

No. 2012-212325

70314

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

L.G. Elrod

Appellant,

v.

Berkeley County Sheriff's
Department and H.
Wayne Dewitt,

Respondent,

Appeal from Berkeley County
Roger M. Young, Sr., Circuit Court Judge (No. 2010-CP-08-4453)

APPELLANT'S PETITION FOR REHEARING
AND REHEARING EN BANC

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SC Court of Appeals

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Statutes

S.C. Code Ann. § 15-3-540	1, 7, 9
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S.C. Code Ann. § 15-78-110	1, 7, 9

Pursuant to Rule 221 of the South Carolina Appellate Court Rules, Appellant-Petitioner L.G. Elrod (“Appellant”) requests that the Court rehear and reconsider the decision denying Appellant’s appeal in this case issued on October 9, 2013.

STATEMENT OF PURPOSE

As counsel for Appellant, we believe for the reasons explained below that the Court’s decision overlooked and misapprehended material factual and legal matters.

The Court held that the two-year statute of limitation for the South Carolina Tort Claims Act barred the action. However, the South Carolina Tort Claims Act does not provide immunity for governmental entities or their employees for acts committed while acting outside the scope of their official duties. Instead, the controlling statute is § 15-3-540 of the South Carolina Code of Laws, which has a three-year statute of limitations, and requires only that a sheriff do an act “in his official capacity and in virtue of his office.” *Id.* The Court misapprehended this distinction, and therefore the case merits a rehearing and rehearing en banc.

FACTUAL AND PROCEDURAL HISTORY

I. Factual History

A. Undisputed Facts

The following facts are not in dispute:

1. On January 10, 2008, Plaintiff L.G. Elrod and Jerry Williams put a “No Trespassing” sign on Plaintiff’s property following a civil dispute with Comcast over the use of Plaintiff’s property. (R. p. 61, lines 1-3.)

2. Later that day, Comcast arrived at the property and tried to access the cable box that was on Plaintiff’s property, and Plaintiff told them that they couldn’t come on the property without a court order or it was trespassing. (R. p. 61, lines 5-7.)

3. Plaintiff called Berkeley County Sheriff’s Department to inform them that Comcast was trying to trespass on his property. (R. p. 61, lines 8-9.)

4. Deputy Randal Timmons arrived, spoke to Comcast, and asked Plaintiff to let them on the property, but he refused. (R. p. 61, lines 12-13.)

5. Following that conversation, Deputy Timmons spoke with Comcast again, and they left. (R. p. 61, lines 14-15.)

6. Later that day (January 10, 2008), Sheriff H. Wayne DeWitt sent two squad cars and several deputies from the Berkeley County

Sheriff's Department out with their lights flashing to assist Comcast in trespassing on Plaintiff's property. (R. p. 61, lines 18-20.)

7. Deputy Clifford McElvogue informed Plaintiff that this equipment belonged to Comcast and that Comcast had a right to work on it. He then told Plaintiff that if he interfered with Comcast, the Sheriff's Department would "lock him up." (R. p. 62, lines 1-3.)

8. The Police Reports from this day reflect that the Deputies were there on a civil matter only. (R. p. 72; R. p. 75.)

9. The Sheriff's Department restrained Plaintiff while Comcast trespassed on Plaintiff's property. (R. p. 62, lines 4-5.)

10. The Sheriff's Department did not provide a court order authorizing the use of Plaintiff's property. (R. p. 62, lines 6-7.)

11. On January 15, 2008, Plaintiff turned the cable box off again because of another civil dispute with Comcast over the use of Plaintiff's property. (R. p. 63 lines 1-2.)

12. Once again, Sheriff H. Wayne DeWitt sent out Berkeley County Sheriff's Deputies, without a court order, to restrain Plaintiff while Comcast trespassed and worked on Plaintiff's property. (R. p. 63, lines 3-5.)

13. The Police Reports from this day also reflect that the Deputies were there on a civil matter only. (R. p. 72; R. p. 75.)

B. Disputed Material Facts

The following facts are in dispute:

1. Sheriff H. Wayne DeWitt stated that his “Deputies who interacted with Plaintiff on January 10 and 15, 2008 were acting within the scope of their official duties”(R. p. 64, lines 10-14.) However, Sheriff H. Wayne DeWitt informed Mr. Elrod that he had sent his Deputies to Mr. Elrod’s property on a civil matter to permit Comcast to trespass on Mr. Elrod’s property (R. p. 64, lines 11-19); as such there is a material fact in dispute as to whether or not Sheriff H. Wayne DeWitt was acting within his official duties.

2. Deputies Clifford McElvogue and Randal Timmons of the Berkeley County Sheriff’s Department both stated that “[a]t all times relative to my interaction with the Plaintiff, and which is the subject of his Complaint, I was acting as an employee of the Berkeley County Sheriff’s Department and within the scope of my official duties as a Berkeley County Sheriff’s Deputy.” (R. p. 44, lines 2-4; R. p. 51, lines 2-4.) However, the Deputies did not acquire a court order prior to permitting Comcast to trespass on Mr. Elrod’s property. (R. p. 62, lines 6-7; R. p. 57, lines 8-14.) Moreover, the Deputies in their reports state that they were only at Mr. Elrod’s property on a “civil matter.” (R. p. 72; R. p. 75.)

Therefore, there is a material fact in dispute as to whether or not the Deputies were acting within their official duties.

II. Procedural History

Plaintiff/Appellant L.G. Elrod ("Appellant") filed this case *pro se* in the South Carolina Court of Common Pleas for Berkeley County on December 16, 2010. Appellant brought the action for False Imprisonment and Unlawful Detention-Abuse of Process against Defendants Berkeley County, Berkeley County Sheriff's Department, and H. Wayne Dewitt (Berkeley County Sheriff).

Defendants moved the court on January 11, 2011 for an order dismissing the action pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure on the grounds that Appellant's Complaint failed to state facts sufficient to constitute a cause of action. Defendants' motion was based on the grounds that, pursuant to the South Carolina Tort Claims Act, the applicable two-year statute of limitation (S.C. Code Ann. § 15-78-110) barred Appellant's claims. However, Appellant argued that the applicable statute of limitations was three years pursuant to § 15-3-540 of the Code of Laws of South Carolina because Defendants' actions were not within the scope of their official duties and therefore outside the shield of the Tort Claims Act.

The Honorable Deadra L. Jefferson granted the motion as to Defendant Berkeley County, but denied the motion as to Defendants' Berkeley County Sheriff's Department and H. Wayne Dewitt. The court stated that the allegations in Appellant's Complaint gave rise to competing inferences on a question of material fact as to whether the Berkeley County Sheriff's Department and H. Wayne Dewitt were acting in their official capacity and whether their actions were within the scope of their duties.

Berkeley County Sheriff's Department and H. Wayne Dewitt ("Respondents") filed a Motion to Reconsider on June 22, 2011, and the court denied Respondents' Motion to Reconsider on June 30, 2011.

Respondents filed a Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure on January 17, 2012. During that hearing, the non-moving party presented matters outside the pleadings. Counsel for Respondents moved that the motion should be treated as one for summary judgment as prescribed in Rule 56 of the South Carolina Rules of Civil Procedure. However, Appellant, at that time, was appearing *pro se* and in order to provide all parties involved a reasonable amount of time to present all pertinent materials, the Honorable Roger M. Young continued the converted motion.

Respondents' Motion for Summary Judgment was heard on May 9, 2012 before the Honorable Roger M. Young. The court granted Respondents' Motion for Summary Judgment stating that S.C. Code Ann. § 15-78-110 (and the applicable two year statute of limitations) applied, because the court found no evidence in the record that Respondents were acting outside the scope of their official duties the Appellant's Complaint was barred by the applicable two-year statute of limitations.

On May 24, 2012, Appellant received written notice of entry of the summary judgment order, and on June 19, 2012, Appellant served his Notice of Appeal.

On October 9, 2013, the Court affirmed the grant of Respondents' Motion for Summary Judgment. This Petition for Rehearing or Rehearing En Banc follows.

ARGUMENT

I. The Court overlooked or misapprehended the distinction between § 15-3-540 and § 15-78-110.

The Berkeley County Sheriff's Department and H. Wayne Dewitt were acting outside the scope of employment in their interaction with L.G. Elrod. Therefore, the statute of limitations governing the action is not the two-year limit of the South Carolina Tort Claims Act, but the three-year statute of limitations found in § 15-3-540 of the Code of Laws of South

Carolina governing civil actions against a sheriff doing an act “in his official capacity and in virtue of his office.”

The cardinal rule of statutory interpretation is to ascertain the intent of the legislature. *State v. Scott*, 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002); *City of Camden v. Brassell*, 326 S.C. 556, 560, 486 S.E.2d 492, 494 (Ct. App. 1997). It is a firm principal in South Carolina that a statute should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute. *Davis v. NationsCredit Fin. Servs. Corp.*, 326 S.C. 83, 484 S.E.2d 471 (1997); *Daisy Outdoor Adver. Co. v. South Carolina Dep't of Transp.*, 352 S.C. 113, 120, 572 S.E.2d 462, 466 (Ct. App. 2002); *Stephen v. Avins Constr. Co.*, 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996).

Furthermore, the legislature is presumed to act intentionally when it includes language in one section and omits it in another. *See Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000) (“The canon of construction ‘*expressio unius est exclusio alterius*’ or ‘*inclusio unius est exclusio alterius*’ holds that to express or include one thing implies the exclusion of another, or of the alternative.”) (internal citation omitted).

It does not follow that the legislature would create two different statutes of limitation for the same claim. Therefore, doing an act in one’s “official capacity and in virtue of his office” is necessarily different from

action within the “scope of official duty. According to §15-78-30(i) of the Code of Laws of South Carolina, “‘Scope of official duty’ or ‘scope of state employment’ means (1) acting in and about the official business of a governmental entity and (2) performing official duties.” *Id.*

“Official capacity and in virtue of his office” is a lower threshold which incorporates acting under the color of one’s authority, but not engaging in official government business or performing official duties. The Berkeley County Sheriff’s Department and Sheriff Dewitt were acting under the appearance of the authority of Berkeley County Sheriff’s Department, but were not in fact performing official duties on January 10, 2008 and January 15, 2008. For this reason, § 15-3-540 applies, rather than §15-78-110. The Court misapprehended this distinction, and therefore constrained its analysis only to the South Carolina Tort Claims Act.

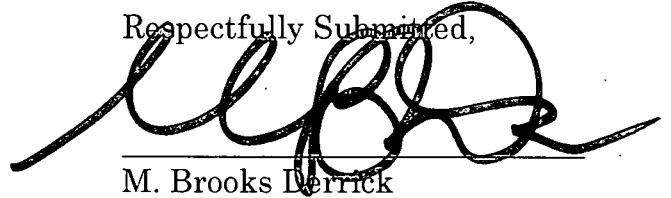
The legislature chose to use different language in describing the acts covered by the South Carolina Tort Claims Act than it had in § 15-3-540. The South Carolina Tort Claims act refers to actions which are “official business” or “official duties,” while § 15-3-540 refers to acts in “official capacity and virtue of his office.” Therefore, the language of the South Carolina Tort Claims Act covers different, more specific acts because it refers to actual official duties. Conversely, § 15-3-540 refers to

duties that may normally be conducted by that individual or office in a broader sense, but its application is limited because it covers only sheriffs, coroners, or constables.

CONCLUSION

Appellant respectfully requests that this Court grant rehearing or rehearing en banc, reverse the decision below, and direct the entry of judgment for Appellant.

Respectfully Submitted,

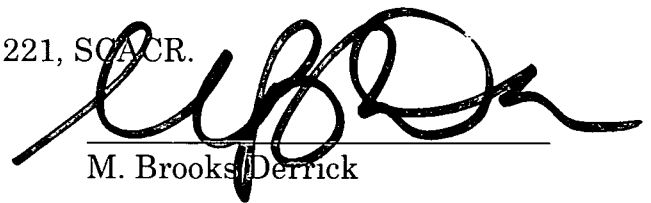
A handwritten signature in black ink, appearing to read 'M. Brooks Derrick', written over a horizontal line.

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CERTIFICATION OF COUNSEL

The undersigned certifies that this Petition for Rehearing and
Rehearing En Banc complies with Rule 221, SCACR.

November 7, 2013



M. Brooks Derrick

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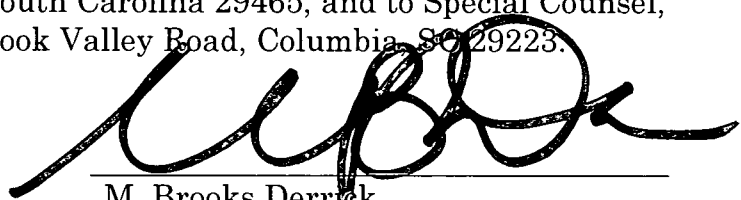
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SC Court of Appeals

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing and Rehearing En Banc by U.S. Mail, postage prepaid, on November 7, addressed to the Attorney for Respondents, G. Wade Cooper, Post Office Box 2424, Mount Pleasant, South Carolina 29465, and to Special Counsel, Deborah H. Sheffield, 117 Brook Valley Road, Columbia, SC 29223.



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November 7, 2013

Via U.S. Mail

Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
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***Re: Berkeley County Sheriff's Department and H. Wayne Dewitt v.
L.G. Elrod, Case No. 2010-CP-08-4453***

Dear Ms. Kitchings:

Enclosed please find an original and six copies of the Appellant's Petition for Rehearing En Banc. Additionally, enclosed please find a check for the \$25.00 filing fee.

Should you have any questions or require additional information, please don't hesitate to contact the office at (843) 410-2545.

With kind regards,

A handwritten signature in black ink that reads 'Shannon V. Hodges'.

Shannon V. Hodges
Assistant to M. Brooks Derrick

Enclosure(s): as stated

cc: G. Wade Cooper (via email and U.S. mail)
Deborah H. Sheffield (via email and U.S. mail)

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