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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2020-000589
Case No. 2017-CP-40-3166

Bridgett Taylor, ... Respondent,

v.

Richland County Sheriff's Department, ... Appellant.

REPLY BRIEF OF APPELLANT

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I. The trial court erred in reversing the directed verdict and granting a new trial based on a prior order of another circuit court judge that denied the Appellant's motion for summary judgment.

In her response brief, the Appellant Bridgett Taylor contends that the trial court did not abuse its discretion in denying the Respondent's motion for directed verdict and granting a new trial as a result. As addressed at length in its opening brief, the Respondent Richland County Sheriff's Department ("Sheriff") has demonstrated that the trial court committed several errors of law which are subject to a *de novo* review and reversal as a matter of law.

By way of background, the trial court issued an oral order at trial granting a directed verdict to the Sheriff. Taylor filed a motion for reconsideration which was granted by form order. The Sheriff then filed a motion to alter or amend that form order, and the trial court entered a formal order on March 10, 2020. In that formal order, the trial court ruled:

> Plaintiff is also correct in her argument that this Court improperly overruled the decision of another Circuit Court judge. Specifically, in denying Defendant's motion for summary judgment on January 23, 2019, Judge Manning disagreed with Defendant's arguments on the issues of sovereign immunity, *res judicata*, and collateral estoppel. For the trial court to have found otherwise (to the extent that it did) was inappropriate.

(R. 24). In addressing its reversal of the directed verdict, the trial court further explained that "[i]t is implicit in its Order that the Court finds, based on the evidence present at the previous trial, that Defendant is not entitled to sovereign immunity and cannot claim the 'protections' of collateral estoppel or *res judicata*." (R. 25).

Those rulings give rise to several errors of law. First, contrary to the trial court's ruling, the order by Judge L. Casey Manning denying the Sheriff's motion for summary judgment does not preclude the same defenses being re-asserted and adjudicated on a directed verdict motion at trial. Second, the denial of a summary judgment motion by one circuit court judge does not preclude another judge from trying the case and ruling differently on a directed motion at trial.

In her brief, Taylor appears to concede these arguments, but she counters that the trial judge's reliance on Judge Manning's denial of summary judgment is "harmless." She plays a game of semantics by claiming that the trial judge found it only "inappropriate" to "overrule" Judge Manning's order, but in actuality, the trial judge found that she had "improperly overruled" Judge Manning's order. (R. 24). The semantics aside, it is clear that the error was not harmless. The trial judge believed that she was precluded by Judge Manning's order from ruling differently than Judge Manning on the issues of sovereign immunity, *res judicata*, and

collateral estoppel. That is an error of law that resulted in a reversal of her ruling granting a directed verdict.

Taylor has only herself to blame. In her motion for reconsideration, Taylor argued that "[t]he Court did not have the authority to overrule Judge Manning's previous order." (R. 183). The trial judge obviously agreed with that very position when she wrote: "Plaintiff is also correct her argument that this Court improperly overruled the decision of another Circuit Court judge." (R. 24).

In short, it is well settled that the denial of a summary judgment motion does not establish the law of the case and "decides nothing about the merits of the case." *Ballenger v. Bowen*, 313 S.C. 476, 443 S.E.2d 379, 380 (1994). Otherwise, the denial of a motion for summary judgment would be appealable, and the jurisprudence in this state clearly holds that a denial of summary judgment is never appealable, even after final judgment. *Id*. Thus, any issue raised and lost at the summary judgment stage *must be re-asserted* at the directed verdict stage, and the trial judge is never precluded from deciding that issue *de novo* and without regard for any earlier ruling denying a summary judgment motion.

Bridgett Taylor suggests that there is some distinction between legal issues and factual issues which are denied at the summary judgment stage. There is none. Rulings on both legal issues and factual issues in an order *denying* summary judgment does not establish the law of the case. *See*, *Falk v. Sadler*, 341 S.C. 281,

533 S.E.2d 350, 355 (Ct. App. 2000) ("[t]his result does not preclude a later determination that summary judgment or a directed verdict may be appropriate, as it does not establish the law of the case or have the effect of striking any applicable defense"). Taylor makes that flawed argument based on a misreading of the Supreme Court's decision in *Belton v. State*, 313 S.C. 549, 443 S.E.2d 554 (1994), where the Court wrote:

> When Belton appealed Authority's determination, the B & C Board determined that it lacked jurisdiction to hear the appeal. Thereafter, Judge Stuckey issued an Order holding that B & C Board *did* have jurisdiction to hear the appeal, from which Order no appeal was taken. Judge Kinard, however, subsequently dismissed Belton's appeal, holding that the B & C Board did *not* have jurisdiction.
>
> When B & C Board failed to appeal Judge Stuckey's Order, it became the law of the case. Moreover, as the question was purely a legal one, Judge Kinard was without authority to review Judge Stuckey's findings.

443 S.E.2d at 557. (Citations omitted). From a procedural standpoint, *Belton* is an unusual case. The appeal simultaneously reviewed an administrative appeal to the former Budget and Control Board as well as circuit court orders granting summary judgment. The administrative appeal resulted in a remand to the Budget and Control Board, and the appeal of the civil action resulted in a partial reversal of summary judgment. The ruling relied upon by Taylor, however, was part of the appeal from the administrative ruling. The Supreme Court ruled that one judge

could not reverse another judge's unappealed and final jurisdictional ruling. That is a far cry from suggesting -- contrary to *Ballenger* which had been issued just two months earlier -- that the denial of summary judgment on a legal issue establishes the law of the case and precludes the re-assertion of that legal issue at the directed verdict stage at trial. In short, Taylor's reliance on *Belton* is absolutely misplaced.

The law of the case may only be established by the *grant* of summary judgment on a legal issue. That ruling would be binding on a subsequent judge and at trial. That is because the *grant* of summary judgment establishes the law of the case and decides the merits of the issue. It also allows for an appeal of that decision. In the case at bar, however, Judge Manning did not grant summary judgment in Bridgett Taylor's favor on any issue. That left the Sheriff's legal defenses lost at the summary judgment stage to be re-asserted at the directed verdict stage at trial, which is precisely what occurred.[1] The trial judge ruled correctly at trial in granting a directed verdict for the Sheriff, but she then

[1] Taylor is also mistaken in suggesting that the trial judge has discretion whether to "reconsider" a summary judgment motion. That is only true where the circuit judge is asked to hear a second or renewed summary judgment motion. *See, Dorrell v. South Carolina Department of Transportation,* 361 S.C. 312, 605 S.E.2d 12, 18 (2003) ("[t]he trial judge had the discretionary authority to hear APAC's renewed motion for summary judgment. That a different trial judge previously denied the motion did not preclude APAC from renewing its motion once new evidence came to light"); *Croswell Enterprises, Inc. v. Arnold,* 309 S.C. 276, 422 S.E.2d 157, 159 (Ct. App. 1992) ("[i]f the first motion for summary judgment is unsuccessful the court has the power to permit a second motion for summary judgment prior to trial"). That is significantly different than a directed verdict motion at trial. The trial judge does not have discretion to decline to hear a directed verdict motion because an earlier summary judgment motion was denied. It bears repeating that the denial of summary judgment does not and cannot decide the merits on any factual or legal issue or defense.

committed reversable error in adjudicating Taylor's motion for reconsideration when she accepted Taylor's erroneous argument that she was barred from "overruling" Judge Manning's order denying summary judgment. That ruling was not "harmless" as suggested; it constitutes a clear error that must be corrected on appeal.

II. The trial court erred in reversing the directed verdict and in concluding that the Appellant is not entitled to judgment based on the application of collateral estoppel or sovereign immunity under the Tort Claims Act.

A. Collateral Estoppel

In her response brief, Taylor argues the final unappealed decision of the Federal Court in the action captioned *Taylor v. Lott*, Civil Action Number 3:16-3823-JFA-PJG, does not collaterally estop her state court claim for gross negligence arising from the same events. She argues that "the issue of whether RCSD was grossly negligent in carrying out the explosive breach at the time it did and using the device it did was not actually litigated and determined by the federal court." *See*, Respondent's Brief, p. 12. That is clearly incorrect.

The Federal Court engaged in a detailed analysis of the use of the detonator on the front door, including the preparation and planning that preceded the execution of the search warrant, the selection of the device, and the actual entry using the detonator. The Court concluded that "no reasonable jury could find that

using the detonator to unlock the door was unconstitutionally excessive." *Taylor v. Lott*, 2018 WL 3912377, *6 (D.S.C. 2018). The Federal Court applied the objective reasonableness standard under the Fourth Amendment, which "requires the court to determine whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Id*. Thus, in finding that the use of the detonator, when considering the totality of the circumstances, was not constitutionally excessive, that is a finding that the use of the detonator was objectively reasonable.

Quite simply, there is no distinction between "objective reasonableness" under the Fourth Amendment and "objective reasonableness" under state tort law.[2] If the officers' use of the detonator, including considerations of when, how, and why the detonator is to be deployed, did not violate the Fourth Amendment objective reasonableness standard, no reasonable jury can conclude that the deputies acted with less than slight care under tort law. In his opening brief, the Sheriff cited numerous cases applying collateral estoppel to bar the relitigation of the reasonableness of officer conduct where a federal court already determined that the conduct was "objectively reasonable" under the Fourth Amendment standard.

[2] Taylor asserts that "objective reasonableness" in the constitutional context has no application to tort law. Not surprisingly, she cites no authority for that claim.

Taylor, however, did not contest or refute those cases, and in fact, she cited none that rejected that analysis.

In actuality, each of the issues that Taylor insists was not adjudicated by the Federal Court actually was adjudicated and was necessary to support the Court's unappealed final judgment. To reiterate, the Federal Court found that the nature and length of the surveillance including the threat assessment were reasonable. 2018 WL 3912377, *3. Moreover, the Court found that the "officers had reason to suspect that [Terrence] Taylor was present, since they had information that Terrence Taylor drove the Impala and that the presence of the Impala would indicate he was at the subject property." 2018 WL 3912377, *5. The Court also determined that the "officers had reason to suspect that the plaintiff herself posed a risk to the effectiveness of the investigation." 2018 WL 3912377, *3. Based thereon, the Court concluded the "officers had particular reason to suspect Terrence Taylor (and possibly co-conspirators) were in the home and that his mother might interfere with law enforcement efforts to conduct the search." 2018 WL 3912377, *4.

In sum, the factual findings and conclusions of law made in the federal lawsuit, which has reached final judgment, preclude Bridgett Taylor's ability to successfully show that the Sheriff acted with gross negligence. Thus, the Sheriff is entitled to have the directed verdict reinstated.

B. Section 15-78-60(6)

In her response brief, Taylor also makes the argument that sovereign immunity under Section 15-78-60(6) of the Tort Claims Act is not a bar to her gross negligence claim. She makes two arguments, both of which lack merit.

First, Taylor argues that Section 15-78-60(6) has no applicability to this case because the Sheriff was not engaged in "police protection."[3] Sovereign immunity under Section 15-78-60(6) extends to "the failure to provide or the method of providing police or fire protection." *Wells v. City of Lynchburg,* 331 S.C. 296, 501 S.E.2d 746, 750 (Ct. App. 1998). However, as the Federal Court summarizes, the Sheriff's deputies were "execut[ing] a search warrant at the plaintiff's residence -- a known source of drug activity in Columbia, South Carolina -- in the early morning, detonating an explosive device to open the front door. Officers thought the plaintiff's son, who was suspected in a homicide investigation as well as of the drug activity at the location, was in the house." *Taylor,* 2018 WL 3912377, *1. Clearly, the law enforcement activity at issue falls within the scope of "police

[3] This argument is improperly raised for the first time on appeal. In her arguments in response to the directed verdict motion at trial, Taylor did not argue that Section 15-78-60(6) has no applicability to this case because the Sheriff was not engaged in "police protection." Instead, she argued only that Section 15-78-60(6) is subject to a gross negligence exception. (R. 752-757). Because that argument was never made in the trial court, it cannot be made for the first time on appeal. *See, Wilder Corp. v. Wilkie,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("it is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review").

protection"; the actions were obviously taken to enforce the criminal laws of the State against a murder suspect and drug dealer, and that undoubtedly provides police protection to the citizenry.

Nonetheless, to the extent that Taylor attempts to argue a more restrictive interpretation of the term "police protection," it is well settled that provisions of the Tort Claims Act "must be liberally construed in favor of limiting the liability of the State." *See,* S.C. Code Ann. § 15-78-20(f). This rule of statutory construction was expressly adopted by the General Assembly and has likewise been applied by the appellate courts in construing the Tort Claims Act. *See, Faile v. South Carolina Department of Juvenile Justice*, 350 S.C. 315, 566 S.E.2d 536, 540 (2002) ("[p]rovisions establishing limitations on liability must be liberally construed in the State's favor"). *See also, Baker v. Sanders*, 301 S.C. 170, 391 S.E.2d 229 (1990); *Bayle v. South Carolina Department of Transportation,* 344 S.C. 115, 542 S.E.2d 736 (Ct. App. 2001). Therefore, to the extent there is any ambiguity or the potential for construing the term "police protection" in inconsistent ways, the meaning of the term that favors limiting the liability of the State must control.

Next, Taylor argues that Section 15-78-60(6) is subject to a gross negligence exception which is interpolated because Section 15-78-60(25) is applicable to the case and that subsection includes a gross negligence exception. *See, Steinke v.*

*South Carolina Department of Labor, Licensing and Regulation***,** 336 S.C. 373, 520 S.E.2d 142 (1999); *Repko v. County of Georgetown*, 424 S.C. 494, 818 S.E.2d 743 (2018). However, Taylor cannot show that Section 15-78-60(25) has any applicability to the facts of this case. Section 15-78-60(25) provides immunity for a loss resulting from "responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner." *See*, S.C. Code Ann. § 15-78-60(25). The Federal Court, however, has already rejected Taylor's assertion that she was in custody. The Federal Court found that "no facts in the record permit a reasonable inference that the plaintiff was in custody, either as a detainee or a convicted prisoner, at the time of her injuries." *Taylor*, 2018 WL 3912377, *7. For this reason, based on the application of collateral estoppel, that finding is entitled to preclusive effect, and accordingly, it is not proper to find Section 15-78-60(25) applicable to this case.

Yet, Taylor also insists that Section 15-78-60(25) is not "limited to 'custody' situations" but rather "applies to the 'supervision, protection, control, confinement, or custody of any student, patient, prisoner, inmate, or client of any governmental entity.'" *See*, Respondent's Brief, p. 17. Taylor argues that, while she was not in custody, she was "controlled or confined" by the Sheriff. *Id*. That is incorrect, but

Taylor has nonetheless not alleged nor shown that she qualifies as a "student, patient, prisoner, inmate, or client." Certainly, she is not a prisoner or inmate because she was not in custody, and the Federal Court also ruled definitely that she was not a detainee or prisoner. *Taylor*, 2018 WL 3912377, *7. That leaves student, patient, or client. She qualifies as none of those. In short, Taylor cannot show that Section 15-78-60(25) is applicable. *See*, *Plyler v. Burns*, 373 S.C. 637, 647 S.E.2d 188 (2007) (holding that Section 15-78-60(25) is inapplicable because plaintiff did not qualify as a "client").

In sum, as Taylor's own expert conceded, the use of the detonator which caused Taylor's injuries constitutes a "method of providing police protection." (Tr. 487-488). The use of the detonator is accordingly subject to absolute sovereign immunity under Section 15-78-60(6). For this additional reason, the Sheriff is entitled to have the directed verdict reinstated.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant Richland County Sheriff's Department respectfully renews its request that this Court reverse the Orders issued by Circuit Court Judge Jocelyn Newman which reversed or set aside the directed verdict in favor of the Sheriff and granted a new trial. The Appellant respectfully requests that the Court reinstate the directed verdict in its favor as issued at trial or, alternatively, remand with direction that a directed verdict be entered.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant Richland County Sheriff's Department certifies that the Final Reply Brief of Appellant complies with Rule 211(b), SCACR.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for the Appellant Richland County Sheriff's Department certifies that the Final Reply Brief of Appellant complies with the Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, issued April 15, 2014.

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