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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Robert E. Hood, Circuit Court Judge

Appellate Case No. 2022-001218
Case No. 2018-CP-40-4835

Joseph P. Sellaro, ... Respondent,

v.

The South Carolina Department of Social Services
and the Richland County Sheriff's Department, ... Defendants,

Of which, The South Carolina Department of
Social Services is the..... Appellant.

REPLY BRIEF OF APPELLANT

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ARGUMENTS

I. The trial court erred in denying the Appellant's directed verdict and JNOV motions on both the negligence and the false imprisonment claims.

A. Existence of Probable Cause

As the Appellant South Carolina Department of Social Services ("SCDSS") has argued, the trial court erred in concluding that the existence of probable cause for the Emergency Protective Custody ("EPC") was a question for the jury when, in actuality, a conclusive finding of probable cause had already made by the Family Court in a valid and lawful order issued pursuant to S.C. Code Ann. § 43-35-55(F). Consistent with the requirements of the Omnibus Adult Protection Act, the Family Court held a Seventy-Two Hour Probable Cause Hearing on March 1, 2016, and Judge James McGee ruled as follows:

> The above facts clearly establish that there was ample probable cause for taking the [Plaintiff] into [EPC], and *probable cause remains for [SCDSS] being ordered to have custody of [the Plaintiff] pending Merits Hearing.* Based on the above information, [the Plaintiff], is a vulnerable adult, as defined by S.C. Code Ann. § 43-35-10(11) (Supp. 2012), as he is a person eighteen (18) years of age or older who is impaired in his ability to adequately provide for his own care and protection, and [the Plaintiff] is not being adequately cared for by others.

(R. 693). (Emphasis added). That decision, including the judicial finding of probable cause, was never appealed, vacated, or set aside, and as a result, SCDSS

has shown that the finding of probable cause is not subject to collateral attack in this subsequently filed civil action based on existing precedent.

In response, the Respondent Joseph Sellaro attempts to distinguish the Supreme Court's decision in *Argoe v. Three Rivers Behavioral Health, LLC*, 392 S.C. 462, 710 S.E.2d 67 (2011), where the Court ruled that "[plaintiff] was precluded from collaterally attacking the underlying commitment orders" which had not been timely appealed or vacated. 710 S.E.2d at 72. The Supreme Court also cited to an article from *American Jurisprudence* stating:

> A person confined pursuant to an authorized mental health commitment proceeding or process may not recover damages in a false imprisonment action. In accordance with the general rule dealing with confinement under process, even where the order of commitment is erroneously made, but is valid on its face and issued by a court of competent jurisdiction, the detention is not false imprisonment.

Id., *citing* 32 Am.Jur.2d *False Imprisonment* § 33 (2007).

That citation precisely describes the facts of the case at bar. There is an order of commitment that is valid on its face and issued by a court of competent jurisdiction, and hence, the detention of Sellaro was lawful and cannot support claims for false imprisonment and negligence based upon that detention. Nonetheless, Sellaro maintains that *Argoe* is distinguishable only because that case addressed the involuntary commitment of a mental health patient under S.C. Code Ann. § 44-17-510 as opposed to the present case which addresses the involuntary

commitment of a vulnerable adult under Omnibus Adult Protection Act. Quite obviously, that presents a distinction without a difference. The only rationale that Sellaro offers is that the mental health commitment statute includes an appeal section that provides for an appeal from probate court to circuit court. *See*, S.C. Code Ann. § 44-17-620. Sellaro seems to imply that the absence of an appeal statute in the Omnibus Adult Protection Act means that there is no right to appeal. Of course, that is not correct. The Omnibus Adult Protection Act does not include an appeal provision because judicial decisions under the Act are made by the family court, and appeals from the family court do not proceed to an intermediate court but rather go directly to the appellate courts pursuant to S.C. Code Ann. § 14-3-320. Therefore, any suggestion that there is no appeal mechanism for a decision under the Omnibus Adult Protection Act is simply mistaken and incorrect. Indeed, Sellaro cites a case where a family court's order finding an appellant to be a vulnerable adult under the Omnibus Adult Protection Act was appealable to this Court. *See*, *South Carolina Dept. of Social Services v. Patten*, 412 S.C. 93, 770 S.E.2d 192 (Ct. App. 2015).

Sellaro also argues that he was unable to appeal from the Family Court's finding of probable cause because the case was later dismissed. He claims that he was no longer an "aggrieved party." Obviously, that is incorrect. If Sellaro believes that the probable cause finding in the March 1, 2016 Seventy-Two Hour

Hearing Order was made in error, then he was an "aggrieved party" and had every opportunity and right to appeal that decision. Certainly, Sellaro contends that he was "aggrieved" from that ruling in that he has filed the current civil lawsuit over his involuntary commitment under Omnibus Adult Protection Act. If he is sufficiently "aggrieved" to establish standing to pursue this civil lawsuit, he was sufficiently "aggrieved" to appeal from the Family Court's probable cause ruling. He did not do so, and he should be precluded from collaterally attacking the unappealed and lawful order issued by the Family Court.

The unassailable fact remains that the Family Court made a judicial finding that probable cause existed for Sellaro to remain in SCDSS custody until the merits hearing was held. While Sellaro claims that order was in error because of insufficient evidence or because he did not attend nor was represented at that hearing, those are issues that could have been asserted in an appeal and were not. As the Supreme Court made clear in *Argoe*, "even where the order of commitment is erroneously made, but is valid on its face and issued by a court of competent jurisdiction," the detention is lawful and cannot be collaterally attacked in a later civil action. *Argoe,* 710 S.E.2d at 72. Despite his claims to the contrary, *Argoe* is controlling and defeats Sellaro's tort claims, including both his false imprisonment claim and his negligence claim.

B. Tort Claim Act Immunities

As an additional basis for judgment as a matter of law, SCDSS raised immunity defenses under the South Carolina Tort Claims Act, including S.C. Code Ann. §§ 15-78-60(3) and 15-78-60(4). In response, Sellaro does not dispute that SCDSS enforced and complied with the procedures established by statute, namely S.C. Code Ann. §§ 43-35-45(B) and 43-35-55(D), (E), (F), and (G). Importantly, SCDSS did not make the decision to place Sellaro in EPC, but once he was in protective custody, SCDSS complied with S.C. Code Ann. § 43-35-55(E), and the Family Court timely conducted its March 1, 2016 Probable Cause Hearing pursuant to S.C. Code Ann. § 43-35-55(F), and thereafter issued its Seventy-Two Hour Hearing Order. (R. 692-695). SCDSS then complied with that lawful court order, which was never appealed, vacated, or set aside. Hence, SCDSS is entitled to sovereign immunity under S.C. Code Ann. §§ 15-78-60(3) and 15-78-60(4).

In its opening brief, SCDSS also demonstrated that there is no statutory requirement for any medical records or psychological evaluation to be provided to the Family Court prior to or at the Probable Cause Hearing. Instead, S.C. Code Ann. § 43-35-45(D) states: "*Before the hearing on the merits* the Adult Protective Services Program must conduct a comprehensive evaluation of the vulnerable adult." S.C. Code Ann. § 43-35-45(D). (Emphasis added). That comprehensive evaluation, by statute, must include "if needed, a medical, psychological, social,

vocational, or educational evaluation." S.C. Code Ann. § 43-35-45(D)(4). Moreover, the statute defines when that evaluation must be provided to the Family Court: "A copy of the evaluation must be provided to the court, the guardian ad litem, and the attorney at least five working days before the hearing on the merits." S.C. Code Ann. § 43-35-45(D). Despite that controlling law demonstrating that SCDSS did not violate any statutory requirements, Sellaro nonetheless argues that SCDSS was not *prevented* by statute from submitting a copy of medical records or a psychological report to Family Court Judge James McGee at the March 1, 2016 hearing. On one hand Sellaro claims that SCDSS was negligent in failing to fulfill "its statutory responsibilities under the Omnibus Adult Protection Act," *see* Respondent's Brief, p. 13, but when the responsibilities of the Act are examined and it is shown that SCDSS was in compliance, then Sellaro argues that SCDSS should be found liable for failing to exceed those statutory responsibilities. *See*, Respondent's Brief, p. 14 ("the statute does not prevent DSS from obtaining and providing the medical record at the 72-hour hearing"). Quite frankly, it is illogical and mistaken to hold a governmental entity liable for failing to exceed its statutory responsibilities. That alone is inconsistent with the immunity provided by S.C. Code Ann. § 15-78-60(4).

Likewise, Sellaro makes the curious argument that SCDSS is precluded from claiming immunity under S.C. Code Ann. § 15-78-60(3) because it "acted

negligently in obtaining [the Seventy-Two Hour Hearing Order]." *See*, Respondent's Brief, p. 15. Of course, Sellaro is attempting to read into S.C. Code Ann. § 15-78-60(3) an exception to the immunity provision that was not enacted by the General Assembly. S.C. Code Ann. § 15-78-60(3) has no such exception. Additionally, SCDSS was complying with S.C. Code Ann. § 43-35-55(E) by petitioning the Family Court after Sellaro was taken into EPC by law enforcement. Thus, SCDSS did not "negligently obtain" a court order – it was complying with its statutory mandate.

C. Absence of Expert Testimony

What should be clear from Sellaro's brief is that his position is riddled with inconsistencies and contradictions. On one hand, he claims that SCDSS failed to comply with Omnibus Adult Protection Act, but he then argues on the other hand that SCDSS had a legal duty to do more than the Act required. Similarly, Sellaro bristles at the argument by SCDSS that expert testimony was required to establish the standard of care and breach thereof. In response, Sellaro claims that the Omnibus Adult Protection Act establishes the standard of care. Indeed, Sellaro insists that he "alleged and the jury found DSS failed to reasonably fulfill its statutory duties." *See*, Respondent's Brief, p. 18. Yet, he never explains how the jury could have made that determination when the statutory duties were not

charged to the jury. The jury had no basis – without a charge on the applicable statutes and in absence of expert testimony establishing a standard of care – to find any breach of statutory duties as Sellaro claims the jury found.

To be clear, in its jury instructions, the trial court correctly charged the jury as to the four elements required to prove a negligence claim. As to the first prong -- the duty of law owed -- the trial court correctly explained that "[t]his is a question of law which I will decide. So, if I find there was a duty, you must then decide the remaining questions." (R. 638). However, the trial court erred because it *never* found a duty of care owed by SCDSS, and the court *never* articulated any duty of care to the jury. *See, Ellis v. Niles*, 324 S.C. 223, 479 S.E.2d 47 (1996) (under South Carolina law, the determination of the existence of a duty is solely the responsibility of the court); *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3, 5 (1997) ("[w]hether the law recognizes a particular duty is an issue of law to be decided by the court").

Moreover, Sellaro never requested that the trial court charge the statutes applicable to SCDSS, and the record clearly reflects that the trial court never charged the jury with the sections of S.C. Code Ann. §§ 43-35-45 and 43-35-55 that pertain to SCDSS's conduct (as opposed to the conduct of law enforcement). (R. 642-644). Not surprisingly, Sellaro disregards this error as committed by his counsel and by the trial court and never points to any aspect of the jury charge

which provided the jury a *basis in law* to find a breach of the duty of care by SCDSS. The trial judge's responsibility is to charge the applicable law. The jury is not entitled to speculate what the law requires or obtain the applicable law from some other source. Thus, in the absence of a charge on the legal duties owed, the jury's verdict is entirely speculative and invalid. That error alone warrants a reversal.

II. The trial court erred in denying the Appellant's motion for a new trial absolute.

In its opening brief, the Appellant SCDSS argued for a new trial absolute because the trial record is devoid of evidence supporting the jury's $300,000 verdict against SCDSS. As SCDSS points out, the damages evidence is minimal. The only economic damages claimed is an "Itemized Statement of Charges" issued by Palmetto Health Richland Hospital reflecting "total charges" of $9,291.00.

Moreover, as to any emotional harm claimed, SCDSS points out that South Carolina law holds that "damages for emotional or mental suffering are typically not recoverable, unless there is some physical manifestation of the emotional distress." *Babb v. Lee County Landfill*, 405 S.C. 129, 747 S.E.2d 468, 481 (2013), *citing Dooley v. Richland Memorial Hospital*, 283 S.C. 372, 322 S.E.2d 669

(1984). Yet, Sellaro offered no evidence to establish any physical manifestation of emotional distress nor any needed medical care as a result.

In response, Sellaro raises an unfounded preservation argument. He contends, without citing any authority, that a post-trial motion for a new trial absolute cannot be used to challenge whether the evidence supports the jury's verdict. Of course, it defies logic to require a party to challenge whether the amount of a verdict is supported by the evidence prior to the verdict even being returned, and not surprisingly, Sellaro offers no citation for such an assertion. SCDSS contends that the evidence in the record does not support a $300,000 verdict. That could not have been raised until the verdict was returned, and SCDSS did timely raise that issue in its motion for a new trial absolute.

In addition, Sellaro fails to point to any evidence in the record of some physical manifestation of emotional distress. In vainly attempting to satisfy the test recognized in *Babb* and *Dooley*, Sellaro claims that he was "touched," "poked," and prodded" as part of routine hospital tests and mental health evaluations. *See*, Respondent's Brief, p. 21. But that is not evidence that his alleged emotional harm was physically manifested. Certainly, there was no evidence to support or justify a $300,000 verdict that is premised almost entirely on emotional harm. For that reason, a new trial absolute is warranted.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant South Carolina Department of Social Services respectfully renews its request that the Court reverse the orders issued by Circuit Court Judge Robert E. Hood denying SCDSS's motions for directed verdict, JNOV, new trial absolute, and new trial nisi remittitur and remand for entry of judgment as a matter of law in favor of SCDSS, or alternatively, a new trial absolute or a new trial nisi remittitur.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned counsel for the Appellant 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 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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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 (As Amended May 6, 2022), the undersigned employee of Lindemann Law Firm, P.A., counsel for the Appellant, does hereby certify that service of the **Final Reply Brief of Appellant** in the above-captioned matter was made upon all counsel of record by email only this the 11th day of August 2023 as follows:

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