

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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AUG 14 2013
COURT OF APPEALS

APPEAL FROM LEXINGTON COUNTY
Frank R. Addy, Jr., Circuit Court Judge

Case No. 2012-CP-32-3208

Raymond Carter, Appellant,

v.

Donnie Myers, Solicitor, Lexington County; Tracey Carroll,
Assistant Solicitor, Lexington County; Brian Buck,
Irmo Police Department; Scott Franklin, Irmo Police Department;
Timothy E. Stephenson, South Carolina Law Enforcement (SLED);
George White, Ex father-in-law; Tammy Carter,
(AKA Tammy Scrogam), Ex wife; Barbara Keadle
(AKA Diane Hinkle) Investigator LDSS; Francis Ross, LDSS;
Paulette Jolly, Guardian ad Litem, in their official and individual capacities, Defendants,

Of whom, Donnie Myers, Solicitor, Lexington County;
Brian Buck, Irmo Police Department; Scott Franklin, Irmo Police
Department, are, Respondents.

INITIAL BRIEF OF RESPONDENT MYERS

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Imbler v. Pachtman,
424 U.S. 409 (1976).

l'On v. Town of Mt. Pleasant,
338 S.C. 406, 526 S.E.2d 716 (2000).

*Republic Contracting Corp. v. South Carolina Dept. of Highways
and Public Transportation*,
332 S.C. 197, 503 S.E.2d 761 (1998).

Smith v. McCarthy,
349 Fed.Appx. 851 (4th Cir. 2009).

Williams v. Condon,
347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001).

Statutes and Rules

S.C. Code Ann. § 15-78-70(a).

S.C. Code Ann. § 15-78-100(a).

S.C. Code Ann. § 44-48-10.

S.C. Code Ann. § 44-48-90.

Rule 12(b)(6), SCRCF.

Rule 59(e), SCRCP.

Rule 207(b)(2), SCACR.

Rule 220(c), SCACR.

STATEMENT OF THE CASE

This action for prospective relief and money damages was brought by the Appellant Raymond W. Carter pursuant to the South Carolina Tort Claims Act. Carter named numerous Defendants, including the Respondent Donald V. Myers, who has been the Eleventh Circuit Solicitor during all periods of time relevant to this action.

Based on the allegations of his complaint, the Appellant Carter was accused of criminal sexual conduct committed against one or more of his minor daughters. The criminal charges were prosecuted by the Eleventh Circuit Solicitor's Office including Solicitor Myers and former Assistant Solicitor Tracey Carroll. On May 13, 2002, Carter pled guilty to one count of Committing or Attempting a Lewd or Lascivious Act on a Minor. He was sentenced to fifteen years in prison by the late Circuit Judge Marc Westbrook. No direct appeal was filed. In 2003, Carter filed a petition for post-conviction relief, but he voluntarily dismissed that petition with prejudice.

Carter completed his sentence and was released from the South Carolina Department of Corrections on or about August 1, 2007. He alleges that he was transferred to Lexington County Detention Center to stand trial pursuant to Section 44-48-90 to determine whether he qualified as a "sexually violent predator." A trial was conducted on November 3-4, 2008, at which time he was adjudicated a sexually violent predator, and he was civilly committed to the South Carolina Department of Mental Health for treatment. Carter has not alleged any further involvement by Solicitor Myers in any proceedings held under the Sexually Violent Predator Act. That civil action was handled by the Attorney General on behalf of the State of South Carolina. Carter alleges that he was released from the Sexually Violent Predator Program on June 30, 2011.

On August 22, 2012, the Appellant Carter filed this civil action in the Lexington County Court of Common Pleas. In a voluminous, 41-page complaint, Carter has alleged four causes of action against Solicitor Myers: (1) malicious prosecution, (2) wrongful conviction arising from his guilty plea on May 13, 2002, (3) wrongful adjudication under the Sexually Violent Predator Act, and (4) false imprisonment resulting from his civil commitment under the Sexually Violent Predator Act.

Solicitor Myers filed a Rule 12(b)(6) motion to dismiss. That motion was heard by Circuit Judge Frank R. Addy, Jr. on February 7, 2013. The Appellant Carter received notice of the hearing but did not appear at the call of the case. Judge Addy heard and granted Solicitor Myers' motion as well as the dispositive motion filed by the Irmo Respondents (Brian Buck and Scott Franklin) from the bench. Carter did appear after the motion hearing was completed and defense counsel had been dismissed.

Judge Addy issued a Form Order filed February 8, 2013, granting the motions to dismiss filed by the Respondents. Specifically, he ruled that the employees of the Eleventh Circuit Solicitor's Office, including Solicitor Myers, were entitled to absolute prosecutorial immunity. He also ruled that the all claims were barred by the statute of limitations. Finally, Judge Addy denied Carter's attempt to hold other Defendants in default, finding that they had not been properly served.¹

Carter did not file a Rule 59(e) motion to reconsider, and instead he filed this appeal to the South Carolina Court of Appeals.

¹ The Defendant Tracey Carroll, the former Assistant Solicitor and current Magistrate Judge, was never served with the complaint and thus never entered a formal appearance. Judge Addy's order, however, granted absolute prosecutorial immunity to all employees of the Solicitor's Office, which included Carroll.

ARGUMENTS

I. The Circuit Court correctly ruled that all claims against the Respondent Myers are barred by absolute prosecutorial immunity.

The Appellant Raymond Carter alleged in his complaint that the Respondent Donald V. Myers, the Eleventh Circuit Solicitor, engaged in prosecutorial misconduct which resulted initially in his guilty plea to one count of Committing or Attempting a Lewd or Lascivious Act on a Minor and later in his civil commitment to the South Carolina Department of Mental Health under the Sexually Violent Predator Act. Specifically, Carter alleges that Solicitor Myers and his office committed misconduct by increasing the charges against him, failing to consider his professed innocence, failing to evaluate the voluntariness of his confession, procuring false testimony, concentrating on a plea bargain strategy, and failing to disclose exculpatory evidence. On appeal, in his brief to this Court, Carter focuses on his allegation that the Solicitor failed to disclose unspecified exculpatory evidence.

Circuit Judge Frank Addy granted summary judgment in favor of Solicitor Myers on the basis of absolute prosecutorial immunity. Carter sued Solicitor Myers solely in his capacity as the Eleventh Circuit Solicitor. In *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001), the South Carolina Court of Appeals held that "a prosecutor in the employ of this state is immune from personal liability under § 1983 or the South Carolina Tort Claims Act for actions relating to the prosecution of an individual as a criminal defendant -- regardless of the prosecutor's motivation -- provided the actions complained of were committed while the prosecutor was acting as an 'advocate,' as defined by *Imbler v. Pachtman* and its progeny." 553 S.E.2d at 509. The Court of Appeals in *Williams* cited extensively to the seminal case of the

United States Supreme Court in *Imbler v. Pachtman*, 424 U.S. 409 (1976), wherein the Supreme Court recognized the defense of absolute prosecutorial immunity in Section 1983 litigation against state prosecutors. The Court concluded that absolute immunity applies to all prosecutorial acts that are intimately associated with the judicial phase of the criminal process. The functions included the initiation of the prosecution and the presenting of the state's case at trial as well as pre-trial and post-trial matters. 424 U.S. at 431.

The scope of absolute prosecutorial immunity extends to the very conduct as alleged by Carter against Solicitor Myers in the present case. These allegations are substantially similar, if not identical, to the allegations made by the plaintiff in *Williams* against a solicitor and the Attorney General. In that case, the plaintiff alleged prosecutorial misconduct including the failure to properly investigate the charges, collusion with defense counsel, withholding of pre-trial discovery and failure to respond to Rule 5 requests for discovery, abuse of power in scheduling, and reliance on insufficient and untruthful evidence to obtain an indictment. After the filing of a Rule 12(b)(6) motion, the Circuit Court dismissed claims for false arrest, malicious prosecution, negligence, and violations of federal constitutional rights under Section 1983. The summary dismissal of those claims was based on absolute prosecutorial immunity.

The decision in *Williams* is controlling in the present case. As in *Williams*, Solicitor Myers filed a Rule 12(b)(6) motion to dismiss and argued that Carter's claims of prosecutorial misconduct were all barred by absolute prosecutorial immunity. Judge Addy agreed and dismissed Carter's complaint and all claims alleged against Solicitor Myers on that basis.² It is

² The Fourth Circuit is also in agreement that absolute prosecutorial immunity bars a civil action seeking relief for the alleged withholding of exculpatory evidence by a prosecutor. See, *Carter v. Burch*, 34 F.3d 257, 262-263 (4th Cir. 1994), *cert. denied*, 513 U.S. 1150 (1995). See also, *Smith v. McCarthy*, 349 Fed.Appx. 851, 859 (4th Cir. 2009) ("as to his alleged actions

clear on this record that Carter's allegations of prosecutorial misconduct are alleged to have occurred during Solicitor Myers' prosecution of the charges against Carter. In accordance with *Imbler* and *Williams*, Solicitor Myers enjoys absolute immunity under the common law and under the Tort Claims Act for all such allegations of misconduct, and for that reason, Judge Addy's dismissal of all claims against Solicitor Myers should be affirmed.³

II. The Circuit Court correctly ruled that all claims are barred by operation of the two-year statute of limitations under the South Carolina Tort Claims Act.

As an alternative basis for dismissal, Judge Addy also concluded that all claims are barred by the two-year statute of limitations under the South Carolina Tort Claims Act. The Appellant Carter's action is brought pursuant to the Tort Claims Act, which provides that "an action for damages under this chapter may be instituted at any time within two years after the loss was or should have been discovered." *See*, S.C. Code Ann. § 15-78-100(a).

"[T]he statutory period of limitations begins to run when a person could or should have known, through the exercise of reasonable diligence, that a cause of action might exist in his or her favor, rather than when a person obtains actual knowledge of either the potential claim or of

in conspiring with police officers to present false testimony and for withholding exculpatory evidence prior to trial, [defendant prosecutor] was entitled to absolute immunity").

³ Unlike the present case, in *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001), the plaintiff had obtained an acquittal by directed verdict at the criminal trial. There was no conviction. In contrast, in the case at bar, Raymond Carter admittedly pled guilty to one count of Committing or Attempting a Lewd or Lascivious Act on a Minor, and later voluntarily dismissed with prejudice his post-conviction relief application. In effect, Carter is seeking to pursue claims for prospective relief and money damages arising from a criminal conviction by guilty plea that was never overturned on direct appeal or by post-conviction relief or by writ of habeas corpus. Carter is attempting to collaterally attack a criminal judgment for which he served his entire sentence. This is not permissible and may serve as an additional sustaining ground.

the facts giving rise thereto." *Abba Equipment, Inc. v. Thomason*, 335 S.C. 477, 517 S.E.2d 235, 239 (Ct. App. 1999). "The rule requires an injured party to act promptly when the facts and circumstances of the injury would place a reasonable person on notice that a claim against another party might exist." *Id.* "The test is whether a person should have known the operative facts is objective, rather than subjective." *Republic Contracting Corp. v. South Carolina Dept. of Highways and Public Transportation*, 332 S.C. 197, 503 S.E.2d 761, 767 (1998). "The statute of limitations begins to run when a plaintiff knows or should know of a potential claim against another party, not when the plaintiff develops a full-blown theory of recovery." *Id.*

Raymond Carter's complaint was filed on August 22, 2012. Consequently, if Carter knew or should have known that a claim might exist prior to August 22, 2010, then his claims are statutorily barred.

Carter has alleged four causes of action against Solicitor Myers: (1) malicious prosecution, (2) wrongful conviction arising from his guilty plea on May 13, 2002, (3) wrongful adjudication under the Sexually Violent Predator Act, and (4) false imprisonment resulting from his civil commitment under the Sexually Violent Predator Act. Each of those claims are barred by the two-year statute of limitations.

Carter pled in his complaint that the prosecution ended on May 13, 2002, which is the date of his guilty plea. It was by that date that any claims arising out of any alleged misconduct by Solicitor Myers or his office must have accrued. The alleged wrongful conviction occurred on that date, and all prosecutorial acts alleged by Carter in his complaint occurred prior to that date. Hence, the first two causes of action alleged against the Solicitor were clearly barred by the statute of limitations which expired by May 13, 2004, and certainly long before the filing date of August 22, 2012.

Carter has also pled additional claims arising from his civil commitment under the Sexually Violent Predator Act, S.C. Code Ann. § 44-48-10, *et al.* He alleges that he completed his criminal sentence on or about August 1, 2007, and was transferred to Lexington County Detention Center to stand trial pursuant to Section 44-48-90 to determine whether he qualified as a "sexually violent predator." A trial was conducted on November 3-4, 2008, at which time he was adjudicated a sexually violent predator and he was civilly committed to the South Carolina Department of Mental Health for treatment. Carter has not alleged any further involvement by Solicitor Myers in any proceedings held under the Sexually Violent Predator Act. That civil action was handled by the Attorney General on behalf of the State of South Carolina. Consequently, there is no further alleged misconduct by Solicitor Myers occurring between August 1, 2007 and November 4, 2008. Instead, Carter relies on the prior acts of prosecutorial misconduct occurring prior to May 13, 2002, which he contends resulted in the guilty plea which in turn contributed to his being adjudicated a sexually violent predator. Yet, even if that is true and a new "injury" triggers a new cause of action, which is denied, Carter's sexually violent predator-related claims would have accrued by November 4, 2008, but he did not commence his state law tort claims under the Tort Claims Act within two years of that date. Instead, the complaint was filed close to four years later on August 22, 2012.

In sum, as Judge Addy ruled, Carter's four causes of action as pled against Solicitor Myers are all barred by the applicable two-year statute of limitations. That ruling should be affirmed.

III. The Appellant cannot rely on Rule 60(b) nor any tolling statute to withstand the statute of limitations defense.

In an effort to avoid the statute of limitations bar, Carter appears to characterize his complaint as, in essence, a motion brought pursuant to Rule 60(b), SCRCF, for relief from an existing judgment. He then claims that he had one year to pursue this litigation from June 30, 2011, which represents to be the filing date for an order issued by Circuit Judge William Keesley that released him from the custody of the Department of Mental Health and ended his civil commitment the Sexually Violent Predator Act. Carter's argument is meritless for several reasons.

First, he confuses a Rule 60(b) motion and a complaint. Second, he fails to explain how or why his current lawsuit seeks relief *from* Judge Keesley's order – which would be the intent or purpose of a Rule 60(b) motion. He obviously does not take issue with the very order which released him from civil custody. Third, the order is dated June 30, 2011, and Carter did not file within one year.

Furthermore, there was no "tolling" of any statute of limitations after Judge Keesley issued his order. It is fairly clear that Carter misunderstands the concept of "tolling." Certainly, he has offered no statutory basis for the tolling of any statute of limitations. In short, Judge Addy's dismissal of all claims based on the expiration of the two-year statute of limitations was a correct ruling and should be affirmed on appeal.

IV. As an addition sustaining ground, the Respondent Myers is entitled to absolute employee immunity under the South Carolina Tort Claims Act.

Finally, as an additional sustaining ground,⁴ the Respondent Myers also asserts absolute employee immunity under the South Carolina Tort Claims Act. Carter's complaint is governed by the Tort Claims Act, which "constitutes the exclusive remedy for any tort committed by an employee of a governmental entity." S.C. Code Ann. § 15-78-70(a). It is well settled that an employee of a governmental entity is immune from liability for tortious acts committed within the scope of his official duties. *See, Flateau v. Harrelson*, 355 S.C. 197, 584 S.E.2d 413 (Ct. App. 2003). Carter has alleged that Solicitor Myers was acting within the scope of his official duties in prosecuting the charges against him. Consequently, Solicitor Myers is also entitled to absolute immunity under the Tort Claims Act.


⁴ In the case of *I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000), the Supreme Court explained that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." 526 S.E.2d at 723. "The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment." *Id.* *See also*, Rule 220(c), SCACR ("[t]he appellate court may affirm any ruling, order, or judgment upon any ground(s) appearing in the record"); Rule 207(b)(2), SCACR ("[r]espondent's brief may also contain argument asking the court to affirm for any ground appearing on the record as provided by Rule 220(c)").

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Donald V. Myers respectfully requests that this Court affirm the order of Circuit Court Judge Frank Addy granting Solicitor Myers' motion to dismiss.

Respectfully submitted,

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Of whom, Donnie Myers, Solicitor, Lexington County;
Brian Buck, Irmo Police Department; Scott Franklin, Irmo Police
Department, are, Respondents.

**RESPONDENT MYERS'
DESIGNATION OF MATTER TO BE INCLUDED
IN THE RECORD ON APPEAL**

The Respondent Donald V. Myers proposes that the following be included in the Record on
Appeal:

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SC Court of Appeals

1. Form Order filed February 8, 2013
2. Complaint filed August 22, 2012
3. Notice of Motion and Motion to Dismiss as to Donnie Myers,
Filed October 22, 2012
4. Transcript of February 7, 2013 Motion Hearing, pp. 1-13

We certify that this designation contains no matter which is irrelevant to this appeal.

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Department, are, Respondents.

CERTIFICATE OF SERVICE

RECEIVED

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SC Court of Appeals

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent Donnie Myers, does hereby certify that service of the enclosed for filing the originals and one copy each of the **Initial Brief of Respondent Myers and Respondent Myers' Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon the pro se Appellant and upon all known counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 12th day of August 2013:

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