning state that the Appellant claims of outrage first does not "relate back" to the original pleading, that the claims are barred by the WCA Exclusivity provision of S.C. Code Ann. §42-1-540 for personal injury. And, since the Appellant seeks to sue the Defendants "in their official capacities it is a suit against the State.

While it is true a State employees sued in their "official capacities" are not "persons" Amenable to suit under 28 USC 42 §1983. However, as is clear on the face of the Appellant's pleading she is not suing the Defendants in their official capacities alone but in their individual capacities as is clear on the face and in the caption of the Appellant's pleading. The Appellant

named each Defendant. Therefore Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) is not applicable as the plaintiff sued the defendants a state agency.

Couram's intentional distress/outrage claims are based on common law and it not clear on the face of Appellant's complaint if she cannot prove intentional infliction of emotional distress, therefore dismissing her pleading at this state was inappropriate. *See Ford*, 276 S.E.2d at 780 (although "physical illness or some other non-mental damage is not essential to [an IIED] recovery . . . where physical harm is lacking, the courts should look initially for more in the way of extreme outrage as an assurance that the mental disturbance claimed is not fictitious"). ("Conduct growing out of a business relationship may be so outrageous and shocking as to be actionable" as an IIED claim).

See also US Court of Appeals ruling in Andrews v. Daw, 98-6329 (4th Cir. 2000): "In sum, we hold that a government employee in his official capacity is not in privity with himself in his individual capacity for purposes of res judicata, and, therefore, the district court erred in dismissing Andrews's suit on that ground. Accordingly, we reverse the district court's dismissal of Andrews's suit and remand for further proceedings."

As discovery has been completed Couram could present evidence that could prove intentional infliction of emotional distress under her common law action and each element.

Under South Carolina law, the general statute of limitations for personal injury actions is three years. *See* S.C. Code Ann. § 15-3-530(5) (Cum. Supp. 2012).

The circuit court was to accept as true Plaintiff's allegations that the Defendants' actions were performed "in their individual capacities" and were "outside the course and scope of their employment."

X. DID THE CIRCUIT COURT ERR IN DISMISSING APPELLANT'S DEFAMATION CLAIMS AGAINST THE RESPONDENTS SAYING THEY ARE BARRED BY A TWO YEAR STATUTE OF LIMIATIONS?

According to the Respondents the Appellant's defamation cause of action is time barred by the common law two year statute of limitation; this claim also relate back to the original compliant as the causes of action are out of the same set of circumstances and the statute of limitation pursuant to §1367, as the common laws statute of limitations was stopped on January 4, 2010, and after dismissal by the late Judge Perry did not resume until March 2011 leaving the Appellant nine months out of the twenty-four to bring the claims of defamation which she timely brought when she refiled on October 25, 2011.

The Appellant has alleged destruction of her reputation and destruction of her relationship with her employer. The Appellant has always been a good employee in her 20 plus years of working for others, she may not have been the most outgoing but she has always been someone who had integrity, majority of her employment was working without direct supervision, who has an employment history of being dependable, conscientious, self starter who took initiative.[23] Now because of the Respondents she will not move forward within the state because of loss of her employment relationship with the state, she would never use her Bachelor Degree, associates or medical certificate which she had hoped would allow advancement with the state. Adams blacklisted the Appellant in retaliation for Appellant going to her to report abuse and loss of pay state the Appellant had to remain under Rivers' management therefore leaving her one option to leave her employment.

The Respondents claim that the Appellant's claims do not "relate back." This is untrue or unsupported pursuant to SCRCP 15(c) and Fed. R. Civ. P. 15(c)'s "relation back" doctrine. Rule

[23] Much of appellants work history has been in one person offices, offices were she worked without direct supervision

8(c) and Title VII; as the original complaint was timely, and it "acts as a lifeline for a later complaint for the claims which it contained" and pursuant to §1367. See US Supreme Court decision in Jinks v Richland County (2003).

In Fleming v. Rose, 338 S.C. 524, 526 S.E.2d 732 (Ct. App. 2000), this Court explained: The tort of defamation allows a Plaintiff to recover for injury to his or her reputation as the result of the Defendant's communications to others of a false message about the Plaintiff; Swinton Creek Nursery v. Edisto Farm Credit 334 S.C. 469, 514 S.E.2d 126 (1999).

The focus of defamation is not on the hurt to the defamed party's feelings, but on the injury to his reputation. See Wardlaw v. Peck, 282 S.C. 199, 318 S.E.2d 270 (Ct. App. 1984).

In Tyler v. Macks Stores, 275 S.C. 456, 272 S.E.2d 633 (1980); the court held: A mere insinuation is actionable as a positive assertion if it is false and malicious and its meaning is plain.

There are clear issues of genuine triable material fact. The Appellant's defamation claim has not been fully adjudicated on its merit at no time were the Respondents not aware of the claim. The federal court accepted the claim of defamation; the evidentiary record - complete with discovery, depositions, etc. precluded dismissal. The circuit court Judge's Order dated November 7, 2012 dismissing Appellant's claims with prejudice and denial of the Motion to Reconsider should be overturned and this matter remanded for full adjudication allowing Appellant her constitutional right to her day in court.[24]

XII. DID THE CIRCUIT COURT ERR/ABUSE ITS DESCRETION IN DISMISSING APPELLANT'S CIVIL CONSPIRACY AND OUTRAGE CLAIMS BASED ON MISAPPLICATION OF JINKS AND THE "RELATE BACK" DOCTRINE?

T. Pg. 21 Lines 4-25, Pg. 22 Lines 1-25, Pg. 27 Lines 10-25, Pg. 28 Lines 1-25, Pg. 29, Line s1-25 and Pg. 30 Lines 1-25

[24] Appellant's pleading, according every controlling law researched by Appellant denied dismissal by motion, by motion for summary judgment and res judicata.

A. Did the circuit err when it dismissed Appellant's state pendant law civil conspiracy and outrage claims agreeing with the Respondents' conclusion that they did not "relate back" to the original complaint timely filed on January 4, 2010 that included state pendant law claims §15-3-530(4)(5) et.seq.

The Respondents and the circuit court Judge Manning concluded that the Appellant's civil conspiracy claim does not "relate back" to the original complaint filed on January 4, 2010 because the Appellant failed to refile the civil conspiracy and outrage claims within 30 days after Judge Perry dismissed the discrimination causes of action and the state law claims without prejudice pursuant to 28 USC 42 §1367. That the original state statute of limitations had run therefore the civil conspiracy claims are untimely and barred.[25] See Judge Perry's Orders.

Upon research and verification the Appellant assert that the claims of outrage and civil conspiracy do "relate back" pursuant to SCRCP 15(c), SCRCP 8 (c), Fed. R. Civ. P. 15(c)'s, Title VII §706. See Edelman v Lynchburg were the court held: as "unassailable" an EEOC relation-back regulation interpreting sections of Title VII to permit "an otherwise timely filer to verify a "charge" after the deadline for filing."

The SC Appeals Court held in Gause v Smithers, No. 4566 (2009) pursuant to SCRCP 8(c), SCRCP 15(a)(c) and Title VII: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment 'relates back' to the date of the original pleading. See also Williams v. Lampe, No. 04-1497 (7th Cir Ct. 2005) were the court stated "as the original complaint was timely, "it acts as a lifeline for a later complaint for the claims which it contained." Appellant's January 4, 2008 complaint filed in federal court was timely and so was

[25] This claim and the outrage claim was as noted previously dismissed without prejudice by Judge Perry on March 2011 and the Motion to Reconsider filed by the Respondents to dismiss with prejudice was denied on May 2011. The claims as the evidentiary record will show have never been fully adjudicated on their merit.

the October 25, 2011 both filed within the applicable statute of limitations under the SCTCA and the common law statute of limitations for South Carolina.

The registered agent and Attorney Matthews was part of this matter since the discrimination charges were filed on November 13, 2008 and was sent a copy of the "right to sue letter by the EEOC. See Wojcicki v. Aiken Technical College, No. 08-1469 (4th Cir. 2010) (unpublished) that court held: "we are constrained to conclude that the district court abused its discretion in refusing to accept the evidence of exhaustion presented by Wojcicki in his objections to the report and recommendation of the magistrate judge and in dismissing the lawsuit on the basis of a failure to exhaust administrative remedies without at least considering that evidence."

This is basically the same situation. The Respondents and the circuit court concluded the Appellant never reported discrimination claims of on December 8, 2008 to December 8, 2009 - Pursuant to §15-78-80, "she cannot say that she did" this comment is not true because the evidentiary record identifies these dates of discrimination as inclusive in the ruling by the late Judge Perry as they were fully adjudicated on their merit and dismissed March 2011 *with* prejudice the circuit court was in err when it ruled on a decision that was moot and not part of the remand Order of US District Judge Seymour.[26]

The court abused its discretion in failing to the review the evidentiary record before the November 5, 2012 hearing and failed to accept the ruling of two Federal District Judges that dismissed all discrimination claims and accepted a third amended complaint which held no discrimination claims or claims falling under §1983.

B. Did the circuit err in dismissing Appellant's civil conspiracy claim based on 28 USC 42 §1367 and Respondents and court's misapplication of Jinks v Richland County?

[26] See motion to reconsider with documented evidence of dismissal by Judge Perry.

The Respondents and the circuit court in a footnote, page 2 in the Order of dismissal claim that the Appellant's civil conspiracy[27] claim filed on January 4, 2010 was barred under 28 USC 42 §1367(d) because she did not refile her October 25, 2011 complaint within the 30 day tolling period after dismissal by Judge Perry in March 2011, the claims were never fully adjudicated on their merit as Judge Perry dismissed the state pendant claims without prejudice and[28] under well established law the courts have held that claims dismissed without prejudice can be refiled in State Court and the Defendants are not in privity with the SCDMV when they are sued in their personal or individual capacities.

The Respondent, it seems to the pro se Appellant, misapplied the ruling in Jinks v Richland County. Instead of quoting the 2003[29] ruling by the US Supreme Court as indicated in the footnote, they quoted 2002 decision of the SC Supreme Court in favor of the "County."

The US Supreme Court, 538 U.S. 456 (2003), the highest court in the land, overturned the SC Supreme Court 2002 decision in favor of the County and reversed and remanded back to SC Supreme Court. That court held:

> "The running of the *state statute of limitations was suspended during the time that the claim was pending in federal court* and for 30 days after the federal district court dismissed the claim."

The SC Supreme Court in Jinks, No. 25690, (August 2003) explained that their decision had been overturned in the footnote 2:

> "Originally, the Court issued an opinion in this matter addressing County's claim that Jinks failed to file this action within the statute of limitations. The Court held the federal statute tolling the applicable state statute of limitations violated the Tenth Amendment to the United States Constitution in Jinks v. Richland County, 349 S.C. 298, 563 S.E.2d 104 (2002). The United States Supreme Court reversed and remanded this matter to the Court for further proceedings." Jinks v. Richland County, ___ U.S. ___, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003).

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[27] And outrage (IIED)

[28] the claims were dismissed by Order of Judge Perry date March 2011 and May 2011.

[29] Shepardizing a process by which attorneys check the lasted rulings – a questions asked to the SC Supreme Court

The lower court's reliance on the quoting of Jinks supplied by the Respondents showed a clear abuse of discretion by Judge Manning.

There is no question Appellant timely refiled her state law claims under the original two year statute of limitations as applicable to the SCTCA §15-78-60 et seq., the Appellant also timely filed state pendant law within the three year common law statute of limitations §15-3-530 et seq.

Even if the December 8, 2008 to December 8, 2009 had not been dismissed by Judge Perry Appellant's common laws claims were timely as she had about nine months remaining of the two years to file under the SCTCA and 21 months to refile under §15-3-530(5), §15-3-535 at the time Judge Perry dismissed her state law claims without prejudice to refile and she timely refiled on October 25, 2011.

In compliance with the US Supreme Court[30] decision. The Minnesota Supreme Court held in Goodman v Best Buy, et al., (7th 2008): "Based on our plain-language reading of section 1367(d), we conclude that the limitations period on Goodman's MHRA had not expired when he filed his complaint in state district court on March 9, 2007. "The running of the limitations period was suspended during the time that the claim was pending in federal court and for 30 days after the federal district court dismissed the claim."

That court supplied an example: "Goodman filed this case on March 9, 2007fewer than twenty-five months after Best Buy terminated his employment on February 21, 2005. But the running of the limitations period was suspended for approximately seventeen months under section 1367(d) from August 4, 2005, when his case was removed to federal court, to January 3, 2007, thirty days after the federal court dismissed the MHRA claim without prejudice. Thus, the

limitations period for Goodman's MHRA claim ran for fewer than eight months before he filed this suit. We therefore conclude that the district court incorrectly determined that Goodman's claim was barred by MHRA's one-year statute of limitations."

See also Bonifield v. County of Nevada, 114 Cal.Rptr.2d 207, 211 (Cal.Ct.App.2001) (employing plain-language analysis); Turner v. Kight, 957 A.2d 984, 989, 992 (Md.2008), cert. denied, 129 S.Ct. 1985 (2009) (concluding that the statute is ambiguous, but holding that the suspension-of-the-clock interpretation is correct because it is "the more commonly applied conception of tolling"); Oleski v. Dep't of Pub. Welfare, 822 A .2d 120, 126 (Pa. Commw. Ct. 2003).

The Appellant's claims started on November 13, 2008, when she filed to the EEOC and then timely filed her claims in federal court on January 4, 2010. From November 1, 2008 to January 4, 2010 approximately 15 months had passed of a two year and three year statute of limitations. Upon filing in federal court the state statute of limitations was stopped/tolled until the Appellant's claims were dismissed on March 2011 and 30 days after the dismissal at which time the "clock" began to run again leaving the appellant nine months remaining in the original two year statute of limitations and about twenty-one months in her common law statute of limitations and the same period under SCTCA because she had filed a sworn verified claim.

C. The ruling in Lawson v SC Department of Correction is not the controlling case for Appellant's civil conspiracy clam?

The Respondents and Judge Manning also dismissed the Appellant's civil conspiracy claim pursuant to the SC Supreme Court ruling in Lawson.

If the court had only looked at the face of the Appellant's complaint as required under well establish law and civil procedure nowhere does the Appellant state in either the remanded third amended complaint or in the proposed request to amend title fourth amended complaint a

claim or cause of action under the SC Whistleblower Act § 8-27-10, et seq..[31] She did not state such a claim in January 2010 which this claim "relate back" to and she did not do so in the pleading dated October 25, 2011 (if she had it was dropped what in the federal court pending remand). (Transcript Pages 21, 27, and 28)

There is no comparison to Lawson. Lawson was a probationary employee he been with the Department of Corrections four months when he filed his Whistleblower claim. He had not gained status with the Department of Corrections. Therefore, they could dismiss at will without progressive discipline required after gaining statutes as a permanent employee with rights.

The Appellant gained permanent status on July 17, 2007. Appellant is fully vested in SCDMV so she could not leave her job as if she was 20 or 30 years old The court made a point on several occasions to say the Appellant was still employed, if the Respondents had grounds to dismiss such as her making false allegations under the Whistleblower Act she would not be still employed. They went so far as to falsify personnel records in order to destroy Appellant's employment with SCDMV and facilitate her termination. If they had the sanctioned means to dismiss as provided for in the Whistleblower Act it would have been used.[32]

In the November 5, 2012 hearing and in her pleading Appellant never said that she heard two supervisors discussing her termination what she clearly stated in the pleading, what had been discovered during the discovery process in November 2010 and during the hearing is that the Respondents acted, they falsified documents, they demoted her to down to data entry literally, they failed to promote, subjected her to continuing harassment and hostile work environment[33]

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[31] The Whistleblower law clearly provide for a one year statute of limitations. Also the employee must make the allegation within 60 days, Appellant did not allege any actions based on or write a complaint of waste or wrong doing based on this law.

[32] To this day the Respondent are working to force the Appellant out of her job.

[33] She was told she had to remain under Rivers' supervision were the hostility and harassment was instigated and sanctioned.

and after going to Marcia Adams she was retaliated against for engaging in a protected activity a clear violation of well established constitutional federal and state law. They put forth an all out effort to remove her from her position. (T. Pg. 21-22)

The evidentiary record before Judge Manning on November 5, 2012, proved and alleged special damages. Ultimately placing her in position where she accept the daily humiliation and embarrassment or quit.

The controlling case in this matter is not Lawson but Pridgen v. Ward, No. 4770, SC Appeals Court (December 2010), the court held: "An act is within the scope of a servant's employment where [it is] reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business." Armstrong v. Food Lion, Inc., 371 S.C. 271, 276, 639 S.E.2d 50, 52 (2006). "On the other hand, if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, his conduct falls *outside the scope* of his employment." Crittenden v. Thompson-Walker Co., Inc., 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct. App. 1986). The Appeals court went on to say, Pridgen's civil conspiracy claim was not against his employer. Rather, Pridgen's claim was against the Appellants, who did not have the power to terminate his employment. Because Pridgen did not serve at the will of the Appellants, they were not immune from suit by Pridgen for civil conspiracy." See also Anthony v Ward (unpublished) No. 07-1932 (4th Cir.2009) and Andrew v Daw, No. 98-6329, (4th Cir., 2000).

Armstrong v. Food Lion, Inc., 371 S.C. 271, 276, 639 S.E.2d 50, 52 (2006). "On the other hand, if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, his conduct falls *outside the scope* of his employment."

28 USC 42 SECTION 1367(d): Supplemental jurisdiction allows a plaintiff who has a claim over which a federal court has original jurisdiction to also include state-law claims "that are so related . . . that they form part of the same case or controversy." Indeed, the text of 28 USC 42 § 1367(d) presupposes that the federal court will ultimately dismiss the claim and the plaintiff will have an opportunity to reassert it in state court—the tolling period applies "while the claim is pending *and* for a period of 30 days *after it is dismissed.*"

> The period of limitations for any claim [over which the court has supplemental jurisdiction] . . . shall be tolled while the claim is pending ***and*** for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

The SC Supreme Court held in Pye v Fox, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006). The elements of a civil conspiracy in South Carolina are (1) the combination of two or more people, (2) for the purpose of injuring the plaintiff, (3) which causes special damages. LaMotte v. Punch Line of Columbia, Inc., 296 S.C. 66, 370 S.E.2d 711 (1988); Cowburn v. Leventis, 366 S.C. 20, 49, 619 S.E.2d 437, 453 (Ct. App. 2005); Ellis v. Davidson, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004); see also Peoples Federal Savings & Loan Ass'n of S. Carolina v. Resources Planning Corp., 358 S.C. 460, 470, 596 S.E.2d 51, 56-57 (2004) ("A civil conspiracy is a combination of two or more parties joined for the purpose of injuring the plaintiff and thereby causing special damage.") (citation omitted).

"In order to establish a civil conspiracy there must be direct or circumstantial evidence from which a party may reasonably infer the joint assent of the minds of two or more parties to the prosecution of the unlawful enterprise." Island Car Wash, Inc. v. Norris, 292 S.C. 595, 601, 358 S.E.2d 150, 153 (Ct. App. 1987); accord Cowburn, 366 S.C. at 49, 619 S.E.2d at 453.

This Court has observed: Conspiracy may be inferred from the very nature of the acts done, the relationship of the parties, the interests of the alleged conspirators, and other

circumstances. "Civil conspiracy is an act which is by its very nature covert and clandestine and usually not susceptible of proof by direct evidence. . . ." Id. at 601, 358 S.E.2d at 153. An action for civil conspiracy is an action at law; the trial judge's findings will be upheld on appeal unless they are without evidentiary support. Gynecology Clinic v. Cloer, 334 S.C. 555, 514 S.E.2d 592 (1999). Peoples Federal, 358 S.C. at 470, 596 S.E.2d at 57.

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. Lee, 289 S.C. 6, 344 S.E.2d 379. "[A]n unlawful act is not a necessary element of the tort." Id. at 11, 344 S.E.2d at 382. Because the quiddity of a civil conspiracy claim is the damage resulting to the plaintiff, the damages alleged must go beyond the damages alleged in other causes of action. Vaught v. Waites, 300 S.C. 201, 387 S.E.2d 91 (Ct. App. 1989).

Lyon v. Sinclair Refining Co., 189 S.C. 136, 200 S.E. 78 (1938). The "essential consideration" in civil conspiracy "is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff." Lee v. Chesterfield General Hosp., Inc., 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986).

Therefore the lower courts conclusion in regards to the Plaintiff civil conspiracy claims did not have to be proven nor by looking at the face of the pleading could the lower court have determine the Appellant had filed a whistleblower claim because there is no mention of this word on the face of the pleading. (Third or Fourth)[34]

The only matter that was before Judge Manning on November 5, 2012 per the evidentiary records was the Appellant's claims related to common law state pendant claims as she clearly in

[34] The October 25, 2011, pleading did say whistleblower but upon remand to state court on August 21, 2012 that cause of action was dropped and it was not part of the Plaintiff's civil conspiracy cause of action which is clear on the face of the complaint.

her pleading brought actions of gross negligence, civil conspiracy, outrage (intentional infliction of emotional distress), etc., all legitimate claims brought under §15-3-530(4)(5) and these were the only claims accepted and remanded by Judge Seymour.

There are questions of genuine triable issue of material fact for a jury. It was an abuse of discretion for the circuit court Judge to have made such a conclusion based on the face of the pleading especially when the Plaintiff clearly stated several times her pleading was not a whistleblower claim and the Judge Manning was mandated to take as true what the Plaintiff said that would have precluded granting a motion to dismiss.

The Appellant with the completion of discovery, etc., and the evidentiary record that was before Judge Manning could prove all essential elements of civil conspiracy.

Regardless of whether or not the Appellant had filed a whistleblower the circuit court erred in dismissing the civil conspiracy claim at this stage because it could not be resolved without an evidentiary record.

CONCLUSION

Accordingly, based on all of the reasons and citations of authority set forth above herein, the circuit court erred in granting the motion to dismiss Appellant's claims and Appellant respectfully requests that this Court reverse the decisions of the Order of dismissal and remand this matter back in the interest of justice for full adjudication of the Appellants state pendant claims on their merits and to correct a travesty of justice. For the reasons stated, this Court should reverse the judgment of the circuit court.

Appellant also ask if the court remand that she be granted cost for needing to file this appeal, if applicable.

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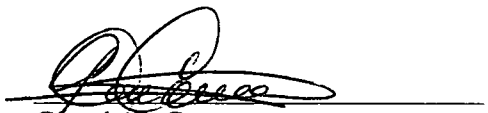
Respectfully Submitted,



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April 21, 2013