

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable L. Casey Manning, Circuit Court Judge

Case No. 2006-CP-40-4840

William A. Thompson, #145029, ...Appellant,

v.

Jon Ozmint, Director, S.C. Dept. of Corr.;
Dennis Patterson, Records, S.C. Dept. of Corr.,.....Defendants,

Of Whom South Carolina Department of Corrections is the, ...Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

- I. THE JUDGE DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS**
- II. THE PLAINTIFF DID NOT ESTABLISH A CASE OF DEFAMATION**
- III. THE PLAINTIFF DID NOT MEET ALL OF THE ELEMENTS TO ESTABLISH A CASE OF DEFAMATION**
- IV. THE PLAINTIFF DID NOT MEET THE STATUTE OF LIMITATIONS**
- V. THE JUDGE DID NOT WAIT MORE THAN FIVE YEARS TO ISSUE THE FINAL ORDER**

STATEMENT OF THE CASE

On July 26, 2004, Appellant, William Thompson ("Thompson"), appearing pro se, brought suit against Jon Ozmint and Dennis Patterson in the Richland County Court of Common Pleas. Defendants filed an Answer and removed the case to the United States District Court. (*Thompson v. Jon Ozmint and Dennis Patterson*, 2004-CP-40-3521, 3:04-22109-JFA-JRM). In his suit, Thompson contended his Fifth and Fourteenth Amendment rights were violated because he was labeled a sex offender without due process and because his picture and name were placed on a website with false information indicating he was a sex offender. He also claimed his Eighth Amendment rights were violated because he was subjected to ridicule and emotional distress by those actions. (*Id.*)

On January 13, 2005, Defendants filed a Motion for Summary Judgment asserting Thompson could not establish any violation of his constitutional rights, that they were entitled to immunity and that Thompson's state law claims were barred. The United States District Court granted Defendants' Motion for Summary Judgment but declined to exercise jurisdiction over any state law claims, instead remanding those claims to the state court for determination. (Supp. R. pp. 20-30; pp. 11-19). In granting Defendants' motion on the merits, the District Court concluded Thompson's claims brought pursuant to 42 U.S.C. § 1983 failed to set forth any violations of the United States Constitution. (*Id.*)

Upon remand of the state law claims, Defendants filed a Motion for Summary Judgment with the Richland County Court of Common Pleas on September 16, 2011. On October 10, 2005, a hearing on Defendants' Motion was held before the Honorable L.

Casey Manning. By Form 4 Order filed August 21, 2006, Judge Manning granted the SCDC's motion. (Supp. R. p. 10). The Form 4 Order provided a formal Order was to follow. However, the formal Order was not filed until September 16, 2011. (Supp. R. 2-9).

On September 23, 2011, Thompson served a Notice of Intent to Appeal upon counsel for Defendants. Thompson's Notice of Intent to Appeal seeks review of Judge Manning's September 16, 2011, Order granting Defendants' Motion for Summary Judgment. (Id.)

STATEMENT OF FACTS

The Sex Offender Registry Act was enacted in 1994 and placed under the direction of the State Law Enforcement Division ("SLED"). S.C. Code Ann. § 23-3-410 (Supp. 2004). The statute also authorizes SLED to create regulations to implement the Act. S.C. Code Ann. §23-3-420 (Supp. 2004). The Sex Offender Registry Act requires that persons who have been convicted of, adjudicated delinquent for, or pled guilty or nolo contendere to certain crimes register with the state of South Carolina as sex offenders. S.C. Code Ann. §23-3-430 (Supp. 2004).

In 1994, the Sex Offender Registry Act provided that kidnapping was a registrable offense. S.C. Code Ann. § 23-3-430 (Supp. 1994). The statute was modified in 1996, and kidnapping was deleted from the registrable offense list. S.C. Code Ann. § 23-3-430 (Supp. 1996). In 1998, the statute was modified a second time, and kidnapping was again included as a registrable offense. S.C. Code Ann. § 23-3-430 (Supp. 1998). However, this time, a person convicted of kidnapping had to register unless "the court ma[de] a finding on the record that the offense did not include a criminal sexual offense." (Id.) In

1999, the statute was modified a third time to change the wording of the section to include only a conviction of kidnapping of a person eighteen years of age or older within the registry requirement. S.C. Code Ann. § 23-3-430 (Supp. 1999).

In 1987, Thompson began serving a life sentence for kidnapping. Since entering the South Carolina Department of Corrections (“SCDC”), Thompson has always been a resident of Broad River Correctional Institution. When the Sex Offender Registry statute was enacted in 1994, Thompson was required to register as a sex offender. (Memorandum in Support of Motion for Summary Judgment.) After the 1996 amendment, Thompson was removed from the Registry. (Id.) Defendants admit Thompson was listed on a February 1998 Parole Hearing List as a sex offender. Thompson filed a grievance, and this information was corrected. However, Thompson was again placed on the Registry when kidnapping was re-inserted into the statute in June 1998. (Id.) There was no finding in Thompson’s Commitment and Sentence documents that his kidnapping offense did not include a criminal sexual offense. (Id.)

In July 2004, Thompson was removed from the Sex Offender Registry after the SCDC received a letter from Judge Lee Alford stating Thompson should not have to register as a sex offender. (Id.) Thompson is no longer included on the Sex Offender Registry. (Id.)

STANDARD OF REVIEW

“When reviewing the grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCF.” White v. J.M. Brown Amusement Co., 360 S.C. 366, 370, 601 S.E.2d 342, 344 (2004). Rule 56(c), SCRCF, provides that summary judgment is appropriate when no genuine issue of

material fact exists entitling the moving party to judgment as a matter of law. Id. In determining whether a genuine issue of material fact exists, the trial court must view all evidence and inferences in the light most favorable to the non-moving party. Id.

The Court of Appeals cannot consider on appeal any facts not appearing in the transcript of record. Vacation Time of Hilton Head Island, Inc. v. Lighthouse Realty, Inc., 286 S.C. 261, 270, 332 S.E.2d 781, 786 (Ct.App.1985). Thus, facts argued by pro se appellants which were not part of the record will not be considered by the Appellate Court. First State Sav. and Loan v. Phelps, 299 S.C. 441, 445, 385 S.E.2d 821, 824 (1989).

The Record on Appeal shall not include matters which were not presented to the lower court. Rule 210(c), SCACR. Further, the appellate court will not consider any fact which does not appear in the Record on Appeal. Rule 210(h), SCACR. The burden is on appellant to furnish a sufficient Record on Appeal from which the Court of Appeals can make an intelligent review and the Court will not consider facts that do not appear in the transcript of record. Windham v. Honeycutt, 290 S.C. 60, 64, 348 S.E.2d 185, 187 (Ct.App.1986).

ARGUMENTS

I. THE JUDGE DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO DEFENDANTS.

The named Respondent in this appeal is the SCDC. Thompson's Complaint was filed against Jon Ozmint, the former Director of the SCDC and Dennis Patterson, a SCDC employee. The SCDC was not a named Defendant. Throughout his Initial Brief, Thompson argues Judge Manning erred by not finding the SCDC at fault in this matter. Because the SCDC is not a named party in this suit, these arguments should not be

considered by the Appellate Court. Further, Defendants Ozmint and Patterson are not named Respondents in Thompson's Brief, so any arguments concerning error in granting summary judgment to them in the underlying action should also not be considered by the Court.

Should the Court proceed with a review of this matter, Respondent submits that summary judgment was appropriately granted to Defendants Ozmint and Patterson on all of Thompson's claims. In his Brief, Thompson seems to allege there were genuine issues of material fact such that Defendants were not entitled to judgment as a matter of law during their summary judgment hearing. Judge Manning did not agree and granted Defendants' summary judgment motion by Form 4 Order filed August 21, 2006.

In the formal Order filed September 16, 2011, Judge Manning granted Defendants' motion for a number of reasons. First, Judge Manning determined Thompson's suit was barred by the two year statute of limitations of the South Carolina Tort Claims Act (the "Act"). The Act provides that a person pursuing a tort action against a state or state agency must commence suit within two years after the date the loss was or should have been discovered. S.C. Code Ann. 15-78-110. By his own admission in his Complaint, Thompson discovered the Registry listing in November 2000. This was after the statute was modified in June 1998 and required Thompson's inclusion on the Registry. Thompson did not file his suit until July 26, 2004. Thus, Thompson's suit was barred as Judge Manning determined because it was filed well outside of the two year statute of limitations period.

Next, Judge Manning determined Thompson did not suffer a loss as required to have a claim pursuant to the Act. The Act is the exclusive remedy for tort suits brought

against the State of South Carolina, its political subdivisions and its employees while acting within the scope of their official duties. S.C. Code Ann. § 15-78-20, -70. The Tort Claims Act does not create causes of action. Rather, it removes the common law bar of sovereign immunity in certain circumstances, but only to the extent mandated by the Act. Summers v. Harrison Constr., 298 S.C. 451, 381 S.E.2d 493 (Ct.App.1989).

The Act also provides that a person must suffer a loss to have a claim against a state or its agencies. S.C. Code Ann. §15-78-50(a). A loss is defined as bodily injury, disease, death, or damage to personal property, including lost wages and economic loss to the person who suffered the injury, disease, or death, pain and suffering and mental anguish. S.C. Code Ann. §15-78-30(f). However, a loss does not include intentional infliction of emotional harm. Id. Further, a person must suffer a bodily injury before he can claim damages for mental anguish or pain and suffering. Thompson did not allege any bodily injury and thus had no loss under the Tort Claims Act as a matter of law.

Then, Judge Manning held Defendants qualified under several exceptions to the government's waiver of immunity provided by the Act, which states that these limitations should be liberally construed in favor of limiting the state's liability. S.C. Code Ann. 15-78-20(f). One exception provides that a governmental entity is not liable for a loss resulting from "adoption, enforcement, or compliance with any law,..." S.C. Code Ann. §15-78-60(4). Defendants were enforcing the provisions of state law when Thompson was placed on the Sex Offender Registry and could not, as a matter of law, be held liable for any loss Thompson believed he suffered as a result of those actions.

Next, the Court found Thompson did not establish Defendants were grossly negligent in this matter so as to establish a violation of the Act. Another exception of the

Act states that a governmental entity is not liable for a loss resulting from the “responsibility or duty including but not limited to supervision, protection, control, confinement, or custody of any ...prisoner...,of any governmental entity, except when the responsibility or duty is exercised in a grossly negligent manner.” S.C. Code Ann. §15-78-60(25). Gross negligence means the failure to exercise even a slight degree of care. Moore v. Berkeley County School Dist., 326 S.C. 584, 486 S.E.2d 9 (Ct. App. 1997). Gross negligence is the intentional, conscious failure to do something which one ought to do. Worsley Companies, Inc. v. Town of Mt. Pleasant, 339 S.C. 51, 528 S.E.2d 657 (2000). When the evidence supports only one reasonable inference, summary judgment is appropriate on the issue of gross negligence. Id.

Thompson failed to allege facts which supported a violation of a tort duty. To establish a claim for gross negligence, Thompson had to prove: 1) Defendants had a duty of due care; 2) Defendants breached the duty by failing to exercise a slight degree of care; 3) proximate cause; and 4) damages. Jinks v. Richland County, 355 S.C. 341, 585 S.E.2d 281, 283 (2003). As a matter of law, Defendants were not grossly negligent in this matter. State law establishes that persons convicted of kidnapping must be included on the Sex Offender Registry unless there was a finding in the record that no sex offense was involved. S.C. Code Ann. § 23-3-430. By following the provisions of state law, Defendants did not breach any duty of care that may have been owed to Thompson. Further, Thompson’s allegations relate to intentional SCDC decisions. Even if true, such allegations as a matter of law do not constitute a “failure to use slight care.”

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Further, the Act provides that when bringing an action against a governmental entity under the provisions of this chapter, the plaintiff shall name as the party defendant only the agency or political subdivision for which the employee was acting. S.C. Code Ann. §15-78-70(c). If the employee is named individually in the suit, the agency for which the employee was acting must be substituted as the defendant. Id. Thompson's suit did not comply with this requirement of the South Carolina Tort Claims Act.

Finally, Judge Manning found Thompson did not establish all of the elements of defamation. Thompson alleged Defendants defamed his character by publishing false information concerning his status as a sex offender. To establish a claim for defamation, a plaintiff must prove the statement: 1) had a defamatory meaning; 2) was published with actual or implied malice; 3) was false; 4) was published by the defendant; 5) concerned the plaintiff; and 6) that the plaintiff suffered either legally presumed damages or special damages. Parker v. Evening Post Publishing Co., 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994).

Thompson could not establish any publication of his sex offender status by Defendants in this matter. Thompson made no allegations in his Complaint that Defendants were actually responsible for publishing any information regarding his status as a sex offender. In fact, Thompson's only allegation against Defendant Ozmint was that Ozmint stated in a letter that he did not know anything about an inmate website. This is not an allegation of a defamatory statement.

Further, there were no allegations Defendants ever personally said or wrote any statements about Thompson's sex offender status, beyond Thompson's allegation that sometime in 2000, Defendant Patterson stated Thompson would remain on the Sex

Judge Manning properly granted Defendants' Motion for Summary Judgment in this matter. Thompson has not set forth any reason why this Court should overturn the lower court's decision. Therefore, this Court should affirm the lower court's Order granting Defendants' Motion for Summary Judgment.

II. THE PLAINTIFF DID NOT ESTABLISH A CASE OF DEFAMATION.

As explained in Argument I *supra*, Thompson did not establish all of the necessary elements for a claim of defamation. Thus, this Court should affirm the lower court's Order granting Defendants' Motion for Summary Judgment.

III. THE PLAINTIFF DID NOT MEET ALL OF THE ELEMENTS TO ESTABLISH A CASE OF DEFAMATION.

See Argument I *supra*.

IV. THE PLAINTIFF DID NOT MEET THE STATUTE OF LIMITATIONS.

The Act establishes a two (2) year statute of limitations for tort actions. S.C. Code Ann. § 15-78-110. This two-year period runs from the date the loss was or should have been discovered. *Id.* The statute of limitations begins to run when the plaintiff should know he might have a potential claim, not from when he develops a theory of recovery. Joubert v. South Carolina Dept. of Social Services, 341 S.C. 176, 534 S.E.2d 1, 8 (Ct.App.2000).

As previously stated, Thompson's Complaint provides that he discovered the Registry listing in November 2000. Thompson did not file his suit until July 26, 2004. Therefore, Thompson's suit was barred by the statute of limitations.

In his Initial Brief, Thompson changes his story about when he discovered the listing. However, even taking Thompson's present statements as correct, Thompson is

outside the statute of limitations period in this matter. In his Brief, Thompson provides inconsistent information concerning when he discovered the SCDC website statement about his sex offender status. In one section, Thompson simply states he discovered the statement in 2004. (R, p. 20, ¶c.) Earlier in his Brief, Thompson states his friend sent him a print-out from the website in 2003 or 2004. (R. pp. 11-13). Thompson then says the print-out was copyrighted 2003 and downloaded on March 11, 2004. (Id.)

All of this information directly contradicts his initial Complaint, where he states he had the grievance clerk check the computer on or about November 27, 2000, to see if he was still on the sex offender registry. (Supp. R. p. 33, ¶15.) Even using the latest date identified, Thompson filed his suit beyond the two year statute of limitations period. Therefore, the Circuit Court did not err in finding that Thompson's claims are barred by the two year statute of limitations period.

V. THE JUDGE DID NOT WAIT MORE THAN FIVE YEARS TO ISSUE THE FINAL ORDER.

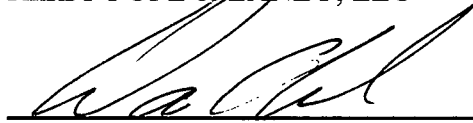
Thompson's last argument is that Judge Manning waited more than five years to issue a final Order in this matter. However, Thompson admits he has no law pertaining to this issue and does not provide any argument as to why this is a matter that the appellate court needs to address as error. While the formal Order was not filed until September 16, 2011, Judge Manning granted Defendants' Motion for Summary Judgment by Form 4 Order filed August 21, 2006. Thompson offers no explanation in this Argument as to why the lack of a formal Order led to any error by the Circuit Court in granting Defendants' summary judgment motion.

CONCLUSION

For the foregoing reasons, Respondents respectfully request this Court affirm the Circuit Court's Order granting Defendants' Motion for Summary Judgment.

Respectfully Submitted,

RILEY POPE & LANEY, LLC

A handwritten signature in black ink, appearing to read 'D. Wlodarczyk', is written over a horizontal line.

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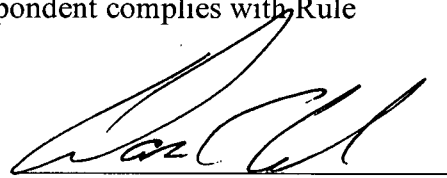
Defendants,

Of whom South Carolina Department of Corrections is the

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CERTIFICATE OF COMPLIANCE

This is to certify that the Final Brief of Respondent complies with Rule
211(b), SCACR.



Damon C. Wlodarczyk

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CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be served upon the persons
named below the attached MOTION TO FILE AND SERVE APPENDIX TO THE
FINAL BRIEF, APPENDIX TO THE FINAL BRIEF, AND FINAL BRIEF OF THE
RESPONDENT in the above-captioned matter via United States mail, first-class
postage prepaid, to the following:

William A. Thompson #145029
KCI HC Rm. 122
4848 Goldmine Hwy.
Kershaw, SC 29067


Damon C. Wlodarczyk

Columbia, South Carolina
August 16, 2013

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