

THE STATE OF SOUTH CAROLINA  
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY  
Court of General Sessions

Honorable Alison R. Lee  
Presiding Judge

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Case No. 2011-GS-40-0580  
2010-GS-40-0586

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The State,.....Respondent,

v.

Alirio Ortiz,.....Appellant.


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**NOTICE OF APPEAL**

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Alirio Ortiz would appeal the decision entered by the Honorable Alison R. Lee dated, filed, and received by this office on April 18, 2012. A copy of this Order is attached.

This 25<sup>th</sup> day of April, 2012

  
James H. May  
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Attorney for Appellant

Other Counsel of Record:  
Assistant Solicitors April Sampson and Justin Williams  
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Attorney for Respondent

**RECEIVED**

APR 25 2012

S.C. Supreme Court

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**PROOF OF SERVICE**

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I hereby certify that a true copy of the Notice of Appeal in the above-referenced case has been served upon opposing counsel by delivering same this date to Office of the Solicitor, Fifth Judicial Circuit, Richland County Judicial Center, 1701 Main Street, Columbia, South Carolina 29201.

This 25 day of April, 2012

  
James H. May  
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Attorney for Respondent

RICHLAND COUNTY  
FILED

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS  
) FIFTH JUDICIAL CIRCUIT

COUNTY OF RICHLAND

2012 APR 25 8 PM

State of South Carolina,

JEANETTE W. McBRIDE  
C.C.P. & G.S. Indictment Nos: 2011-GS-40-0580  
2011-GS-40-0586

v.

**ORDER**

Alirio Ortiz,

Defendant.

This matter is before the Court pursuant to the Defendant's Motion Asserting Statutory Immunity from Prosecution. Defendant's motion is based on the Protection of Persons and Property Act (hereinafter "the Act"), S.C. Code Ann. §§ 16-11-410, et seq. Defendant was indicted for two counts of Assault and Battery of a High and Aggravated Nature following an altercation during which the Defendant is alleged to have struck Donald and Maria Calef with a machete. On January 3, 2012, the Defendant filed a Motion to Enforce the Protections of S.C. Code Ann. § 16-11-440(A) seeking an Order of Immunity from prosecution under the Act and requesting a hearing to determine whether the Act applies to this case. A hearing on this matter was held on January 12, 2012. The State was represented by April Sampson and Justin Williams of the Fifth Circuit Solicitor's Office. Defendant was represented by Kris Hines, and James May of the Public Defender's Office.

**FINDINGS OF FACT**

This Court makes the following findings of fact based upon the testimony of the witnesses and the burden of the Defendant to establish his case by a preponderance of the evidence. At the hearing, the following witnesses testified: Herbert Smith, Alirio Ortiz, Donald Calef, Maria Calef, David Calef, Frieda Hernandez, and Deputy Robert Stoker.

The Defendant lives at 1504 Omega Drive, Columbia, South Carolina. Cynthia Calef, the daughter of Donald and Maria Calef, lives next door. There has been an ongoing property line dispute between the two parties resulting in pending civil litigation. On August 7, 2010, Mr. Calef received a phone call from his daughter Cynthia alerting him that the Defendant was removing survey stakes that had been placed on the property a few days previously by a surveyor. Mr. Calef arrived at Omega Drive to witness the Defendant digging a hole with a post-

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hole digger on or in front of Cynthia Calef's property. The hole was located on or near the border between the two properties. Defendant intended to erect a fence around his front yard. Defendant testified that the Calefs parked their vehicle on the Defendant's property in his driveway. None of the other witnesses testified similarly. Mr. Calef called the Richland County Sheriff's Department to report that Defendant was disturbing the surveyor's stake. He then called his wife asking her to bring the paperwork relating to the property dispute. At some point, Defendant was using a hose to fill the hole and sprayed mud from the hole he was digging onto Mr. Calef.

Mrs. Calef was driven to the property by her son David. When they arrived, Ms. Calef handed her husband the requested documents and was similarly muddied by the Defendant. Mrs. Calef told her husband to call 911 and request emergency assistance. Defendant claims that he was chased by Mrs. Calef who was hitting him with her purse. Defendant also claims that Mr. Calef picked up the post-hole digger. In response, Defendant picked up a machete that was near the hole he was digging and used it to defend himself, striking Mr. Calef twice on the shoulder. Mrs. Calef began screaming. At that point, David Calef exited the car to assist his parents. The Defendant began to swing his machete at the Calefs and struck Mrs. Calef's hands, which she was using to protect herself and her son from the Defendant.

In the middle of this incident, a neighbor, Mr. Herbert Smith, observed Mrs. Calef hitting the Defendant with some type of folder. He then approached the parties to break up the altercation. Mr. Smith pushed Mrs. Calef to the ground and placed David Calef in a chokehold to calm the situation. Mr. Smith observed the Defendant with the machete in his hand but did not see him strike anyone. The police arrived shortly thereafter. The first responding officer, Deputy Robert Stoker, observed the parties standing in front of the properties in the portion of the road typically reserved for an easement adjacent to the street. According to Officer Stoker, when the Defendant noticed the approaching officers, he began walking toward his house with the machete, where he eventually dropped it. Defendant was not on his property when Officer Stoker first saw him. None of the witnesses observed the dispute occurring within either the Calef's or Defendant's property line. Only the Defendant states that the altercation occurred on his property in his driveway.

The Defendant was removed from the area by Deputy Stoker and questioned regarding the incident. When questioned, the Defendant did not mention that Mrs. Calef hit him with her

purse or Mr. Calef came at him with a post-hole digger. He also did not mention to the officer that he was brandishing the machete in self-defense.

### DISCUSSION

The Defendant is seeking a grant of immunity from prosecution pursuant to the Act. Specifically, the Defendant claims that S.C. Code Ann. § 16-11-440(A) applies. That section states:

A person is presumed to have a reasonable fear of imminent peril of death or great bodily injury to himself or another person when using deadly force that is intended or likely to cause death or great bodily injury to another person if the person:

- (1) against whom the deadly force is used is in the process of unlawfully and forcefully entering, or has unlawfully and forcibly entered a dwelling, residence, or occupied vehicle, or if he removes or is attempting to remove another person against his will from the dwelling, residence, or occupied vehicle; and
- (2) who uses deadly force knows or has reason to believe that an unlawful and forcible entry or unlawful and forcible act is occurring or has occurred.

S.C. Code Ann. § 16-11-440(A). However, that section applies to the forcible entry of a dwelling or occupied vehicle. Dwelling is defined by the statute as a “building or conveyance of any kind, including an attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging there at night.” S.C. Code Ann. § 16-11-430. This section does not apply to the facts at hand because, by all accounts, the dispute occurred outside of a dwelling and did not involve an occupied vehicle.

The Court finds that the appropriate subsection under which to analyze the facts of this case is Section 16-11-440(C). Section 16-11-440(C) provides that one “not engaged in unlawful activity who is attacked in a place where he has a right to be, including, but not limited to, his place of business has no duty to retreat.” Such a person may use deadly force “if he reasonably believes it to be necessary to prevent death or great bodily injury to himself or another person, or to prevent the commission of a violent crime...” Id.

The primary and cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007). Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. Mid-State Auto Auction of Lexington, Inc. v. Altman, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). “Where the statute’s language is plain and

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unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Pittman, 373 S.C. at 561, 647 S.E.2d at 161 (citing Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).

**A. Defendant was not attacked on his property.**

Evidence was presented that the Defendant was digging a hole on or near the border in front of his and Cynthia Calef's homes, and that his digging of the hole disturbed survey markers indicating the property line. The altercation that ensued spilled from that area onto the public property outside of Cynthia Calef's home. This Court finds that the portion of the altercation involving the assault by the Defendant did not occur on the Defendant's property. While being examined by the Court, Defendant stated that David Calef and Mrs. Calef parked their vehicle on the Defendant's property in his driveway. No other witness, including Defense witness Herbert Smith testified similarly. In addition, Deputy Stoker stated that the parties "were on the easement in front of the fences, right between the property lines" when he arrived at the scene. No witness testified that the Defendant and the Calefs were arguing behind the fence on property that belonged to the Defendant. Deputy Stoker testified that when the Defendant saw the police, he picked up his machete and started walking towards his home. At that time, Deputy Stoker testified that the Defendant was located "in front of his fence, in front of his house." This is consistent with other witness statements recounting the incident occurring in the street or on the public easement in front of the parties' properties. Certainly, the Defendant had a right to be on the public easement. Defendant claims he was attacked first by the Calefs.

**B. Defendant was not engaged in a lawful activity.**

Defendant has not shown by a preponderance of evidence that he was engaged in a lawful activity. As both parties have conceded, prior court cases interpreting the Act involved a party who was clearly on his own property. Here, there is a question about whether the Defendant was on his own property digging the post hole. Without making a determination as to the property line, this Court can find that Mr. Ortiz may have been trespassing onto Cynthia Calef's property, an unlawful activity. In addition, there was testimony from Mr. and Mrs. Calef that the Defendant intentionally sprayed water and mud on their clothes when they questioned the Defendant about the hole he was digging on or near the property line. The unconsented touching of the Calefs by an instrument controlled by the Defendant would be a battery, another unlawful activity.

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**C. Use of deadly force wasn't necessary to prevent death or great bodily injury.**

Section 16-11-440(C) allows a person to use "force, including deadly force, if he reasonably believes it is necessary to prevent death or great bodily injury to himself or another person." Great bodily injury is defined under Section 16-11-430 as "bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted loss or impairment of the function of the bodily member or organ." Defendant has not shown by a preponderance of evidence that the use of force was necessary to prevent death or great bodily injury to him. When questioned by Deputy Stoker, the Defendant did not mention that any of the Calefs hit him. He did not mention that Mrs. Calef struck him with a purse. He did not mention that Mr. Calef approached him with a post-hole digger. The Defendant did not say that any of the Calefs did anything with the post-hole digger other than pick it up. Deputy Stoker's statement is consistent with that of the Calefs.

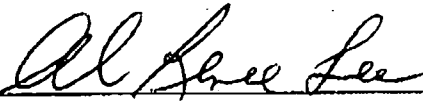
Defendant testified Mrs. Calef instigated the physical confrontation by hitting him with her purse and that he brandished the machete to defend against Mrs. Calef's purse and Mr. Calef's use of the post-hole digger. This Court finds that version of the facts unpersuasive. When Defendant lifted the machete to swing it at the Calefs, Defendant must have had a reasonable belief that he would be killed or seriously harmed. Further, Mr. Smith testified that Mrs. Calef struck Defendant with a folder. The Defendant has not shown that a reasonable person in his situation would have used force such as a machete to repel any threat. Defendant denied using force towards the Calefs at all. When questioned by his attorney, Defendant denied hitting anyone with the machete, stating that "he just had it in [his] hand." Defendant's contention that no force at all was used would further make the Act inapplicable to the present set of facts.

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**ORDER**

For the foregoing reasons, the Defendant has not proven by a preponderance of evidence that he is entitled to receive immunity from prosecution as prescribed in S.C. Code Ann. § 16-11-410.

**AND IT IS SO ORDERED.**

  
ALISON RENEE LEE  
Presiding Judge

April 18, 2012  
Columbia, South Carolina

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2010) (emphasis supplied).

The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature. *Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning. *Id.* When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must [\*409] apply the statute according to its literal meaning. *Sloan v. Hardee*, 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007).

Black's Law Dictionary defines "immune" as "having immunity" or being "exempt from a duty or liability." Black's Law Dictionary (9th ed. 2009). "Prosecution" is defined as "a criminal proceeding in which an accused person is tried." *Id.*

The trial court found the plain meaning of the immunity provision was to shield a person from a "full blown criminal trial." Accordingly, the trial court found the only way this statutorily granted right [\*\*\*6] could be meaningfully enforced was for the defendant to be able to raise immunity in a pre-trial motion.

Whether immunity under the Act should be determined prior to trial is an issue of first impression in this state. Further, the Act does not explicitly provide a procedure for determining immunity. In deciding this matter, we find guidance from several other states that have addressed similar statutory immunity provisions.

In *Fair v. State*, the Supreme Court of Georgia held the trial court erred in refusing to rule on the defendants' immunity<sup>3</sup> prior to trial. *Fair v. State*, 284 Ga. 165, 166, 664 S.E.2d 227, 230 (Ga. 2008). Particularly, the Fair court found that by the plain meaning of "immune from prosecution," the statute must be construed to bar criminal proceedings against persons who used force under the circumstances set forth in the statute, and that this determination must be made before the trial commences. *Id.*

3 The defendants argued they were immune from prosecution under *OCGA* § 16-3-24.2, which provides in relevant part that "[a] person who uses threat or force in accordance with Code Section . . . 16-3-23 or . . . 16-3-24 shall be immune from

criminal prosecution . . . ."

In [\*\*\*7] the recent decision of *Dennis v. State*, 51 So.3d 456 (Fla. 2010), the Supreme Court of Florida approved the reasoning of *Peterson v. Florida*, 983 So.2d 27 (Fla.1st D.C.A. 2008), where the First District Court of Appeal found that by enacting a statute<sup>4</sup> similar to the Act at issue here, the legislature intended to establish a true immunity and not merely an affirmative defense. The Dennis court therefore [\*410] found the plain language of the statute grants defendants a substantive right to assert immunity from prosecution and to avoid being subjected to a trial. *Dennis*, 51 So.3d at 462. The Dennis court [\*\*665] concluded that, where a defendant files a motion to dismiss on the basis of Florida's "Stand Your Ground" statute, the trial court should conduct a pre-trial evidentiary hearing to decide the factual question of the applicability of the statutory immunity. *Id.*

4 See *F.S.A.* § 776.032 (Supp. 2010).

Likewise, we find that, by using the words "immune from criminal prosecution," the legislature intended to create a true immunity, and not simply an affirmative defense. We also look to the language of the statute that provides, "the General Assembly finds that it is proper for law-abiding citizens to [\*\*\*8] protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." We agree with the circuit court that the legislature intended defendants to be shielded from trial if they use deadly force as outlined under the Act. Immunity under the Act is therefore a bar to prosecution and, upon motion of either party, must be decided prior to trial. Accordingly, we find the trial court properly made a pre-trial determination of respondent's immunity.

## II. Respondent's immunity under the Act

The State argues the circuit court erred in finding respondent was entitled to immunity under the Act. We disagree.

The circuit court found that, applying any standard of proof, respondent would be entitled to immunity under the Act.

The proper standard of proof in determining immunity under the Act is also a novel issue in this state. Other states have addressed this matter. In *Dennis*, the

Florida Supreme Court rejected the State's argument that the pre-trial hearing on immunity should test merely whether the State has probable cause to believe the defendant's use of force was not legally justified. *Dennis*, 51 So.3d at 463. [\*\*\*9] Specifically, the Dennis court found the grant of immunity from "criminal prosecution" under the statute "must be interpreted in a manner that provides the defendant with more protection from prosecution for a justified use of force than the probable cause determination previously provided to the defendant by [\*411] rule." Id. Accordingly, the court found the procedure set out in *Peterson*, supra, best effectuated the intent of the legislature. The Peterson court held that when a defendant raises the question of statutory immunity pre-trial, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches. *Peterson*, 983 So.2d at 29.

Likewise, we hold that when a party raises the question of statutory immunity prior to trial, the proper standard for the circuit court to use in determining immunity under the Act is a preponderance of the evidence. Turning to the facts of this case, we find there is evidence to support the circuit court's finding that respondent was entitled to immunity. Templeton's testimony and statements showed that, at the time the victim was shot, she was between the victim and respondent, trying to remove the victim [\*\*\*10] from the

dwelling. The victim, however, continued to force his way onto the porch. We find respondent showed by a preponderance of the evidence that the victim was in the process of unlawfully and forcefully entering respondent's home in accordance with § 16-11-440. Accordingly, the circuit court properly found respondent was entitled to immunity under the Act.

We further find the circuit court's order of dismissal was proper because it found respondent was entitled to immunity under the Act under any standard of proof. In other words, had the circuit court held respondent to a stricter standard of proof, such as clear and convincing evidence or even proof beyond a reasonable doubt, the circuit court would have nonetheless found respondent was entitled to immunity.

CONCLUSION

We conclude a pre-trial determination of immunity under the Act using a preponderance of the evidence standard is proper and that respondent was entitled to immunity under the Act. Accordingly, the findings of the circuit court are

AFFIRMED.

TOAL, C.J., BEATTY, KITTREDGE and HEARN, JJ., concur.