THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2023-001360

Taylor Chasey Robertson ..... Appellant,

v.

South Carolina Department of Public Safety, South Carolina Highway Patrol, and Trooper Patrick J Goshorn ..... Respondents.

INITIAL BRIEF OF RESPONDENTS

April 22, 2024

Russell W. Harter, Jr.
CHAPMAN HARTER, P.A.
14 Lavinia Avenue
Greenville, SC 29601
rwhjr@chhlaw.net
Telephone: (864) 233-4500
Facsimile: (864)232-1710

Stephanie H. Burton
GIBBES BURTON, LLC
308 East Saint John Street
Spartanburg, SC 29302
sburton@gibbesburton.com
Telephone: (864) 327-5000
Facsimile: (864) 342-6884

Attorneys for Respondents South Carolina Department of Public Safety, South Carolina Highway Patrol, and Trooper Patrick J. Goshorn

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF THE ISSUES ON APPEAL

I. Whether the Trial Court properly dismissed Plaintiff's claims against the South Carolina Department of Public Safety because Plaintiff failed to properly serve it with the Summons and Complaint within 120 days after filing this Action.

II. Whether the Trial Court properly dismissed Plaintiff's claims against Trooper Goshorn because he is not a proper party under the South Carolina Tort Claims Act.

III. Whether the Trial Court properly dismissed Plaintiff's tort claims against Trooper Goshorn because her Complaint fails to state facts sufficient to support those claims.

IV. Whether the Trial Court properly denied Plaintiff's oral motion to amend her Complaint to add a federal claim under 42 U.S.C. § 1983 against Trooper Goshorn.

STATEMENT OF THE CASE

Allegations Relating to May 9, 2020

Plaintiff alleges that on May 9, 2020, at approximately 2:00 a.m., South Carolina Highway Patrol Trooper Patrick J. Goshorn performed a traffic stop of a vehicle he observed traveling 48 mph in a 35 mph zone.[1] (Compl., ¶ 11.) In her Complaint, Plaintiff admits that at all relevant times, Trooper Goshorn acted within the course and scope of his employment. (Id. at ¶ 6, 56.)

During the traffic stop, Trooper Goshorn requested that Plaintiff exit her vehicle to perform a field sobriety test. (Id. at ¶ 13, 16.) In her Complaint, Plaintiff admits that she informed Trooper Goshorn that she had consumed alcohol earlier that night. (Id. at ¶ 20.)

Plaintiff alleges that Trooper Goshorn conducted a Horizontal Gaze Nystagmus test. (Id. at ¶ 21.) Trooper Goshorn requested that Plaintiff perform "the Nine Step Walk and Turn test." (Id. at ¶ 29.) Plaintiff alleges that she informed Trooper Goshorn that she had a knee injury affecting her ability to perform the test, but admits that no medical provider had diagnosed her with "any specific injury." (Id. at ¶ 17, 18.) After completing a couple of steps, Plaintiff informed Trooper Goshorn that her knee hurt too much to complete the test, and admittedly "offered to take a breath test to prove she was not intoxicated." (Id. at ¶ 30.) Trooper Goshorn requested that Plaintiff perform a "One Leg Stand test." (Id. at ¶ 31.) Plaintiff alleges that Trooper Goshorn arrested her for driving under the influence and had Plaintiff's car towed from the scene of the traffic stop. (Id. at ¶ 32.)

Plaintiff alleges that Trooper Goshorn transported Plaintiff to the Greer City Police Department "to provide a breath sample on the Datamaster DMT." (Id. at ¶ 35.) Plaintiff alleges

[1] South Carolina Highway Patrol is a division of South Carolina Department of Public Safety and is not a separate legal entity. S.C. Code Ann. § 23-6-100.

that her BAC was 0.01%. (Id. at ¶ 37.) Plaintiff alleges that "upon receiving the results from the Datamaster DMT, Trooper Goshorn "unarrested" Plaintiff. (Id. at ¶ 44.)

Plaintiff alleges that before she was released, Trooper Goshorn issued a ticket to her for Failure to Change Address. (Id. at ¶ 42.) Plaintiff alleges that the court dismissed the Failure to Change Address ticket specifically because Trooper Goshorn was no longer employed as a Trooper. (Id. at ¶ 50, 79.)

Plaintiff Initiated this Case on May 9, 2022

Exactly two years later, on May 9, 2022, at 4:47 p.m., Plaintiff filed this South Carolina Tort Claims Action against Defendants South Carolina Department of Public Safety (SCDPS), South Carolina Highway Patrol (SCHP), and Trooper Patrick J. Goshorn.[2] (Id.) In her Complaint, Plaintiff asserts causes of action for: (1) negligent training, supervision, and retention; (2) claims under the South Carolina Tort Claims Act; (3) false imprisonment; (4) malicious prosecution; (5) abuse of process; (6) outrage; and (7) gross negligence. (Id. at ¶ 58-103.) The only causes of action relevant in this appeal are false imprisonment, malicious prosecution, and abuse of process. (Brief of Appellant, p. 19.) Importantly, Plaintiff does not allege in her Complaint that Trooper Goshorn acted with actual fraud, actual malice, intent to harm, or committed a crime involving moral turpitude.

Plaintiff's Flawed Attempt to Serve SCDPS and SCHP on September 6, 2022

On the very last day, September 6, 2022, 120 days after filing her lawsuit, Plaintiff attempted to serve SCDPS and SCHP. That afternoon, a process server hand-delivered a copy of the Summons and Complaint to the South Carolina Attorney General's Office. (Sept. 13, 2022, Aff. of Service, p. 2.) A process server also hand-delivered a copy of the Summons and

[2] Under the South Carolina Tort Claims Act, the statute of limitations applicable to this case is two years. S.C. Code Ann. § 15-78-110.

Complaint to Candance Horton, an employee of the South Carolina Department of Motor Vehicles, at 10311 Wilson Boulevard in Blythewood, South Carolina. (Sept. 13, 2022, Aff. of Service, p. 1.)[3]

Defendants' October 6, 2022, Motions to Dismiss

On October 6, 2022, Defendants SCDPS and SCHP filed their motions to dismiss Plaintiff's Complaint because Plaintiff failed to timely and properly serve them. (Oct. 6, 2022, Mot.) On October 6, 2022, Trooper Goshorn also filed a motion to dismiss Plaintiff's Complaint pursuant to South Carolina Code of Laws Sections 15-78-60 and 15-78-70. (Oct. 6, 2022, Mot.)

In support of their motion to dismiss, on December 29, 2022, Defendants filed the affidavit of Diana Brown, the Human Resources Operations Manager for the South Carolina Department of Public Safety. (Brown Aff.) Brown indicated that Candance Horton, the person who Plaintiff attempted to serve, has never been employed by either SCDPS or SCHP nor authorized to accept service on their behalf. (Id.)

February 23, 2023, Hearing on Defendants' Motions to Dismiss

On February 23, 2023, the trial court conducted a hearing on Defendants' motions to dismiss. (Feb. 23, 2023, Tr.) During the hearing, Plaintiff's counsel acknowledged "that the process server did serve a Candance Horton, who we – we have learned is employed with the Department of Motor Vehicles." (Id. at 12:23-25.) Counsel admitted that although Plaintiff's service on SCDPS "might not have been exactly in compliance" with the South Carolina Rules

[3] On September 13, 2022, Plaintiff filed an affidavit of service indicating that she had served SCDPS and SCHP "by personal delivery to: Candance Horton (Branch Services)" on September 6, 2022. (Sept. 13, 2022, Aff. of Service, p. 1.) Later, on September 21, 2022, Plaintiff filed another Affidavit of Service indicating that she served Candance Horton at 3:12 p.m. on September 6, 2022, by leaving copies with her at 10311 Wilson Blvd Blythewood, SC 29016. (Sept. 21, 2022, Aff. of Service.)

of Civil Procedure, Plaintiff provided "sufficient notice" to SCDPS and, therefore, the case should not be dismissed. (Id. at 15:12-21.)

During the hearing, Plaintiff's counsel conceded that certain claims against Trooper Goshorn should be dismissed. The court asked, "so what you contend should remain is the false imprisonment, malicious prosecution, and abuse of process." (Id. at 19:11-13.) Plaintiff's counsel responded: "As to the officer solely, yes, Your Honor." (Id. at 19:14.) At the hearing, Plaintiff orally moved the court "for leave to amend the complaint to include a 1983 cause of action" against Trooper Goshorn. (Id. at 16:14-15.)

On June 27, 2023, the Trial Court issued an order granting Defendants' motions to dismiss. (June 27, 2023, Order.) The court held that with the exception of Plaintiff's claim for outrage, which is explicitly barred by Section 15-78-30(f) of the Act, and Plaintiff's claim for abuse of process, Plaintiff's other causes of action against SCDPS might have been viable if the action was timely commenced. (Id. at p. 6-7.) However, the court found that Plaintiff's "attempted service on the South Carolina Department of Public Safety and/or the South Carolina Highway Patrol was not proper service pursuant to Rule 4." (Id. at p. 5.) Accordingly, the court ruled that Plaintiff's claims against SCDPS and SCHP should be dismissed because Plaintiff failed to properly serve SCDPS or SCHP and, therefore failed properly commence this action against those Defendants. (Id. at p. 7-8.)

The court found that there are no allegations in the Complaint that Trooper Goshorn acted outside the scope of his official duties. (Id. at p. 6.) Instead, Plaintiff alleges in her Complaint that at all times Trooper Goshorn "acted within the scope and course of his official duties as a trooper with the South Carolina Department of Public Safety and/or the South Carolina Highway Patrol." (Id. at p. 5.) The court also found that there are no allegations in the Complaint that

Trooper "Goshorn's actions amounted to actual fraud, actual malice, intent to harm, and/or a crime of moral turpitude" and thus he was immune from suit pursuant to the Tort Claims Act. (Id. at p. 6.) The court held that Plaintiff's cause of action for negligent training, supervision, and retention was not viable against Trooper Goshorn. (Id.) The court also held that the cause of action stylized by Plaintiff as "State Tort Claims Act" did not state a cause of action against Trooper Goshorn. (Id.)

Plaintiff's June 30, 2023, Motion for Reconsideration

On June 30, 2023, Plaintiff filed a 43-page motion for reconsideration with 145 pages of exhibits. (June 30, 2023, Mot.) In her motion, Plaintiff argued that her service upon an employee of SCDMV constitutes proper service upon SCDPS under Rule 4(d). (Id. at p. 5.) Plaintiff also argued that even if her service upon SCDPS was not technically proper under Rule 4(d)(5), her noncompliance should be excused because Plaintiff "sufficiently complied" with Rule 4(d). (Id. at p. 5.)

In her motion, Plaintiff conceded that her Complaint fails to state a cause of action against Trooper Goshorn as to her causes of action for negligence, gross negligence, and "State Tort Claims Act". (Id. at 34.) Despite previously confirming to the court that Plaintiff's cause of action against Goshorn for outrage should be dismissed, Plaintiff argued that the court mistakenly dismissed her claim against Trooper Goshorn for outrage. (Id. at 34-40.) Plaintiff requested a ruling concerning the oral motion made by Plaintiff during the February 23, 2023, hearing for leave to amend her complaint to add a federal claim pursuant to 42 U.S.C. §1983. (Id. at 6-7.) Plaintiff also contended for the first time that if her Complaint is deficient "Plaintiff must be given an opportunity to amend the Complaint before the final order of dismissal is

entered", although she did not specify her proposed amendments nor did she file a motion to amend. (Id. at 40.)

August 14, 2023, Hearing

On August 14, 2023, the trial court heard Plaintiff's motion for reconsideration. (Aug. 14, 2023, Tr.) Plaintiff argued that because Rule 4(d)(5) does not specify a specific employee of every state agency for purposes of accepting service on behalf of the agency, Plaintiff should be permitted to accomplish service on SCDPS by delivering a copy of her Complaint to anyone present at 10311 Wilson Boulevard. (Id. at 8:3-5; 10:2-6, 19-22.) Notably, during the hearing, Plaintiff's counsel contended that "was there a failure by the process server to serve the right entity? Maybe, maybe not if service is made in the lobby." (Id. at 30:20-22.)

Without referencing any specific allegation in Plaintiff's Complaint, Plaintiff's counsel contended that "we believe that we have alleged properly what we needed to allege as far as what he did and whether or not it could be deemed as actual malice or something else that would qualify to remove any type of immunity, and we believe that, you know, those are issues that a jury should determine." (Id. at 16:18-22.) Notably, Plaintiff did not seek leave to amend her Complaint to cure any deficiencies in her state law pleadings. Instead, Plaintiff's counsel asked the court to issue a ruling on Plaintiff's oral motion for leave to amend her Complaint "to add a cause of action for a 1983 cause of action." (Id. at 17:10-12.)

August 16, 2023, Order Denying Plaintiff's Motion for Reconsideration

On August 16, 2023, the court issued a Form 4 Order denying Plaintiff's motion for reconsideration and Plaintiff's oral motion to amend her Complaint. (Aug. 16, 2023, Order.)

STANDARD OF REVIEW

Plaintiff's appeal concerns three issues: (1) the dismissal of Plaintiff's claims against SCDPS for lack of proper service; (2) the dismissal of Plaintiff's claims against Trooper Goshorn; and (3) the denial of Plaintiff's oral motion to amend her complaint to add a federal cause of action. A court's finding of facts regarding validity of service of process must be reviewed under an abuse of discretion standard. Graham Law Firm, P.A. v. Makawi, 396 S.C. 290, 294-95, 721 S.E.2d 430, 32 (2012). In reviewing the dismissal of an action pursuant to Rule 12(b)(6), this Court applies the same standard of review as the trial court. Id. A denial of a motion to amend under Rule 15 is within the sound discretion of the trial court. Oulla v. Velazques, 427 S.C. 428, 435, 831 S.E.2d 450 (2019). Accordingly, a trial court's decision regarding a motion to amend is reviewed under an abuse of discretion standard. Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 153, 723 S.E.2d 835, 840 (Ct. App. 2012). An abuse of discretion arises where an order is controlled by an error of law or where it is based on factual conclusions that are without evidentiary support. BB&T v. Taylor, 369 S.C. 548, 551, 633 S.E.2d 501 (2006).

The decision to grant or deny a motion for reconsideration under Rule 59(e) lies within the sound discretion of the trial court and a review of such a decision is limited to determining whether the court abused this discretion. Pollard v. County of Florence, 314 S.C. 397, 402, 444 S.E.2d 534, 536 (Ct. App. 1994). With respect to arguments first raised by Plaintiff in her motion for reconsideration, those arguments should not be considered by this Court. See Johnson v. Sonoco Prod. Co., 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."); Dixon v. Dixon, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (holding that an issue raised for the first time in a Rule 59 motion is not

preserved for appellate review); Reliford v. Pearson, Op. No. 2003-UP-558, p. 4 (Ct. App. Sept. 26, 2003) (ruling that the trial court properly declined to consider an issue raised by the plaintiff in a Rule 59(e) motion when the plaintiff failed to make the argument at the hearing for a motion to dismiss); Glassmeyer v. City of Columbia, Op. No. 2016-UP-404 (Ct. App. Aug. 24, 2016) (ruling that a defendant who asserted an argument for the first time in a Rule 59(e) motion despite having had an opportunity to raise the argument prior to the trial court's grant of summary judgment had failed to preserve the argument for appellate review.); McDaniels v. Wilson, Op. No. 2012-UP-074 (Ct. App. Feb. 8, 2012) (holding that arguments presented in the plaintiff's appeal of the trial court's order granting a motion to dismiss were not properly before this Court because "party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.").

ARGUMENT

The Trial Court Correctly Determined that Plaintiff Failed to Properly Serve SCDPS and Therefore did not Timely Commence this Action.

You may delay, but time will not." - Benjamin Franklin

SCDPS is a state agency. SCHP is instead a division of SCDPS.[4] S.C. Code Ann. § 23-6-100(A). To timely commence an action against SCDPS, Plaintiff was required to comply with Rule 3 of the South Carolina Rules of Civil Procedure which states:

> **(a) Commencement of civil action**. A civil action is commenced when the summons and complaint are filed with the clerk of court if:
>
> **(1)** the summons and complaint are served within the statute of limitations in any manner prescribed by law; or
>
> **(2)** if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

Rule 3(a), SCRCP. Plaintiff's tort claims are admittedly governed by the South Carolina Tort Claims Act. Under the Act, unless a verified claim is submitted, the statute of limitations is two years. S.C. Code Ann. § 15-78-100(a). Plaintiff has not alleged that she submitted a verified claim, and the two-year statute of limitations applies. Thus, Plaintiff could not commence this civil action against SCDPS unless she served the Summons and Complaint within the statute of limitations or within 120 days after filing. Plaintiff alleges that the incident involving Trooper Goshorn occurred on May 9, 2020. (Compl., ¶ 9.) She filed this Action on May 9, 2022. (Compl.) She does not contend that she served the Summons and Complaint upon SCDPS within the statute of limitations. Thus, to have timely commenced her lawsuit, she had to do so by Tuesday, September 6, 2022.

---

[4] To the extent that Plaintiff believes that they are separate legal entities, she did not attempt to serve them separately. The affidavits to service that she filed do not indicate that she attempted to serve two copies of the Summons and Complaint or attempted to serve the entities separately.

Having waited until the last day to file her lawsuit, Plaintiff also then waited until the eleventh hour to try to serve SCDPS. The trial court correctly determined that she did not do so.

Rule 4(d)(5) of the South Carolina Rules of Civil Procedure provides that service upon a state agency such as SCDPS shall be made as follows:

> Upon an officer or agency of the State ***by delivering*** a copy of the summons and complaint to such officer or agency ***and by sending*** a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

Rule 4(d)(5), SCRCP (emphasis added). Thus, to properly serve a state agency like SCDPS, Plaintiff had to: (1) personally deliver a copy of the Summons and Complaint to SCDPS; and (2) send a certified mailing to the South Carolina Attorney General. She did neither and the trial court correctly exercised its discretion in this case.

When service is challenged as by Defendants' motion to dismiss, "the record must affirmatively show that service of process was correctly made." Bakala v. Bakala, 352 S.C. 612, 576 S.E.2d 156 (2003). Plaintiff "has the burden to show that service of process was correctly made." Jensen v. Doe, 292 S.C. 592, 594, 358 S.E.2d 148 (Ct. App. 1987). See also Matheson v. McCormac, 186 S.C. 93, 195 S.E. 122 (1938) (when service is challenged, the record must show affirmatively that service of process was correctly made); Yarborough and Co. v. Schoolfield Furniture Industries, Inc., 275 S.C. 151, 268 S.E.2d 42 (1980) (the plaintiff has the burden to establish that the Court has personal jurisdiction over the defendant).

Furthermore, claims by one to possess authority to receive process or actual acceptance of process by an alleged agent will not bind the defendant, especially in the absence of evidence that the defendant intended to confer such authority. Hamilton v. Davis, 300 S.C. 411, 389 S.E.2d 297, 298 (Ct. App. 1990). Without specific authorization to receive process, service is not

effective when made upon an employee of the defendant, such as a secretary. Moore v. Simpson, 322 S.C. 518, 523-24, 473 S.E.2d 64, 67 (Ct. App. 1987); Graham Law Firm, P.A. v. Makawi, 369 S.C. 290, 297, 721 S.E.2d 430, 434 (2012) ("a rule permitting certain persons to receive service of process on behalf of others does not imply that 'anyone who happens to pick up the mail' can stand in for the defendant.")

During the February 23, 2023, hearing, Plaintiff admitted that she did not personally serve SCDPS when she delivered the Summons and Complaint to Candance Horton. To personally serve SCDPS, Plaintiff was required to demonstrate that she delivered the Summons and Complaint to an employee of SCDPS who was authorized to accept such service on behalf of SCDPS. SCDPS produced evidence establishing that Candance Horton has never been authorized to accept service on behalf of SCDPS or SCHP. Plaintiff did not produce any evidence to establish that Horton possessed apparent authority. In fact, Plaintiff's counsel acknowledged that Candance Horton "is employed with the Department of Motor Vehicles," and that Plaintiff's service on SCDPS "might not have been exactly in compliance" with the rules. (Feb. 23, 2023, Tr. 12:23-25; 15:12-21.)

Therefore, the trial court did not abuse its discretion that SCDPS was not properly served with the Summons and Complaint. Given Plaintiff's failure to serve SCDPS within 120 days of filing her action, the trial court correctly concluded that Plaintiff failed to timely commence her action against SCDPS. As such, this Court should affirm the trial court's dismissal of Plaintiff's claims against SCDPS.

Plaintiff Should Not be Excused from Failing to Properly Serve SCDPS

Plaintiff inaccurately contends that she did not have to comply with the requirements of Rule 4(d)(5) because she "substantially" complied and thus should be excused from failing to

properly serve SCDPS. (Initial Brief of Appellant, p. 16.) Plaintiff cites a number of cases to support her argument that attempted compliance is sufficient, none of which support her position. In each case cited by Plaintiff where the court found that service was proper, the serving party complied with the requirements of the applicable rule regarding service. See e.g. Roche v. Young Bros., Inc., 318 S.C. 207, 211-12, 456 S.E.2d 897 (1995) (finding that the "plaintiff fully complied with all of the requirements of Rule 4(d)(8)" because the return receipt was restricted to the addressee and showed acceptance by the defendant); McCall v. Ikon, 363 S.C. 646, 611 S.E.2d 315, 318-19 (2005) (finding that the plaintiff had effectively served the defendant with his Summons and Complaint through the defendant's registered agent); Fassett v. Evans, 364 S.C. 42, 48-49, 610 S.E.2d 841 (Ct. App. 2005) (finding that the plaintiff properly served the defendant by serving the defendant's wife with the summons and complaint at the defendant's dwelling); Bage, LLC v. Southeastern Roofing, 373 S.C. 457, 646 S.E.2d 153 (Ct. App. 2007) (finding that the plaintiff's service upon an employee who was both a managing and authorized agent of the defendant constituted proper service under Rule 4(d)(3), SCRCP); Richardson v. PV, Inc., 383 S.C. 610, 682 S.E.2d 263 (2009) (finding that the plaintiff's service upon an employee of the defendant constituted proper service under Rule 4(d)(3) because the defendant knowingly permitted the employee to exercise authority to accept service of process and the defendant's statements to the process server at the time of service indicated that the employee had such authority).

Plaintiff attempts to distinguish the decisions in Maybin v. Northside Correctional Center, 891 F.2d 72 (4th Cir. 1989) and Jensen v. Doe, 292 S.C. 582, 358 S.E.2d 148 (Ct. App. 1987). In both cases, and contrary to Plaintiff's substantial compliance argument, the courts required strict compliance with service of process rules and held that the burden is upon Plaintiff to prove that

service was correctly accomplished. The Maybin court further ruled that delivery to any employee of a state entity is not sufficient. Here, Plaintiff did not serve any employee of SCDPS, but admits instead serving an employee of an entirely different state agency, the South Carolina Department of Motor Vehicles.

Contrary to those cases, Plaintiff did not comply with Rule 4(d)(5) because she did not deliver the Summons and Complaint **to the named defendant SCDPS**, but instead to a person not in its employ. Similarly, while the rule requires that the Attorney General be served by certified mail, she admittedly attempted service upon it by hand-delivery because she procrastinated until the afternoon of the last day to affect service. Accordingly, the decision of the trial court should be affirmed.

The Trial Court Properly Dismissed Plaintiff's Tort Claims Against Trooper Goshorn

Under the South Carolina Tort Claims Act, a governmental entity is liable for the acts of its employees and is the proper party in an action where an employee is acting within the course and scope of course of his job. S.C. Code Ann. §15-78-20(b). The Act provides that a governmental entity is immune from suit where a loss results from:

> (17) employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.

S.C. Code Ann. § 15-78-60(17).

Pursuant to section 15-78-70(a) of the Act, "[a]n employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b)." Section 15-78-70(b) provides:

> Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.

S.C. Code Ann. § 15-78-70(b). Thus, under the Act, where an employee commits a tort during the course of performing his job, the proper defendant is the governmental entity that employs him. The employee is liable only if the plaintiff pleads and proves that employee's act constitutes actual fraud, actual malice, intent to harm or a crime involving moral turpitude.

While the South Carolina Rules of Civil Procedure were patterned after the Federal Rules of Civil Procedure, the pleading standard is materially different. Rule 8 requires "a short and plain **statement of the facts** showing that the pleader is entitled to relief". Rule 8(a)(2), SCRCP. As the notes indicate, South Carolian adopted fact pleading and not the federal court's notice pleading standard. Thus, Plaintiff must plead facts that support her claims against Trooper Goshorn under the Act. She did not.

To the contrary, the trial court correctly found that Plaintiff alleged that at all times that Trooper Goshorn "acted within the scope and course of his official duties as a trooper with the South Carolina Department of Public Safety and/or the South Carolina Highway Patrol." (June 27, 2023, Order, p. 1.) Given this allegation, unless Plaintiff's Complaint includes factual allegations that Trooper Goshorn engaged in actual fraud, actual malice, an intent to harm or committed a crime of moral turpitude when he stopped and detained her, her Complaint is deficient as a matter of law. Review of her Complaint shows that Plaintiff did not even attempt to assert such facts. Therefore, the trial court correctly dismissed Plaintiff's claims against Trooper Goshorn under the Tort Claims Act.

Plaintiff posits that because she alleges claims for intentional torts, she has somehow pled facts that Trooper Goshorn intended to harm her. Intending to perform an act (stopping Plaintiff, administering a sobriety test) is not the same as the intent to harm Plaintiff necessary to impose personal liability upon a governmental employee doing his job. In support of her argument,

Plaintiff cites a number of cases, which not only do not support her contention, but confirm that the trial court properly granted the motion to dismiss in this case.

For example, in Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 826 S.E.2d 585 (2019), and contrary to Plaintiff's representations in her brief, the Court did not address whether the complaint included allegations that thwarted application of the defendants' immunity defense. There, the Court addressed only whether the Plaintiff's motion to amend to bolster his civil conspiracy, fraud, and defamation claims was futile. Id. at 185, 826 S.E.2d at 590.

Similarly, the Supreme Court's ruling in Eldeco, Inc. v. Charleston Cnty. Sch. Dist., 372 S.C. 470, 642 S.E.2d 726 (2007) supports the trial court's decision in this case. There, the governmental entity argued that a claim for tortious interference with contract necessarily includes an allegation of "intent to harm" and that it was therefore immune from suit pursuant to Section 15-78-60 (17). The Supreme Court rejected that argument, stating that the elements of that legal claim did not necessarily include an intent to harm under the Act. Id. at 479-81, 642 S.E.2d at 732. See also McBride v. School Dist. of Greenville Cnty., 389 S.C. 546, 565-66, 698 S.E.2d 845, 855 (Ct. App. 2010) (Ruling that a cause of action for malicious prosecution does not require proof of "actual malice" and a claim for malicious prosecution against an entity is not necessarily barred under Section 15-78-60(17) of the Act); Swicegood v. Lott, 379 S.C. 346, 351-53, 665 S.E.2d 211, 213-14 (Ct. App. 2008) (Ruling that abuse of process does not require pleading or proof of intent to harm warranting immunity to a governmental entity pursuant to Section 15-78-60(17) of the Act.). These cases demonstrate that merely pleading the elements of the tort claims asserted by Plaintiff in this case for false imprisonment, malicious prosecution, or abuse of process does not mean that Plaintiff has alleged intent to harm or actual malice.

Additional Sustaining Grounds[5]

Plaintiff Fails to State Facts to Support a Claim for False Imprisonment

Even if Trooper Goshorn is not immune under the Act, there are additional grounds to support the Trial Court's decision to dismiss Plaintiff's false imprisonment claim. To assert a cause of action against Trooper Goshorn for false imprisonment, Plaintiff must allege that Trooper Goshorn intentionally restrained Plaintiff without lawful justification. Carter v. Bryant, 429 S.C. 298, 306, 838 S.E.2d 523 (Ct. App. 2020). However, an action for false imprisonment cannot be maintained where the plaintiff consented to the restraint. See Gathers v. Harris Teeter Supermarket, Inc., 282 S.C. 220, 229, 317 S.E.2d 748, 754 (Ct. App. 1984) (holding that "no one can enforce a right arising out of a transaction which [she] has voluntarily assented to."); Beraho v. South Carolina State Coll., 302 S.C. 129, 131, 394 S.E.2d 28 (Ct. App. 1990) (ruling that "even if [the defendants] were acting unlawfully, it is frequently recognized that consent of the plaintiff to acts which constitute an unlawful imprisonment will bar his right of recovery therefor."). In her Complaint, Plaintiff alleges that Trooper Goshorn transported Plaintiff to the Greer City Police Department to "provide a breath sample on the Datamaster DMT," after Plaintiff admittedly "offered to take a breath test to prove she was not intoxicated." (Compl., ¶ 30, 35). Plaintiff's consent to the acts which she now alleges constitute the alleged unlawful imprisonment bars her claim.

Plaintiff Fails to Plead Facts to Support a Claim for Malicious Prosecution

Plaintiff's cause of action for malicious prosecution is similarly defective. To properly plead a claim for malicious prosecution, Plaintiff must allege: (1) the institution or continuation

---

[5] I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 419 526 S.E.2d 716, 723 (2000)(…[A] respondent - the 'winner' in the lower court – 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.")

of original judicial proceedings; (2) by or at the instance of the defendant; (3) **termination of such proceedings in Plaintiff's favor**; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage. Law v. South Carolina Dep't of Corr., 368 S.C. 424, 435, 629 S.E.2d 642 (2006)(emphasis added) Plaintiff has not alleged that the charges were dismissed in her favor. To the contrary, she alleges that the charge was dismissed simply because Trooper Goshorn was no longer employed by SCDPS. (Compl., ¶ 50, 79.)

In Gecy v. Somerset Point at Lady's Island Homeowners Ass'n, Inc., 426 S.C. 540, 553, 828 S.E.2d 73 (Ct. App. 2019), this Court held that the favorable termination element means a "termination consistent with a finding for the defendant on substantive grounds and not based solely on technical or procedural considerations." The favorable termination must be "on the merits of the dispute underlying the malicious prosecution claim." Id. at 552, 828 S.E.2d at 79-80. This Court noted by way of example, that "a case's dismissal based on the statute of limitations would not be a favorable termination because a decision on the statute of limitations does not reflect the merits of the action." Id. at 553, 828 S.E.2d at 80. Accordingly, Plaintiff must allege that that the criminal charge for failing to change her address was dismissed for a reason consistent with her innocence. In her Complaint, Plaintiff repeatedly alleges that the charge was dismissed because Trooper Goshorn no longer worked for SCDPS. (Compl., ¶ 50, 79.) Such an allegation is not consistent with innocence. Therefore, Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against Defendant for malicious prosecution.

Plaintiff Fails to Plead Facts to Support an Abuse of Process Claim

Plaintiff's cause of action for abuse of process is also legally deficient. To plead such claim, Plaintiff must allege facts to support the following elements: (1) an ulterior purpose; and (2) a willful act in the use of the process not proper in the regular conduct of the proceeding.

Huggins v. Winn-Dixie Greenville, Inc., 249 S.C. 206, 209, 153 S.E.2d 693 (1967) Here, Plaintiff contends that her "arrest constituted an improper use of regularly issued process." (Compl., ¶ 88.) In her Complaint, Plaintiff alleges in a conclusory manner that "Defendants acted willfully in the use of process," and "had an ulterior purpose in employing legal process against [her]." (Id. at ¶ 90-91.)

Abuse of process centers on events occurring outside of the process. In Huggins v. Winn–Dixie Greenville, Inc., 249 S.C. 206, 209, 153 S.E.2d 693, 694 (1967), the South Carolina Supreme Court held that some definitive act or threat not authorized by the process, or aimed at an objective that is not legitimate in the use of the process, is required. The Huggins court noted that improper purpose usually takes the form of coercion or extortion to obtain a collateral advantage, not properly involved in the proceeding itself, such as the surrender of property or the payment of money, by the use of the process as a threat or club. Id. A conclusory "allegation that a party had a "bad motive" or an "ulterior purpose" in bringing an action, standing alone, is insufficient to sustain an abuse of process claim." Pallares v. Seinar, 407 S.C. 359, 756 S.E.2d 128, 133 (2014).

In this case, Plaintiff does not allege that Trooper Goshorn knew her before the traffic stop. She does not allege that he had any ulterior motive or purpose to stop her other than the fact that's he was speeding. Plaintiff does not allege that he threatened to arrest her or tried to extort her for some purpose. Aside from a rote recitation of the elements of abuse of process, Plaintiff fails to make any factual allegations to support such claim. Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action against Trooper Goshorn for abuse of process and the Trial Court correctly dismissed that claim against Trooper Goshorn.

The Trial Court Properly Denied Plaintiff's Motion to Amend Her Complaint

Defendant Goshorn filed his motion to dismiss on October 6, 2022. At no point prior to the hearing four months later, did Plaintiff seek to amend her pleadings. At the hearing on February 23, 2023, Plaintiff orally moved to amend her complaint. Importantly, however, she did not seek to amend her Complaint to clarify her tort claims against Trooper Goshorn or to allege facts sufficient to overcome his immunity under the Act. Instead, Plaintiff sought **only** to amend her Complaint "to include a 1983 cause of action."[6] (Feb. 23, 2023, Tr. 16:14-15.) That proposed amendment would do nothing to resuscitate Plaintiff's tort claims in this case against Trooper Goshorn.

In her motion for reconsideration, Plaintiff again did not seek to amend her tort claims to address the deficiencies in her pleading. In addition, during the August 14, 2023 hearing on Plaintiff's motion for reconsideration, when asked by the Court why it should consider or rule upon her motion to amend to add a federal claim given the ruling finding a lack of proper service, Plaintiff's counsel replied "that's a fair question, one that I cannot think of an answer off the top of my head." (Aug. 14, 2023, Tr. 18:8-9.) Plaintiff has never filed any motion to amend her Complaint cure deficiencies in her tort claims against Trooper Goshorn.

Plaintiff incorrectly argues that the decision in Skydive Myrtle Beach, Inc. saves her. Skydive Myrtle Beach, Inc. v. Horry Cnty., 426 S.C. 175, 826 S.E.2d 585 (2019). On two

[6] Plaintiff was not barred from asserting a claim under 42 U.S.C. § 1983 in federal court by any ruling by the trial court as it is well-established that both state and federal courts have concurrent jurisdiction over such claim. See Felder v. Casey, 487 U.S. 131, 139 (1988) (Holding that state and federal courts have concurrent jurisdiction over claims brought pursuant to section 1983); Greenville Bistro v. Greenville County, 435 S.C. 146, 163 n.2, 866 S.E.2d 562, 571 (2021) ("Pursuant to *Howlett v. Rose*, 496 U.S. 356, 367, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990), the circuit court has concurrent jurisdiction with the United States District Court over [the plaintiff's] federal civil rights claim."). Plaintiff easily could have filed an action in federal court within the three-year statute of limitation period applicable to such claims.

occasions the plaintiff in that case requested in writing to be allowed to amend its complaint specifically to cure the defects in its pleading that warranted dismissal. In addition, unlike the order at issue here, the Skydive court dismissed the complaint **with prejudice** without permitting amendment. Given the with prejudice dismissal, the Court found that the plaintiff could not practically file a motion to amend:

> However, the circuit court's "with prejudice" order put Skydive in a difficult position because it made Skydive practically unable to litigate a motion to amend before it must file the appeal….Thus, the circuit court erred not only in refusing to consider the request to amend, but also in effectively preventing Skydive from litigating a post-ruling motion to amend by immediately dismissing the claims "with prejudice".

Id. at 181-182, 826 S.E.2d 588. The trial court's order in this case was not issued with prejudice. Plaintiff was not precluded from filing a motion to amend to litigate her proposed amendment. Plaintiff was not precluded from filing a separate federal court action within the statute of limitations. Accordingly, the decision of the trial court should be affirmed.

CONCLUSION

The Trial Court correctly dismissed Plaintiff's claims against SCDPS based upon Plaintiff admitted failure to properly and timely serve it. The Trial Court correctly ruled that Trooper Goshorn was entitled to immunity under the South Carolina Tort Claims Act and because she failed to allege the essential elements of her tort claims against him. The trial court also properly denied Plaintiff's request to add a Section 1983 claim to this action. Therefore, this Court should affirm the Trial Court's orders.

April 22, 2024

s/Stephanie H. Burton
Stephanie H. Burton
GIBBES BURTON, LLC
308 East Saint John Street
Spartanburg, SC 29302
sburton@gibbesburton.com
Telephone: (864) 327-5000
Facsimile: (864) 342-6884

Russell W. Harter, Jr.
CHAPMAN HARTER, P.A.
14 Lavinia Avenue
Greenville, SC 29601
rwhjr@chhlaw.net
Telephone: (864) 233-4500
Facsimile: (864)232-1710

Attorneys for Respondents South Carolina Department of Public Safety, South Carolina Highway Patrol, and Trooper Patrick J. Goshorn