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AUG 26 2022

SC Court of Appeals

IN THE SOUTH CAROLINA APPEALS COURT

APPELLATE CASE# 2022-000985

MARCUS A JOSEPH 147764 )

VS )

ANELLE G POWELL )

A.P.P.E.A.L.

NOW HERE COMES THE PRO-SE PLAINTIFF IN THE ABOVE MENTION ACTION WHO HEREBY MOVES BEFORE THIS COURT FOR AN ORDER REVERSING THE LOWER COURT DECISION IN THIS CASE AND REMAND WITH DIRECTIONS ORDERING JUDGEMENT IN HIS FAVOR BY DEFAULT AS IS BASED UPON THE FOLLOWING GROUNDS AND FACTS PRESENTED.

MEMORANDUM  
AND  
HISTORICAL BACKGROUND.

THE PLAINTIFF FILED THIS ACTION ON 8-2-21 AND SERVED A COPY OF SUMMONS AND COMPLAINT ON THE DEFENDANTS WHO RECEIVED SUIT ON 8-23-21 IN WHICH A RESPONSE PLEADING WAS DUE BY 9-23-21. THE DEFENDANTS RESPONDED BY MOTION TO DISMISS DATED SEPT 14TH 2021, ALLEGING THAT THE COURT LACKED PERSONAL JURISDICTION BECAUSE THE PROCESS OF SERVICE WAS INSUFFICIENT.

THE DEFENDANTS IN THEIR MOTION WAS NOT SPECIFIC IN THEIR MOTION IN POINTING OUT IN WHAT MANNER OF THE SERVICE OF PROCESS THE PLAINTIFF DID NOT COMPLY WITH. VIOLATING UNISUN INSURANCE HAWKINS N 2

I SENT ANOTHER COMPLAINT AND SUMMONS WHICH WAS RECEIVED BY THE DEFENDANTS ON 9-7-21 AND A RESPONSIVE PLEADING TO THIS SECOND SERVICE OF PROCESS WAS DUE BY 10-7-21

THE DEFENDANTS DID NOT RESPOND TO THE SECOND SERVICE OF PROCESS, ANSWER OR PLEADED, AND HAD DEFAULTED BY THE TIME THEY STATED WHAT WAS WRONG WITH THE SERVICE OF PROCESS.

I ALSO SENT A THIRD COMPLAINT AND SUMMONS WHICH ALSO WENT UNANSWERED BY THE DEFENDANT. I FILED A MOTION FOR JUDGEMENT BY DEFAULT AND AFFIDAVIT BASED UPON THE SECOND SERVICE OF COMPLAINT AND SUMMONS ON THE 24TH OF OCT 2021 AND IN ACCORDANCE WITH RULE 55(A) THE CLERK HAD A DUTY TO ENTER SUCH, HOWEVER SHE DID NOT DO SO. THIS WAS ERROR.

ON MAY 20TH A HEARING WAS HELD ON THE MOTION AND JUDGE KRISTI CURTIS DENIED ALL MY MOTIONS BUT DID NOT STATE ANY REASON WHY SHE DENIED THE DEFAULT MOTION REGARDING THE SECOND SERVICES OF PROCESS NOR WAS SUCH MENTION IN THE ORDER. THIS AMOUNTS TO AN ABUSE OF DISCRETION BY AN ERROR OF LAW BECAUSE WITHOUT DOUBT THE DEFENDANT HAS CLEARLY DEFAULTED IN REGARDS TO THE SECOND SERVICE OF PROCESS YET PLAINTIFF WAS DENIED THE RELIEF HE WAS ENTITLED TO AS A MATTER OF LAW

(2)

SEE EG. SUNDOWN OPERATING CO INC V INTERSE INDUSTRIES INC, 383 SC 601, 681 SE 2d 885 (2009) IN SUNDOWN THE SOUTH CAROLINA SUPREME COURT HELD THAT THE PETITIONERS WAS NOT ENTITLED TO SET ASIDE WITH REGARD TO THE SEPT 4 (2007) SERVICE DATE. BECAUSE THEY HAVE DEFAULTED SEE NOTE (4) "EVEN THERE WAS CAUSE THE FIRST SERVICE WAS INVALID "A SECOND SUMMONS AND COMPLAINT WENT UNANSWERED."

IN THE CASE AT BAR THE DEFENDANTS ARGUED THAT THE FIRST SERVICE OF PROCESS WAS INVALID BUT WAS NOT SPECIFIC AS TO WHICH SERVICE OF PROCESS THEY WAS RESPONDING TO.

THE COURT LIKEWISE DID NOT APPLY THE LAW TO THE FACTS OF THE CASE AS IT RELATES TO THE DEFAULT MOTION;

ASSUMING FOR ARGUMENTS SAKE THAT THE DEFENDANT COULD AVOID LACK OF SUFFICIENT SERVICE OF PROCESS THAT ASSUMPTION WAS MOST BECAUSE IT VIOLATED THE RULES IN THAT THE DEFENDANTS MADE A VOLUNTARY APPEARANCE WHICH IS THE EQUIVALENT OF PERSONAL SERVICE OF PROCESS "RULE 4 D" AS POINTED OUT BY THE PLAINTIFF IN HIS RULE 59E MOTION

A DETERMINATION IN THIS CASE REQUIRES AN EVALUATION OF RULE 55(b) SCRPC.

WHEN INTERPRETING A COURT RULE THE APPEALS COURT

MUST APPLY THE SAME STANDARD/RULES OF CONSTRUCTION USED IN INTERPRETING STATUTES.

THEREFORE THE WORDS IN THE RULES MUST BE GIVEN THEIR PLAIN AND ORDINARY MEANING WITHOUT RECOURSE TO SUBTLE OR FORCED CONSTRUCTION TO LIMIT OR EXPAND THE RULE. RULE 55(A) PROVIDES "WHEN A PARTY AGAINST WHOM A JUDGMENT FOR AFFIRMATIVE RELIEF IS SOUGHT HAS FAILED TO PLEAD OR OTHERWISE DEFEND AS PROVIDED BY THESE RULES AND THAT FACT IS MADE TO APPEAR BY AFFIDAVIT OR OTHERWISE THE CLERK SHALL ENTER HIS DEFAULT UPON THE CALENDAR BOOK. CITING THYNES V LLOYD 294 SC 152, 153, 54, 363 SE 2d 122, 123 1987 (7APP)

ENTRY OF DEFAULT IS A MINISTERIAL ACT WHICH A CLERK IS REQUIRED TO PERFORM ONCE DEFAULT IS MADE TO APPEAR BY THE AFFIDAVIT OF THE MOVING PARTY. CIV PROC 12(a).

HERE THERE WAS NO EXTENSION OF TIME, REQUESTED BY THE DEFENDANTS,

THE PLAINTIFF HAD MADE IT APPEAR BY THE RECORDS AND AFFIDAVIT THAT THE DEFENDANTS HAD DEFAULTED YET THE CLERK DID NOT ENTER SUCH ON THE RECORD. THIS WAS ERROR WARRANTING REVERSAL AND JUDGMENT IN FAVOR OF THE PLAINTIFF. "SUNDOWN"

1  
PLAINTIFF FURTHER ADDS THAT AN ABUSE OF DISCRETION FURTHER OCCURRED WHEN THE COURT FAILED TO MAKE ANY FINDINGS BY ORDER REGARDING THE DEFENDANT'S CLAIM THAT HE FAILED TO STATE SUFFICIENT FACTS IN WHICH RELIEF COULD BE GRANTED.

THE COURT ABUSE ITS DISCRETION IN RULING ON THIS 12 B(6) MOTION BECAUSE NEITHER THE COURT OR DEFENDANT HAS POINTED OUT TO ANY DEFICIENCIES IN THE PLAINTIFF COMPLAINT AND AS SUCH VIOLATES THE RULES OF CIVIL PROCEDURE BECAUSE THE PLEADINGS ARE BEING ASSESSSED IN A MANNER NON-COMPLIANT WITH THE RULES OF CIVIL PROCEDURE 12 B(6) AND RULE 8(C)

"AN AFFIRMATIVE DEFENSE MAY NOT BE ASSERTED IN A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UNLESS THE ALLEGATIONS OF THE COMPLAINT DEMONSTRATE THE EXISTENCE OF THE AFFIRMATIVE DEFENSE,"

FURTHER IN CONSIDERING A MOTION TO DISMISS UNDER RULE 12. B(6) THE COURT MUST LOOK TO AND BASED ITS RULING SOLELY ON THE ALLEGATIONS SET FORT IN THE COMPLAINT Id. CITING DOEN MARION 373 SC 390, 645 SE2 245 (2007)

SUCH A MOTION MAY NOT BE SUSTAINED IF THE FACTS ALLEGED AND THE INFERENCES DRAWN WOULD ENTITLE THE PLAINTIFF TO ANY RELIEF ON ANY THEORY OF THE CASE Id AT 148-49

THE JUDGE DID NOT BASE HER RULING SOLELY ON THE ALLEGATIONS OF THE COMPLAINT  
(5)

HERE THE JUDGE SUSTAIN THIS MOTION WHEN IT WAS NOT BASE ON ALLEGATIONS SET FORT IN THE COMPLAINT VIOLATING DOEN MARION BECAUSE THERE WAS NO FACTUAL FINDINGS AND CONCLUSIONS OF LAW THAT PLAINTIFF FAIL TO STATE CLAIMS IN WHICH RELIEF COULD BE GRANTED. AND IS WITHOUT EVIDENCE TO SUPPORT THE COURTS RULING THE COURT FURTHER COMMITTED ERROR WHEN IT DISMISSED THE PLAINTIFFS CLAIMS "WITH PREJUDICE".

DISMISSAL OF A CASE PRECLUDES LITISATION ONLY ON MATTERS ACTUALLY DECIDED IN THE DISMISSAL HERE IN THE CASE AT BAR THERE WAS NO MATTER DECIDED ON PLAINTIFFS CLAIM OF FALSE ARREST AND FALSE IMPRISONMENT THEREFORE THE PLAINTIFF SHOULD HAVE GIVEN AN OPPORTUNITY TO FILE AND SERVED AMENDED COMPLAINT. SEE EG SPENCE V SPENCE 368 SC 106, 628 SE 2d 869.

HOWEVER THERE WAS NO FINDINGS MADE WHETHER OR NOT PLAINTIFF FAILED TO STATE SUFFICIENT FACTS UPON WHICH RELIEF COULD BE GRANTED.

AN APPEAL COURT MUST CONSIDER THE MERITS OF COMPLAINT TO DECIDE WHETHER IT IN FACT FAILED TO STATE A CLAIM, BUT WAS IMPROPERLY DISMISSED WITH PREJUDICE WITHOUT GRANTING LEAVE TO AMEND CITING PARADIS V CHARLESTON CTY 5 CH DIST 819 SE 2d 147 S.C.R CIVP 12 (b)(6), 15 (a) NOTING THAT "A CIRCUIT COURT DOES NOT HAVE DISCRETION TO DISMISS A COMPLAINT

WITH PREJUDICE FOR FAILURE TO STATE A CLAIM WITHOUT AT LEAST CONSIDERING WHETHER TO ALLOW LEAVE TO AMEND IN DECIDING WHETHER THE TRIAL COURT PROPERLY GRANTED A MOTION TO DISMISS, THE COURT OF APPEALS MUST CONSIDER WHETHER THE COMPLAINT, VIEWED IN LIGHT MOST FAVORABLE TO THE PLAINTIFF, STATES ANY VALID CLAIM FOR RELIEF RULES. CIV. PROC. RULE 12 (b) (6) CITING FLATEAUN HARRELSON 355 SC 197, 584 SE2d 413 (2003) N(4)

VIEWED IN LIGHT MOST FAVORABLE TO THE PLAINTIFF HAS STATED SUFFICIENT GROUNDS IN WHICH RELIEF COULD BE GRANTED. NOT ONLY IN HIS COMPLAINT BUT IN HIS MOTIONS.

THE PLAINTIFF CLAIMS THAT HE WAS ARRESTED AND IS PRESENTLY BEING CONFINED ON THE BASIS OF A MAGISTRATE WARRANT FOR MURDER THAT WAS SECURED BY THE CLARENDON COUNTY SHERIFF'S DEPUTY H.M. TURBOWICK BY THE USE OF PERJURED TESTIMONY SUFFICIENTLY STATES A CAUSE OF ACTION FOR FALSE ARREST AND FALSE IMPRISONMENT BECAUSE THE PROCESS WAS NOT LEGAL THE PROCESS WAS NOT LEGAL BECAUSE A MAGISTRATE DOES NOT HAVE JURISDICTION IN CASES OF MURDER AND HAD NO AUTHORITY TO ISSUE THE WARRANT AND SUCH WAS VOID.

LIKEWISE THE OFFICER IN APPLYING FOR THE WARRANT WENT TO A MAGISTRATE INSTEAD OF A JUDGE OF  
(7)

A COURT OF RECORD IE CIRCUIT COURT JUDGE AND PRESENTED PERTURBED TESTIMONY IN SECURING THE WARRANT STATING THAT I GAVE HIM AND SLED <sup>11</sup> A FULL WRITTEN STATEMENT.

IN GEORGE V. LEONARD 71 F SUPP 662 THE COURT HELD THAT FALSE ARREST AND FALSE IMPRISONMENT IS DEPRIVATION OF ONE LIBERTY WITHOUT LEGAL PROCESS.

IN MAPP V OHIO THE SUPREME COURT HELD THAT STATE CRIMINAL PROCEEDINGS MUST CONFORM TO THE SAME FOURTH AMENDMENT STANDARD THAT APPLY TO FEDERAL PROCEEDINGS.

THIS REQUIREMENT WAS SPELLED OUT IN GERNSTEIN V. PUGH 420 US 103, 95 S Ct 854, 43 L Ed 2d 54 (1975).

THE COURT HELD THAT THE FOURTH AMENDMENT REQUIRES A <sup>11</sup> "JUDICIAL DETERMINATION" OF PROBABLE CAUSE AS A PRE-REQUISITE TO EXTENDED RESTRAINT ON LIBERTY FOLLOWING ARREST.

IN THE CASE AT BAR THE PLAINTIFF WAS NOT SEIZED WITH A JUDICIAL WARRANT, THERE WAS NO JUDICIAL DETERMINATION OF PROBABLE CAUSE THEREFORE PLAINTIFF HAS STATED CAUSES OF ACTION IN WHICH RELIEF CAN BE GRANTED. FOR FALSE ARREST AND FALSE IMPRISONMENT IN THAT HE WAS NOT SEIZED WITH LEGAL PROCESS. CITING ZIMBERLAND V SAVAGE 745 F SUPP 2d 664.

THOMPSON V SMITH 289 SC 334, 345 SE2D 500 (1988)

TO COMPOUND MATTERS THE DEFENDANT USE PERJURY IN OBTAINING NOT ONLY THE WARRANT BUT ALSO THE INDICTMENT IN VIOLATION OF 16-9-10(A) (1) WHICH IS A CRIME OF MORAL TURPITUDE IN SOUTH CAROLINA PUNISHABLE BY (5) YEARS.

PURSUANT TO THE PROVISION OF 17-13-50 IT IS UNLAWFUL FOR AN OFFICER TO ASSIGN TO THE PERSON ARRESTED AN UNTRUE REASON FOR THE ARREST. AN OFFICER WHO DOES SO IS GUILTY OF A FELONY AND MUST BE FINED OR IMPRISONED FOR TEN (10) YEARS OR BOTH.

PURSUANT TO 16-9-30 IT IS UNLAWFUL FOR A PERSON TO WILLFULLY AND KNOWINGLY SWEAR FALSELY IN THE TAKING OF ANY OATH REQUIRED BY LAW THAT IS ADMINISTERED BY A PERSON DIRECTED TO OR PERMITTED BY LAW TO ADMINISTER SUCH OATH.

THERE WAS NO PROBABLE CAUSE BECAUSE OF THE FALSITY IN THE AFFIDAVIT SECTION OF THE WARRANT. CITING STATE V COVERT 368 SC 188 HOLDING THAT "FALSITY IN THE AFFIDAVIT SECTION OF THE WARRANT IS THE EQUIVALENT OF NOT HAVING AFFIDAVIT AT ALL"

### "SOVEREIGN IMMUNITY"

IN M'CALL V BATSON 285 SC 243, 329 SE 2d 741 NOTES (2) (3) THE SOUTH CAROLINA SUPREME COURT HELD THAT THE DOCTRINE OF SOVEREIGN IMMUNITY IS ABOLISHED AS IT APPLIES TO THE STATE AND ALL LOCAL SUBDIVISIONS OF GOVERNMENT (9)

AND THAT IT SHALL NOT APPLY TO ANY CASE FILED AFTER JULY 1 (1986)

IN RESPONSE TO THE ABOLITION OF THE DOCTRINE OF SOVEREIGN IMMUNITY THE GENERAL ASSEMBLY ENACTED THE TORT CLAIMS ACT SEE S.C. CODE ANN. § 15-78-10 TO 200 (2005) § SUPP 2017) PURSUANT TO 15-78-40 THE STATE ITS POLITICAL SUBDIVISION AND GOVERNMENT ENTITY ARE LIABLE FOR THEIR TORTS IN THE SAME MANNER AS A PRIVATE INDIVIDUAL UNDER LIKE CIRCUMSTANCES SUBJECT TO LIMITATIONS UPON LIABILITY.

THE TORT CLAIMS ACT DOES NOT CREATE A CAUSE OF ACTION AS ASSERTED BY THE DEFENDANTS IN THEIR MEMORANDUM "1"

RATHER IT REMOVES THE COMMON LAW BAR OF SOVEREIGN IMMUNITY SEE EX REL ESTATE OF MUNN V AIKEN COUNTY NOTE (9) 15-78-10-15-78-200

SEE ALSO PROCTOR V DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL 368 S.C. 279, 628 S.E.2D 496 (2006) NOTE (2) TORT CLAIMS ACT WAIVES SOVEREIGN IMMUNITY FOR TORTS COMMITTED BY THE "STATE" ITS POLITICAL SUBDIVISION AND GOVERNMENT ENTITIES AND EMPLOYEES ACTING WITHIN THE SCOPE OF THEIR OFFICIAL DUTIES 15-78-30 (d).

DEFINES GOVERNMENT ENTITY AS THE "STATE" SEE HAWKINS 358 S.C. AT 292, 594 S.E.2D AT 563 FLATEAU 358 S.C. AT 204 584 S.E.2D AT 416

CODE 15-18-20(b) THE GENERAL ASSEMBLY ADDITIONALLY INTENDS TO PROVIDED FOR LIABILITY ON THE PART OF THE STATE ITS POLITICAL SUBDIVISIONS AND EMPLOYEES SOVEREIGN IMMUNITY IS AN AFFIRMATIVE DEFENSE THAT MUST BE PLED RULE 8(C) S.C.R.P.

LIKEWISE ANY EXCEPTION UNDER THE TORT CLAIMS ACT MUST BE PLED RULE 8(C) 12(B) "WHERE AFFIRMATIVE DEFENSE WAS NOT RAISED IN ORIGINAL PLEADING, IS WAIVED BY A FAILURE TO PLEAD IT EARTHSCAPES INC V LILBRICH 390 S.C. 609, 703 S.E. 2d 221 S.C. SUP. CT (2010) RULE 8(C) 12(B)(6)

PLAINTIFF REQUEST THE COURT TO TAKE JUDICIAL NOTICE THAT WHILE THE DEFENDANT RAISE THE DEFENSE OF SOVEREIGN IMMUNITY. UNDER RULE 12(B)(6) THE COURT DID NOT MAKE ANY FINDING IN THE COURTS ORDER REGARDING SUCH OR TO THE PLAINTIFFS ARGUMENT IN HIS OPPOSITION TO THE DEFENDANTS MOTION FOR A PROTECTIVE ORDER

I ALSO PRESENTED A RULE 59(E) WITH MEMORANDUM WHICH BY LAW CONTRADICT AND CONFLICT WITH THAT OF THE DEFENDANTS REGARDING SOVEREIGN IMMUNITY HAVING MADE THIS APPEAL, PLAINTIFF REQUEST THAT SUCH BE GRANTED AND REVERSE AND REMAND WITH DIRECTIVE TO (1) ENTER JUDGEMENT IN FAVOR OF PLAINTIFF BY DEFAULT ON THE SECOND SERVICE OF PROCESS (2) REVERSE DUE TO ABUSES OF DISCRETION BY THE JUDGE

(11)

HAVING MADE THIS APPEAL THE PLAINTIFF MOVE  
THAT SUCH BE GRANTED WITHIN THE INTEREST OF  
JUSTICE

Respectfully Submitted  
Marcus A Joseph 147784  
Kirkland Correctional Inst  
4344 Broad River Rd  
Columbus SC 29210  
Unit F2 B 162  
Pro se Plaintiff

Done this 23rd day of August 2022

## QUESTIONS PRESENTED

(1) DID THE COURT ERRED WHEN IT FAILED TO GRANT JUDGEMENT BY DEFAULT REGARDING THE SECOND SERVICE OF COMPLAINT AND SUMMONS?

(2) DID THE COURT ERRED WHEN IT ALLOWED THE DEFENDANTS TO ARGUE INSUFFICIENT SERVICE OF PROCESS WHEN THEY IN FACT MADE A VOLUNTARY APPEARANCE? AND FAILED TO PROPERLY CHALLENGE SERVICE OF PROCESS?

(3) DID THE COURT ERRED WHEN IT SUSTAINED THE DEFENDANTS RULE 12 B (6) MOTION?

(4) CAN THE STATE BE SUED UNDER THE TORT CLAIMS ACT?

(5) DID THE COURT ERRED WHEN SHE DISMISSED ACTION WITH PREJUDICE?

CERTIFICATE OF SERVICE

CASE # 2022-000985

THIS IS TO HEREBY CERTIFY THAT I MARION A JOSEPH  
THE PLAINTIFF IN THE HEREIN MENTION ACTION HAS CAUSED  
AN APPEAL TO BE FILED WITH THE CLERK OF COURT FOR  
THE APPEALS COURT AND HAS CAUSED THE SAME TO  
BE SERVED UPON THE DEFENDANT WITH CERTIFICATE OF  
SERVICE BY PERSONS SAME BY THE UNITED STATES MAIL  
HERE AT KIRILLAND CORRECTIONAL INST ON THIS 23<sup>RD</sup> DAY  
OF August 2022.

PERSONS SERVED  
L. DAVID LOSSETT  
P.O. BOX 11549  
Columbia SC 29211

*Marion A Joseph*  
pro-se plaintiff

JENNY ABBOT KITCHINGS  
P.O. BOX 11629  
Columbia SC 29211

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done this 23<sup>rd</sup> day of August 2022

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APPEAL CASE # 2022-000985

DEAR CLERK

PLEASE FIND FOR FILING

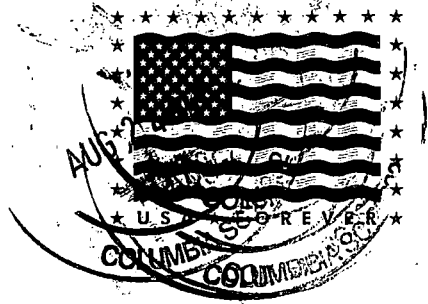
(1) APPEAL (2) CERTIFICATE OF SERVICE AND

BY THIS LETTER I HEREBY GIVES NOTICE  
THAT I HAVE CAUSE THE SAME TO BE  
SERVED UPON THE DEFENDANTS

THANK YOU  
MORNS A JOSEPH  
PRO-SE PLAINTIFF

- COVER -

MARCUS A JOSEPH 147764  
KIRKLAND Correctional Inst  
4344 Broad River Rd  
Columbus SC 29210  
Unit F2B 162



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CLERK OF COURT  
JENNY ABBOTT KITCHINGS  
P.O. Box 11629  
Columbus SC 29211

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