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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

Judge Michael G. Nettles

Appellant Case No. 2022-001741

Michael Qualls ……Appellant

v.

Town of McBee…… …….. Respondent.

APPELLANT'S FINAL BRIEF

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5 June, 2023

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STATEMENT OF THE CASE

This matter is before the Court of Appeals pursuant to the appeal of a summary judgment motion in favor of Respondent that was rendered by the Circuit Court. An initial hearing was held on this matter September 14, 2022. Present for Appellant was Skyler Hutto, and present for Respondent was Katherine Ryan. Judge Michael Nettles granted the Respondent's motion and reaffirmed her decision following the Appellant's motion to reconsider.

Appellant subsequently filed an appeal and noticed Respondent.

STATEMENT OF THE FACTS

The case stems from Appellant's arrest in the Town of McBee on July 8, 2019 and the subsequent proceedings, wrongful detention, and violation of Appellant's constitutional rights paired with gross negligence that occurred therin. On July 8, 2019, Appellant was stopped by a deputy of the Chesterfield County Sheriff's Department and was charged with several traffic violations, including driving under suspension. Reichart Deposition (ROA pp. 181-187). Appellant's court appearance was set for September 12, 2019, and the hearing was held before Barbara Lisenby (hereinafter "Lisenby"), municipal judge for the Town of McBee. Appellant did not plead guilty to any of the charges and did not sign a guilty plea form, but he instead requested a continuance from Lisenby to deal with the issues with his license and insurance which was a standard practice. Lisenby Deposition (ROA 109 & 118). Lisenby initially granted this continuance, and Appellant began to leave the building. *Id.* at 38.

However, prior to Appellant leaving, agents from the Town of McBee began questioning Appellant on whether he had driven himself to Court and did not allow him to leave. *Id.* at 38. These agents returned Appellant to Lisenby, and he immediately requested a jury trial on his charges and also asked for a lawyer or public defender. *Id*. at 39; Appellant's Deposition at (ROA pp. 077-079). Inexplicably, however, Lisenby denied Appellant access to counsel and a jury trial. Lisenby Deposition at (ROA 117). She instead began her own prosecution of Appellant by investigating the status of his license by personally calling the Department of Motor Vehicles to search and obtain Appellant's records, which she then allowed herself to introduce as evidence to the court. *Id.* at 35-36. She then proceeded to call Appellant a liar and then, without any trial whatsoever, she found, in her words, "that black guy" guilty of all charges. *Id.* at 45.

None of these proceedings were recorded by Clerk of Court, Terri King or any other

official. *Id.* at 15-16. Appellant was sentenced to jail time by Lisenby, which he began to serve. Appellant retained Attorney Julian Marsh after this incident, and Attorney Marsh attempted to file a letter of representation with King along with several motions. Marsh Deposition (ROA pp. 139-142). However, King promptly called King to inform him that he was filing too much and that he was wasting their ink. *Id.* at 8. King refused to provide any proof of these motions being filed or the letter. *Id*. Instead, Lisenby called Attorney Marsh to inform him that there would be no additional proceedings or a hearing for Appellant, and then again called Appellant a liar. *Id.* at 9. Only after several days in jail and after Appellant's father paid his fines in full was Appellant released from jail.

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ARGUMENT

I. Respondent Is Not Entitled to Judicial Immunity.

Judicial and quasi-judicial immunity are not all-encompassing doctrines that automatically bar suits against judges and other officials who work in a courthouse under all circumstances. Judicial immunity only bars suits against judicial officers for "judicial acts" taken by judges within the court's subject matter jurisdiction. *King v. Myers*, 973 F.2d 354, 356-57 (4th Cir. 1992); *see Plyer v. Burns*, 373 S.C. 637, 647 S.E.2d 188, 192-93 (2007) (stating that judicial immunity only applies "in certain circumstances" and "is not absolute"). Thus, judicial officials are "not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity," and they are also "not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). Judicial immunity does not provide protection for "administrative, legislative, or executive functions that judges may on occasion by assigned by law to perform." *Forrester v. White*, 484 U.S. 219, 227 (1988). In other words, while immunity applies to judicial acts, it does not apply to "acts that simply happen to have been done by judges." *Id.* "[T]he factors determining whether an act by a judge is a 'judicial' one relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). As such, it is "the nature of the function performed, not the identity of the actor who performed it, that inform[s] [the court's] immunity analysis." *Forrester*, 484 U.S. at 229.

1. *Respondent Is Liable for the Non-Judicial Acts Performed by its Judge.*

Judges who undertake to perform investigative functions and do their own searches for

evidence have been found by the United States Supreme Court to be "not acting as a judicial officer but as an adjunct law enforcement officer." *Lo-Ji Sales, Inc. v. New York,* 442 U.S. 319, 327 (1979); *United States v. Servance*, 394 F.3d 222, 231 (4th Cir. 2005) (holding that "it is elementary that a judge can overstep his responsibilities and compromise his judicial neutrality if, by way of example, he serves as a leader of a search party"); *Gibson v. Goldston*, C/A No. 5:21-cv-00181 (S.D.W.Va. July 13, 2022). Thus, where a town judge went to a store after issuing a search warrant and ordered law enforcement to seize certain items, the Court found that "the objective facts of record manifest an erosion of whatever neutral and detached posture existed at the outset. He allowed himself to become a member, if not the leader, of the search party which was essentially a police operation." *Lo-Ji Sales, Inc.*, 442 U.S. at 327. Likewise, recently in *Gibson v. Goldston*, C/A No. 5:21-cv-00181 (S.D.W.Va. July 13, 2022), a family court judge, during a hearing in a divorce case regarding defects in property disbursement, took the parties and the bailiff on a "field trip" to the residence, performed a search, and seized private property. The court held that judicial immunity did not apply because while the judge "might similarly have had the authority to order a search of a litigant's home and a seizure of certain items, she could not conduct a search and seizure herself." *Id.* Similarly, in *Thomas v. Sams*, 734 F.2d 185 (5th Cir. 1984), a magistrate took it upon himself to investigate the destruction of city property (cutting a pipe) and then swore out a complaint. In finding that judicial immunity did not apply, the Fifth Circuit held that "[w]hen the same person '[wears] two hats,' once as judge and the other as a city executive official, he may be liable for an arrest resulting from his acts as a city official." *Id.* at 190; *see Wilson v. Rackmill*, 878 F.2d 772, 776 (3d Cir. 1989) (finding that allegations that parole examiners "investigated allegations of parole violations" alleged that the Respondents "performed executive and investigative functions, in addition to their adjudicatory duties," and were not "completely entitled

to absolute immunity").

Courts have also similarly held that when a judge undertakes "prosecutorial duties," then the judge performs non-judicial acts. *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1984); *see Murchison*, 349 U.S. 133, 137 (1955) (holding that "[f]air trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer."). For instance, in *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir. 1980), the court found that a judge was not entitled to immunity where he acted as a prosecutor, and held:

> Vanderwater acted as prosecutor. He made the decision to prosecute. He determined the offense to be charged, originally contemplating criminal trespass and then deciding on theft of the key. He prepared a written charge on the "Notice to Appear" form. He caused Gamble to sign the blank complaint form and the next day had that form completed by the State's Attorney's staff. He prepared a guilty plea and waiver of jury and caused a signature, which he says was Lopez', to be placed thereon. Finally, Vanderwater presented the charge and plea form to himself with the expectation that it would be the basis for the unconstitutional conviction and sentence. These acts were not functions "normally performed by a judge." They were not, therefore, "judicial acts," and are not, as a consequence, protected by judicial immunity.

Id. at 1235; *see Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993) ("It is well settled that charging a Defendant is a prosecutorial function, not a judicial function.").

Moreover, judicial immunity does not foreclose claims against judges for racial animus or discrimination in performing non-judicial acts. The Supreme Court has "never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of constitutional rights." *O'Shea v. Littleton*, 414 U.S. 488, 503 (1974). In *Ex parte Virginia*, 100 U.S. 339 (1879) a county judge was found to have racially discriminated in preparing general jury lists, and the Court held that judicial immunity did not apply and that the act of selecting juror was "merely a ministerial act." *Id.* at 348. The Court further held:

> But if the selection of jurors could be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted outside of his authority and in direction violation of the spirit of the State statute? That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion.

Id.

Here, contrary to Respondent's assertion, Appellant has sufficiently alleged in the Complaint several non-judicial acts that amounted to gross negligence for which Respondent is liable in this case and for which she is not entitled to judicial immunity. For instance, Appellant alleges, Respondent engaged in "improper fact findings practices." In other words, these allegations in the light most favorable to Appellant, show that Respondent, through its judge, acted outside the scope of judicial functions, compromised neutrality, and performed a factual investigation and procured evidence against Appellant to then use against him in Court, thus, "not acting as a judicial officer but as an adjunct law enforcement officer." *Lo-Ji Sales, Inc.,* 442 U.S. at 327. After obtaining this information, Judge Lisenby then chose to prosecute Appellant based on this information she herself had gathered and entered into evidence. Judge Lisenby made a credibility determination based on this factual information she had obtained in her investigation, called Appellant a "liar," and then proceeded to find him guilty of all charges without a trial. *See* Lisenby Deposition previously noted with the Court. As alleged in the Complaint, in performing these non-judicial acts, Judge Lisenby intentionally acted with animus toward Appellant, as rather than calling him by his name, she has testified that she found "that black guy" guilty. She continued this vendetta against Appellant after the proceeding when she again spoke with his attorney and called Appellant a liar and refused to provide any additional proceedings or otherwise allow Appellant access to the court. Accordingly, based on the authority cited above, Appellant has sufficiently alleged facts in the Complaint against Respondent that when accepted as true and

viewed in the light most favorable to Appellant show that Judge Lisenby acted not as a judge, but in the role of investigator and prosecutor in performing these non-judicial acts, and thus, she is not entitled to absolute judicial immunity for the harm caused to Appellant by these acts. As such, Respondent's motion should be denied.

2. *Respondent, through its Judge, Acted In the Complete Absence of All Jurisdiction.*

Respondent is also not entitled to judicial immunity for her actions taken against Appellant that were "taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). South Carolina municipal courts are established by statute and are courts of limited jurisdiction. *See* S.C. Code Ann. § 14-25-45. The statute establishing municipal courts provides a right to a trial by jury and states:

> A person to be tried in a municipal court, prior to trial, **may demand a jury trial, and the jury, when demanded, must be composed of six persons** drawn from the jury list prepared by the jury commissioners from the latest official list furnished to the municipality by the State Election Commission each year in the manner prescribed in Section 14-25-130. The right to a jury trial shall be deemed to have been waived unless demand is made prior to trial.

S.C. Code Ann. § 14-25-125 (emphasis added). Here, as set forth above, prior to trial, Appellant unequivocally demanded a jury trial and counsel, but Judge Lisenby knowingly ignored Appellant's right to trial by jury. At that moment, Judge Lisenby then began to act in the "complete absence of all jurisdiction" and proceeded to prosecute Appellant herself and find him guilty without a jury. As such, Appellant has sufficiently alleged acts against Judge Lisenby for which she is not entitled to judicial immunity, and the Motion should be denied.

II. Respondent Is Not Entitled to Quasi-Judicial Immunity.

Contrary to Respondent's assertion, the Fourth Circuit has held that clerks of court are not entitled to judicial or quasi-judicial immunity for actions not done pursuant to court order or a judge's direction. The Court holds that "[w]here an official is not called upon to exercise judicial

or quasi-judicial discretion, courts have properly refused to extend to him the protection of absolute judicial immunity, regardless of any apparent relationship of his role to the judicial system." *McCray v. State of Maryland*, 456 F.2d 1, 3 (4th Cir. 1972), *overruled on other grounds by Pink v. Lester*, 52 F.3d 73 (4th Cir. 1995); *see Myer v. Stoney*, No. 18-1735 (Unpub. 4th Cir. Feb. 8, 2019) (citing *McCray* and finding that the district court may have erred in finding that a claim against a clerk was "barred by quasi-judicial immunity"); *Lee v. Baron*, No. 12-1272 (Unpub. 4th Cir. 2012) (citing to holding in *McCray*). With respect to clerks of court, the Fourth Circuit noted that "in respect to filing papers, the clerk has no discretion that merits insulation by a grant of absolute immunity; the act is mandatory. . . . His duty, although associated with the court system, is not quasi-judicial (meaning entailing a discretion similar to that exercised by a judge). Clerical duties are generally classified as ministerial . . . and the act of filing papers with the court is as ministerial and inflexibly mandatory as any of the clerk's responsibilities." *Id.* As such, the Fourth Circuit holds that "there is no basis for sheltering the clerk from liability under section 1983 for failure to perform a required ministerial act such as properly filing papers." *Id.*; *see Wazney v. Campbell*, C/A No. 6:21-cv-04063-JD-KFM (D.S.C. Feb. 18, 2022) (citing *McCray* and holding that clerks of court "have derivative absolute judicial immunity when they act in obedience to a judicial order or under the court's direction"); *Siddha v. Sealing*, C/A No. GLR-131, at *11 (D. Md. Mar. 30, 2020) (noting that "*McCray*'s holding would undoubtedly undermine [a clerk of court's] claim of quasi-judicial immunity"); *Shipman v. Williams*, C/A No. JKB-13-3080, at *3 (D. Md. Jan. 30, 2014) (holding that "court clerks generally do not enjoy absolute immunity when they perform ministerial duties such as filing pleadings or responding to requests for court files"); *Harbeck v. Smith*, 814 F.Supp.2d 608, 630 (E.D. Va. 2011) (denying a motion to dismiss a Appellant's claim against a clerk of court on judicial immunity grounds

because the court could not determine whether the actions taken by the clerk were "a product of discretion afforded to [the clerk] or was in accordance with a judicial order"). Here, as set forth below, Appellant's claims against Respondent, among other things, are that as clerk of court, she failed "to provide Appellant due process," and these actions by Judge Lisenby were deliberate. Thus, based on these allegations and Fourth Circuit precedent, Respondent is not entitled to a dismissal pursuant this motion under the doctrine of quasi-judicial immunity.

III. Appellant Has Alleged Gross Negligence That Relates to Other Town Employees.

Finally, Appellant has alleged violations of his constitutional rights by Respondent that amount to Gross Negligence. The United States Supreme Court has long recognized a right of access to the courts. "The right of access to the courts . . . is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violation of fundamental constitutional rights." *Pink v. Lester*, 52 F.3d 73, 76 (4th Cir. 1995) (quoting *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974)). The right of access to the courts includes "the opportunity to prepare, serve and file whatever pleadings or other documents are necessary or appropriate in order to commence or prosecute court proceedings affecting one's personal liberty, or to assert and sustain a defense therein." *Silva v. Di Vittorio*, 638 F.3d 1090, 1103 (9th Cir. 2011). Thus, as recognized by the Fourth Circuit, an allegation that a clerk of court deliberately failed to file documents states a claim for violation of a Appellant's constitutional right or due process and meaningful access to the courts. *Pink*, 52 F.3d at 77.

CONCLUSION

There are questions of fact in this matter as to the duties that Respondent owed to Appellant. *See e.g.*, *Wright v. PRG Real Est. Mgmt., Inc.*, 426 S.C. 202, 219, 826 S.E.2d 285, 294 (2019) ("We conclude there are questions of fact that a jury must resolve to ascertain

whether a duty of care arose in this case"). The South Carolina Supreme Court holds that under the SCTCA, "when an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception. Otherwise, portions of the Act would be a nullity, which the Legislature could not have intended." *Steinke v. S.C. Dept. of Labor, Licensing*, 336 S.C. 373, 398, 520 S.E.2d 142 (1999); see *Repko v. Cnty of Georgetown*, 424 S.C. 494,507, 818 S.E.2d 743, 750 (2018) (holding that "in order for the gross negligence standard from one immunity provision to be read into an immunity provision that does not contain a gross negligence standard, the immunity provision containing the gross negligence standard must first apply to the case"); *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 320, 743 S.E.2d 109, 115 (Ct. App. 2013) ("We hold that when an exception containing the gross negligence standard applies, that same standard will be read into any other applicable exception."). As numerous provisions of the Tort Claims Act raised by the Respondents in this defense contain a gross negligence standard, including but not limited to exemption (25), the gross negligence standard should be read into all other exemptions, such that none of the exemptions operate as a complete bar to recovery. Particularly with respect to Lisenby's acts as prosecutor and failed actor, Respondent was not entitled to Summary Judgment and this matter should proceed to trial.

Respectfully Submitted,

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/s/ Skyler Hutto

5 June, 2023

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