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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Courtney Clyburn Pope, Circuit Court Judge

Appellate Case No. 2023-000009
Case No. 2017-CP-02-1413

Otis Owens, ... Respondent,

v.

Michael Hunt, in his Official Capacity as Sheriff of Aiken County,
Aiken County Sheriff's Office, Aiken County Detention Center,
and Aiken County, ... Appellants.

MEMORANDUM IN SUPPORT OF
APPELLANTS' PETITION FOR REHEARING

The Appellants have petitioned this Court for a rehearing of its recent unpublished decision in *Owens v. Hunt*, Op. No. 2025-UP-271 (S.C. Ct. App. filed July 30, 2025). The Appellants (collectively referred to as "Sheriff") respectfully submit that the following points were overlooked or misapprehended by this Court:

I.

The Appellants contend that the trial court erred in allowing the Respondent Otis Owens to present an unpled claim for assault and battery as a converted gross negligence claim. Additionally, the trial court erred in denying the Appellants' motions for directed verdict and JNOV based on Section 15-78-60(17) of the Tort Claims Act. This Court addressed those issues

in tandem and affirmed the trial court's rulings. The Appellants respectfully request a rehearing.

In its opinion, this Court found that "the trial court properly denied Appellants' motion for JNOV as to this claim because Owens consistently presented evidence for a gross negligence claim." (Slip Op. at 3). The Court proceeded: "Any reference to assault in Owens's claim was used, among other factual allegations, to characterize how Appellants were grossly negligent in their supervision and confinement of Owens." (Slip Op. at 3). In effect, this Court has recognized for the first time a cause of action in South Carolina for a negligent assault and battery. In doing so, the Court overlooked (and in fact did not even reference) the substantial case law cited by the Sheriff demonstrating that negligence and intentional torts are mutually exclusive and cannot be melded to create a negligent/intentional tort.

It is unclear what the Court is referring to as "among other factual allegations." (Slip Op. at 3). Without any doubt, in his Complaint, the Owens makes the following factual allegations as the basis for his claims:

> On or about January 27, 2017, when the plaintiff was going in from the recreation yard, an Aiken County Detention Center corrections guard, in searching the plaintiff, probed the plaintiff's belly button, ran his hands up the inside of the plaintiff's legs, and grabbed and squeezed the plaintiff's testicles. The guard maliciously and aggressively assaulted the plaintiff, going beyond anything necessary to search the plaintiff.

See, Complaint, ¶ 9. (R. 19-20). The guard referred to is Deputy Gibson. There are no additional allegations in the Complaint as to the *factual basis* of the claims. Thus, it is simply incorrect to suggest that Owens did not allege an assault. He used that very word. In fact, in listing his particulars of "gross negligence," Owens alleges that the Appellants were grossly negligent "(a) by assaulting the plaintiff, (b) by battering the plaintiff, and (c) by using excessive force." *See*, Complaint, ¶ 21. (R. 20-21). There can be no reasonable dispute that Owens

improperly brought a gross negligence claim for what is only actionable as an assault and battery.

Yet, despite those allegations, the trial court, and now this Court, have allowed Owens to creatively (and improperly) plead an assault and battery claim under the guise of a gross negligence claim. It cannot be more obvious why that was attempted – to try to plead around and in contravention of Section 15-78-60(17) immunity which the General Assembly enacted *as the public policy of this State* to bar claims, such as this one, from being brought and won against a governmental entity. That is not and should not be the law of this State. The General Assembly did not adopt sovereign immunity for many intentional torts only to allow a party to succeed in pursing an intentional tort by calling it "gross negligence."[1]

The Appellants provided a detailed explanation of existing precedent from this Court and the Supreme Court that has recognized that negligence and intentional torts are mutually exclusive. South Carolina law cannot be clearer that an intentional tort cannot be committed negligently. To reiterate, under South Carolina law, there is no question that a sexual assault is actionable as an intentional tort, namely as an assault and battery claim, and not as a negligence or gross negligence claim. As this Court has held, "[a]ssault and battery is generally classified as an intentional tort, as contrasted with a tort based on negligence." *Longshore v. Saber Security Services, Inc.*, 365 S.C. 554, 619 S.E.2d 5, 9-10 (Ct. App. 2005). In *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607 (2011), the Supreme Court applied that very holding from *Longshore* in describing "assault" and "battery" as intentional torts not subject to comparative fault rules. 709 S.E.2d at 615, n.3. *See also*, *Prior v. South Carolina Medical Malpractice Liability Ins. Joint Underwriting Asso.*, 305 S.C. 247, 407 S.E.2d 655, 657 (Ct. App. 1991) (finding that sexual assault is an intentional tort "despite

[1] *See*, *Wright v. Colleton County School District*, 301 S.C. 282, 391 S.E.2d 564, 570 (1990) (recognizing the "legislative objectives" of the Tort Claims Act are "relieving the government from hardships of unlimited and unqualified liability and preserving the finite assets of governmental entities which are needed for an effective and efficient government").

the use of the terms negligence and recklessness"); *Douglass v. Florence General Hospital*, 273 S.C. 716, 259 S.E.2d 117 (1979) (describing assault and battery as an intentional tort); *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455, 459 (Ct. App. 1997) (describing civil assault and battery as an "intentional tort theory").

In effect, gross negligence does not *per se* include intentional conduct. As indicated, South Carolina law recognizes that intentional torts may not be committed in a negligent manner. In other words, this Court's ruling notwithstanding, negligence and battery are mutually exclusive; there is no such cause of action for a negligent assault and battery or a grossly negligent assault and battery. *See*, *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132, 137 (Ct. App. 2000) (recognizing that "an intentional tort … by definition cannot be committed in a negligent manner"); Restatement (Second) of Torts, § 262, cmt. d ("The definition of negligence given in this Section includes only such conduct as creates liability for the reason that it involves a risk and not a certainty of invading the interest of another. It therefore excludes conduct which creates liability because of the actor's intention to invade a legally protected interest of the person injured or of a third person"). Likewise, in *Wannamaker v. Traywick*, 136 S.C. 21, 134 S.E. 234 (1926), the Supreme Court explained that the term "negligence" is "ordinarily used in common-law terminology to express the foundation for civil liability for injury to person or property, when such injury is not the result of premeditation and formed intention." 134 S.E. at 235. Thus, intent and negligence are mutually exclusive, and there is no claim of gross negligence that flows from intentionally tortious conduct. Moreover, in *Gist v. Berkeley County Sheriff's Dept.*, 336 S.C. 611, 521 S.E.2d 163 (Ct. App. 1999), the South Carolina Court of Appeals recognized that "[f]alse imprisonment is an intentional tort;

negligence is not an element." 521 S.E.2d at 167. Accordingly, the Court concluded that "the gross negligence standard is not applicable" to claims for intentional torts. *Id*.[2]

As an additional citation, the Court is urged to consider the case of *Seabrook v. Town of Mount Pleasant*, 432 S.C. 441, 853 S.E.2d 508 (Ct. App. 2020), where the plaintiff was suing for an arrest and included causes of action for false arrest, malicious prosecution, and gross negligence. In affirming summary judgment on the gross negligence claim, this Court wrote: "*There is also no viable claim for negligence or gross negligence.* Seabrook contends the officers negligently arrested him without probable cause. This is indistinguishable from his malicious prosecution claim." 853 S.E.2d at 510. (Emphasis added).

Thus, *Seabrook* is yet another case where this Court correctly recognized that an intentional tort, like malicious prosecution, cannot be pled and prosecuted as a "gross negligence" claim. However, in the present case, this Court did not address nor refute nor distinguish the existing case law and has ruled that South Carolina law allows a plaintiff to pursue a claim *explicitly* premised on an assault and battery theory – a sexual assault no less -- as a gross negligence claim.

Additionally, and of particular significance to this discussion, the Supreme Court has clearly stated that an intentional tort *cannot be converted into a negligence claim*. In *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006), the Supreme Court ruled

[2] In the related context of force used to effect an arrest, South Carolina law holds an excessive use of force is actionable as an assault and battery. In *Moody v. Ferguson*, 732 F.Supp. 627 (D.S.C. 1989), the district court, applying South Carolina law, explained: "Although a law enforcement officer is privileged to use lawful force, he is nevertheless liable for assault if he uses force greater than is reasonably necessary under the circumstances." 732 F.Supp. at 632. Having found that "the force employed by the defendant in shooting at the plaintiff's car was unreasonable under the circumstances," the district court in *Moody* entered judgment in favor of the plaintiff on the state law assault claim. *Id*. *See also*, *Roberts v. City of Forest Acres*, 902 F.Supp. 662, 671 (1995) ("if a police officer uses excessive force, or 'force greater than is reasonably necessary under the circumstances,' he may be liable for assault or battery").

that a defamation claim may not be converted into a negligence claim. Instead, any allegation that a statement is false or otherwise defamatory must be brought as a defamation cause of action. In that case, the Supreme Court affirmed the Rule 12(b)(6) dismissal of a negligence claim that was based on the same factual allegations as a defamation claim. The Supreme Court explained that "[a] claim that a statement constitutes libel or slander must be brought in a defamation cause of action, which is grounded in and affected by both common law and constitutional law." 629 S.E.2d at 674. *See also*, *McGlothlin v. Henneley*, 370 F.Supp.3d 603, 620 (D.S.C. 2019) (citing *Erickson* in dismissing negligence claim for defamation). The same is true in the case at bar. As the Supreme Court instructs in *Erickson*, Owens cannot re-allege or convert his assault and battery claim into a gross negligence cause of action. Yet, that is precisely what this Court has permitted.

And most certainly, the law does not allow such "creative" pleading in order to circumvent other laws, be it the statute of limitation in *Erickson* or the bar of sovereign immunity in the case at bar. *See*, *Cartee v. Wilbur Smith Associates, Inc.*, 2010 WL 1052082, *5 (D.S.C. 2010) ("The court cannot allow creative pleading to accomplish what [plaintiff] cannot do under law"). Although this Court's *per curiam* opinion is not published and hence is not technically precedent, it does send the wrong message – in effect, the Court is sanctioning such "creative pleading" -- first, by allowing it to stand and second, by failing to even address the issue. The Court does not even reference, let alone refute or distinguish, the binding precedent that *Erickson* presents and which the Sheriff strenuously argued.

Again, it should be patently obvious why Owens pled his assault and battery claim as a gross negligence claim. That was done in order to avoid the bar of Section 15-78-60(17) immunity and the strong and well-established precedent in this State governing sexual assaults in the civil context. There is no question that Owens pursued this case as a sexual assault. Indeed,

the trial court allowed Owens' counsel, over objection, to present extensive testimony on the application of the Prison Rape Elimination Act, 34 U.S.C. § 30301 ("PREA"), which by law applies only to allegations of "rape" as defined by the Act. *See,* 42 U.S.C. § 30309(9) (defining "rape"). Owens should be estopped from denying that his claim was for a sexual assault or "rape" as defined by PREA. Moreover, as examples of evidence supporting the verdict, this Court even points to PREA-related allegations. (Slip Op. at 4) ("Lieutenant Bowman admitted that the detention center's PREA investigation did not comply with agency policies"). Thus, this Court acknowledges that this case involves a sexual assault.

Yet, this Court then ruled in a entirely conclusory manner and without any analysis that "the protection from liability under section 15-78-60(17) does not extend to gross negligence and, thus, is not applicable here." (Slip Op. at 4). Respectfully, that merits further consideration on rehearing. The Court has overlooked that Owens alleged that Deputy Gibson acted maliciously and with the intent to cause harm. *See*, Complaint, ¶ 9. (R. 19-20).[3] More importantly, South Carolina law recognizes that "an intent to harm will be inferred as a matter of law when a person sexually assaults, harasses, or otherwise engages in sexual misconduct towards an adult." *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132, 136 (Ct. App. 2000). That is black letter South Carolina law that should not have been overlooked or ignored by this Court. Because Owens has alleged that Deputy Gibson committed an act of sexual assault or sexual misconduct upon him, the Appellants are entitled to absolute sovereign

[3] Owens is judicially bound by the allegations in his Complaint. In *Postal v. Mann*, 308 S.C. 385, 387, 418 S.E.2d 322 (Ct. App. 1992), this Court held that "parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise." 418 S.E.2d at 323. "The allegations, statements or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action." *Id*. *See also*, *Johnson v. Alexander*, 413 S.C. 196, 775 S.E.2d 697, 700 (2015); *Kitchen Planner, LLC v. Friedman*, 432 S.C. 267, 851 S.E.2d 724 (Ct. App. 2020).

immunity under Section 15-78-60(17) of the Tort Claims Act, which provides: "The governmental entity is not liable for a loss resulting from … employee conduct … which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-60(17). The law infers an intent to harm from Deputy Gibson's conduct as alleged, and thus, the Appellants are entitled to a directed verdict and JNOV based on sovereign immunity. The trial court rejected the Appellants' claim for sovereign immunity under Section 15-78-60(17) by treating Owens' claim as one for gross negligence rather than what it was – a claim for assault and battery. (R. 9-10). That constitutes reversible error. Binding precedent that this Court has overlooked holds that a governmental entity is not liable for a sexual assault committed by an employee, and that is true regardless of how the plaintiff has creatively pled his claim. Quite simply, Owens should not be permitted to plead a sexual assault committed maliciously and with the intent to harm and to rely on PREA regulations which apply only to a *prison rape*, and nonetheless avoid the bar of Section 15-78-60(17) immunity because this Court found it not to be "applicable" without any explanation as to why not. Clearly, and with all due respect, that deserves another look on rehearing.

II.

The Appellants argued that the trial court erred in allowing Owens to proceed with claims or allegations related to the investigation conducted by Detention Center personnel under the Prison Rape Elimination Act, 34 U.S.C. § 30301 ("PREA"). This Court did not address that issue. Instead, this Court points to the manner by which the PREA investigation was conducted as evidence supporting the verdict on the gross negligence claim. (Slip Op. at 4) ("Lieutenant Bowman admitted that the detention center's PREA investigation did not comply with agency policies"). In so doing, the Court overlooked the Sheriff's arguments and the overwhelming precedent establishing that Owens' PREA-related allegations are not actionable because PREA

does not create a private right of action. *See*, *Taylor v. Worrick*, 2016 WL 11190496, *7 (D.S.C. 2016); *Moorman v. Herrington*, 2009 WL 2020669, *2 (W.D. Ky. 2009). That means that PREA cannot serve as the basis for either a § 1983 federal statutory claim or a state law gross negligence claim. As the federal district court held in *Ngono v. Geo Group, Inc.*, 2023 WL 2325573 (W.D. Pa. 2023), "[t]he PREA, however, does not create a cause of action, and thus Plaintiff cannot assert a negligence claim under it." 2023 WL 2325573, *4. "While the PREA was intended in part to increase the accountability of prison officials and to protect the Eighth Amendment rights of Federal, State, and local prisoners, nothing in the language of the statute establishes a private right of action." *Id*. "Likewise, as to Plaintiff's challenge to the sufficiency of the investigation into his rape and assault allegations under the PREA, Plaintiff has no freestanding constitutional right to such an investigation, let alone a cause of action to challenge the sufficiency of the investigation." *Id*. Similarly, in *Franklin v. Franklin County*, 2023 WL 1978907 (E.D. Ky. 2023), the federal district court explained:

> Ms. Franklin alleges that the Defendants are liable for negligence because they failed to enforce 'PREA rules through training and supervision.' She also plainly alleges that they 'had a ministerial duty to enforce PREA's requirements.' However, as the Defendants point out, PREA is not mandatory and does not create a private cause of action. Rather, PREA was enacted to study the problem of rape in prisons and provide funding and expertise to address it.

2023 WL 1978907, *10. *See also*, *Jena v. Geo Group, Inc.*, 2023 WL 114701 (N.D. Tex. 2023) ("Plaintiff states that Doss committed negligence per se by sexually assaulting him because the Prison Rape Elimination Act (PREA) is meant to provide inmates legal protection from rape. The PREA, however, does not create [or] provide a cause of action, and thus Plaintiff cannot assert a claim under it").

In short, the trial court as well as this Court has erred in allowing alleged violations of PREA to serve as the bases for Owens' gross negligence claims which was in direct violation of

controlling federal law. Moreover, this Court did not consider the fact that there is no evidence that the allegations related to a PREA investigation proximately caused any injury to Owens. In sum, the disposition of the PREA-related allegations are deserving of further consideration on rehearing.

CONCLUSION

The Appellants respectfully request that the Court rehear its decision in this case for the reasons argued herein.

Respectfully submitted,

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