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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY

L. Casey Manning, Circuit Court Judge

Case No. 2018-CP-40-1224

Kevin L. Paul …… Appellant,

v.

Walmart Stores East, L.P.; Wal-Mart Supercenter, d/b/a Wal-Mart Store #1339; and Richland County Sheriff's Office…….……. Defendants,

Of which, Richland County Sheriff's Office, is …… Respondent.

RETURN TO MOTION FOR COSTS ON APPEAL

This return is made pursuant to Rule 201, 222 and 240 of the South Carolina Appellate Court Rules. Appellant Kevin L. Paul requests that this Court deny the motion for costs on appeal filed by Respondent and find that both parties shall bear their own appellate attorney's fees and costs. The trial court's order was based, in part, on a novel legal finding that, as Respondent admitted, no South Carolina appellate court had ruled upon. Further, the trial court failed to address legal argument made by the Appellant, despite that argument having been made writing prior to the hearing, at oral argument during the motion hearing; and, again, in writing via post-judgment motion.

The reliance of the trial court on a novel legal argument which appears contrary to decisions by both this Court and the South Carolina Supreme Court, as well as the trail court's failure to address legal argument made by the Appellant despite repeated requests for a finding on that argument, compelled the Appellant to appeal that order. To award Respondent fees and costs, after Respondent admittedly charged the Appellant with a crime he did not commit, took no action to rectify that situation despite indicating to a court they would remedy it, and then prepared an order the trial court adopted which ignored a key legal argument relied on by the Appellant in opposition to the motion for summary judgment, would be unfair and unjust.

BACKGROUND

On March 29, 2017, RCSO Deputy Melvin Brown was dispatched to the WalMart Supercenter located on Two Notch Road in Columbia, South Carolina. WalMart had contacted RCSO to ask for assistance in dealing with an alleged shoplifting incident. Deputy Brown arrived and questioned the suspect, obtaining the Appellant's name and date of birth from the suspect. Brown ran that name and DOB through the National Crime Information Center (NCIC) on the computer terminal in his patrol vehicle, obtaining additional information on the Appellant such as his address, South Carolina's driver's license number, height, weight and eye color. Deputy Brown then provided all of that information to WalMart, arrested the suspect for shoplifting and had him transported to the Alvin S. Glenn Detention Center, where an arrest warrant was obtained in, and the suspect was booked under, the Appellant's name.

The information Brown obtained and, subsequently, provided to WalMart, and which RCSO used to charge the suspect, was incorrect. The suspect arrested was actually Mack Paul, Jr., the Appellant's brother, who provided Brown his brother's name and date of birth.

RCSO knew that they had charged the wrong person and shared inaccurate information no later than April 28, 2017 when Sgt. Ronald "Cris" Truluck sent an email to the Pontiac Magistrate Court Clerk of Court requesting a continuance for a May 2, 2017 appearance because "the real Kevin Paul has a brother named Mack Paul who was using his name. The continuance is needed to clear this issue up when the arresting deputy comes back from vacation." WalMart took the information provided by RCSO and entered the Appellant into their system as a shoplifter, which automatically began a civil recovery process against the Appellant.

Despite the above, the false criminal charges remained pending against the Appellant, requiring him to retain an attorney and expend time and money in order to clear his name. It was not until June 26, 2017, sixty (60) days after Respondent's admitted notice that the Appellant had been falsely identified, that the criminal charges against the Appellant were dismissed. Respondent's own witnesses have admitted that despite multiple members of Sheriff's Office knowing they had the wrong person charged with the crime, they took no further action to correct the matter (despite notifying a court they needed a continuance to "clear up" the issue), that it was the Appellant's attorney who actually got the charges cleared and that Respondent never contacted WalMart to inform them that they had provided WalMart with false identification information on the suspect.

ARGUMENT

Respondent has moved for $2,561.44 in attorney's fees and costs pursuant to Rule 222(d) SCACR. Rule 222 states that

> **Unless otherwise ordered by the appellate court** or agreed by the parties, **costs shall be taxed against the appellant when the appeal is** dismissed or judgment on appeal is **affirmed**. When a judgment is reversed, costs shall be taxed against the respondent unless the court orders otherwise. When an appeal is affirmed or

> reversed in part or is vacated, costs shall be allowed only as ordered by the appellate court.

Rule 222(a) SCACR, emphasis added.

Therefore, unless this Court orders that costs shall not be taxed in this case, Respondent is entitled to the requested award of fees and costs. Appellant respectfully requests that this Court deny Respondent's motion and order that costs shall not be taxed and that the parties should bear their own appellate attorney's fees and costs in the interest of fairness and justice.

I. The Trial Court's Order relied, in part, on a legal argument that Respondent admitted, at oral argument before this Court, had never been ruled on by a South Carolina Appellate Court.

As part of its order granting summary judgment, the trial court found that the actions by the Respondent that caused the harmful delay to the Appellant were "administrative actions (or any such alleged inactions)" and "were of a judicial or quasi-judicial nature and as a result, the [Respondent] is entitled to absolute immunity." (R. p.11)

Appellant had originally addressed this issue in his response when addressing exceptions to the waiver of immunity contained within S.C. Code §15-78-60, noting that in the case of Faile v. South Carolina Dept. of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002), the South Carolina Supreme Court had refused to grant absolute immunity to law enforcement officers in similar situations.

> The *Faile* court refused to accept DJJ's argument that a probation agent being sued for improper placement of a juvenile was immune pursuant to exception (1) because a court order allowed the placement. In refusing to accept DJJ's order, the *Faile* court noted, "Just as police officers are not granted absolute immunity when they apply for arrest warrants, probation officers generally are not immune in performing their enforcement duties." Faile at 326, citing to Gant v. United States Probation Office, 994 F.Supp. 729 (S.D. W. Va. 1998); Acevedo v. Pima County Adult Prob. Dept., 142 Ariz. 319, 690 P.2d 38 (Ariz. 1984).

> Similar to Faile, the complained of conduct in this case cannot be considered judicial or quasi-judicial or administrative judicial or quasi-judicial conduct in nature and would not fit within exceptions (1) or (2).

(R. p.43)

During oral argument, Respondent conceded the argument they were entitled to immunity pursuant to S.C. Code §15-78-60 (23) has not been ruled on by a South Carolina Appellate court "one way or the other."[1]

Appellant argued against that immunity in his *Response* in opposition to Appellant's motion for summary judgment (R.p.42-47), at the January 30, 2020 hearing (R.p.126), and in his motion to alter/amend/reconsider (R.p.98-99), specifically noting that South Carolina Appellate Court's had issued numerous opinions **not** finding immunity under similar circumstances indicating that argument for immunity was not viable.

Presented with a ruling from the trial court that was based, in part, on what is conceded by the Respondent to be a novel legal argument, it would be unfair and unjust for this Court to tax costs against the Appellant for seeking to have this Court address the admitted novel legal argument the trial court relied upon. As such, Respondent's motion should be denied.

II. The Trial Court failed to address a legal argument Appellant relied on heavily despite Appellant making all reasonable effort allowed under the rules to obtain a finding on that argument.

Additionally, the trial court refused to address a legal argument the Appellant made below, despite Appellant raising that argument both in his written *Response* in opposition (R.p.55-56), at the January 30, 2020 hearing (R.p.126) and in his motion to alter/amend/reconsider (R.p.96-99). That argument was that Respondent had voluntarily

[1] *See* Oral Argument at 23:54 – 24:20, https://media.sccourts.org/COA_Videos/2020-000550.mp4

assumed a duty to Appellant, that pursuant to South Carolina case law, Respondent had to exercise that duty with due care, and that it was a question of material fact for a jury to consider as to whether Respondent had been negligent/grossly negligent in the performance of that duty.

South Carolina law specifically recognizes that the "State, an agency, a political subdivision, and a governmental entity **are liable for torts in the same manner and to the same extent as a private individual under like circumstances**, subject to the limitations upon liability and damages, and exemptions from liability and damages, contained herein." S.C. Code §15-78-40, emphasis added. "The burden of establishing a limitation upon liability or an exception to the waiver of immunity under the Tort Claims Act is upon the governmental entity asserting it as an affirmative defense." Steinke v. S.C. Dept. of Labor, Licensing and Regulation, 336 S.C. 373, 393, 520 S.E.2d 142, 152 (1999).

A plaintiff, to establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty. Bloom v. Ravoira, 339 S.C. 417, 529 S.E.2d 710 (2000). "An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff." Bishop v. S.C. Dept. of Mental Health, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998).

An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance. Hendricks v. Clemson Univ., 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003), citing Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997). Ordinarily, the common law imposes no duty on a person to act. **Where an act is voluntarily undertaken, however, the actor assumes the duty to use due care**. Hendricks at

457, 714, citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991), *emphasis added*.

Appellant addressed this issue in section IV of his response, arguing that the Respondent charged him with a crime that he did not commit, and:

> Setting aside whether they were negligent or grossly negligent in bringing those charges against the Plaintiff, Defendant Lott has admitted they had notice that the criminal charge against the Plaintiff was false by the April 28, 2017. **Not only has Defendant Lott admitted to knowing the false nature of the criminal charge by that time, but they also affirmatively acknowledged (in writing via the email) their duty (or in the least volunteered to undertake the duty) "to clear up this issue." Despite that acknowledgment, there is a material question of fact as to whether Defendant Lott used due care in "clearing up" the issue, as the false criminal charge remained pending against the Plaintiff for approximately two (2) months.**
>
> Sgt. Truluck admitted that once he asked the Court for the continuance via his April 28, 2017 email, his involvement in trying to rectify the matter was done. *Deposition of Sgt. Cris Truluck*, (R. p.80, lines 11 – 21)
>
> Sgt. Holdorf testified that he spent "maybe an hour" attempting to rectify this situation and that despite never receiving any further communication from the Court about how the matter would be handled, he did not follow up, instead he "moved on to the next thing." Sgt. Holdorf did this despite knowing of no other person who was trying to resolve the matter for Defendant Lott. *Deposition of Sgt. Travis Holdorf*, (R.p.67, lines 15-18, p.71, lines 11-19). In fact, when asked who actually cleared this matter up, Sgt. Holdorf testified "I think it was his attorney when he did the expungement." *Deposition of Sgt. Travis Holdorf*, (R. p.70, lines 14-15. Deputy Brown testified that he spent all of five (5) minutes in trying to resolve the matter via his memo concluding "it wasn't my responsibility after that." *Deposition of Melvin Brown*, (R. p.86, lines 1-22).
>
> Gross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do. Negligence is the failure to exercise due care, while gross negligence is the failure to exercise slight care. Clyburn v. Sumter County Sch. Dist. #17, 317 S.C. 50, 53, 451 S.E.2d 885, 887 (1994).
>
> In most cases, gross negligence is a factually controlled concept whose determination best rests with the jury. Faile v. S.C. Dept. of Juvenile Justice, 350 S.C. 315, 333, 566 S.E.2d 536, 545 (2002).

(R. p.54-55)

The trial court did not rule on this issue. As such, the Appellant's motion to alter or amend/reconsider drew the trial court's attention to the fact this issue had not been addressed:

> The Order also ignores Plaintiff's argument that **RCSO undertook a voluntary duty to clear the false charges against the Plaintiff**. An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, **or some other special circumstance**. Hendricks v. Clemson Univ., 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003), citing Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997), emphasis added. **Where an act is voluntarily undertaken, however, the actor assumes the duty to use due care**. Hendricks at 457, 714, citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991), emphasis added. See Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) (holding that duty can arise by voluntary undertaking). See also Sherer v. James, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986) (it has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care).
>
> In the present case, there is more than a mere scintilla of evidence that RCSO undertook a voluntary duty. There is actual documentary evidence produced to the Court in the form of correspondence from RCSO agents/employees to the magistrate's court wherein RCSO affirmatively states they were going to "clear this issue up." See Exhibits A, B and C Plaintiff's Memo in Opposition). It is reasonable that a jury could view this evidence and find that RCSO was grossly negligent in failing to complete this voluntary duty they undertook.

(R. p.96-98)

The trial court never addressed this legal argument.

During oral argument, this Court specifically questioned whether the trial court had ruled on that argument and Appellant's counsel explained the trial court had not. Appellant's counsel was then questioned as to whether it was his duty to obtain a ruling one way or the other to preserve the issue, to which Appellant's counsel responded he was unsure of what else he could have done, given that Appellant raised the issue to the trial court, then raised, again, in the motion to alter/amend/reconsider.[2]

[2] *See* Oral Argument at 25:33–26:28, https://media.sccourts.org/COA_Videos/2020-000550.mp4

Presented with a ruling from the trial court that failed to address a legal argument made by Appellant, even after motion to reconsider, it would be unfair and unjust for this Court to tax costs against the Appellant for seeking to have this Court address the failure of the trial court rule on that legal argument. As such, Respondent's motion should be denied.

CONCLUSION

Appellant respectfully requests that the Court dismiss the Respondent's motion for attorney's fees and costs, and Order that both sides bear their own appellate fees and costs.

Respectfully Submitted,

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Of which, Richland County Sheriff's Office, is ..... Respondent.

CERTIFICATE OF SERVICE

Pursuant to Section (d) (1) of the Supreme Court's Order Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules, the undersigned employee of Wukela Law Firm, counsel for the Appellate, does hereby certify that service of the Return to Motion for Costs on Appeal in the above-captioned matter was made upon the Respondent's counsels by email only this 6th day of July 2023 as follows:

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s/ Patrick J. McLaughlin

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July 6, 2023

VIA EMAIL TRANSMITTAL ONLY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Email: *ctappfilings@sccourts.org*

RE: Kevin L. Paul v. Walmart Stores East, L.P.; Wal-Mart Supercenter, d/b/a Wal-Mart Store #1339; and Richland County Sheriff's Office
Appellate Case Number: 2020-000550
Civil Action Case Number: 2018-CP-40-1224

Dear Ms. Kitchings:

Enclosed please find the Appellant's Return to Motion for Costs on Appeal for filing in the above matter. Please return a stamped copy to my office.

By copy of this letter, I am courtesy copying the opposing counsel of record.

Yours truly,

WUKELA LAW FIRM

PJM:nhs
Enclosure
cc: Andrew F. Lindemann (*via email only*)
Robert D. Garfield (*via email only*)