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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.

**REPLY 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The Appellants have petitioned this Court for a rehearing of its recent unpublished decision in *Owens v. Hunt*, Op.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 Respondent Otis Owens has now filed a return as directed by the Court.

The Appellants contend that the trial court erred in allowing the Respondent 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.

The Respondent Owens disavows that this action was brought or should have been brought as an assault and battery claim. He even claims that he did not allege any intentional conduct on the part of Deputy Matthew Gibson, who conducted the frisk search at issue. Those assertions ring hollow. Owens is deliberately ignoring his very own Complaint. As a reminder, the *only* factual allegations pled as the basis for his claims are as follows

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). 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). It is equally incorrect to allege that he did not allege intent to harm. He alleged that Gibson “maliciously and aggressively assaulted the plaintiff.” (R. 20). In his return, Owens argues that the references in his Complaint to an “assault” were “descriptive” but not “dispositive.” That is meaningless lawyer-speak and entirely unsupported by any authority.

What is clear and should not have been disregarded by this Court is that Owens brought what is distinctly and exclusively an assault and battery claim under the guise of a gross negligence claim, and that such “creative pleading” violates the Supreme Court’s decision in *Erickson v. Jones Street Publishers, LLC*, 368 S.C. 444, 629 S.E.2d 653 (2006), holding that an intentional tort *cannot be converted into a negligence claim*. Owens’ tactics were challenged in

the trial court to no avail. (R. 918-920). They are challenged again on appeal. In the trial court, Owens' counsel argued that the causes of action are interchangeable. (R. 919) ("Of course a sexual assault is grossly negligent"). On appeal, Owens has now taken a different approach – obviously in recognition that the arguments at the trial level were mistaken and not sustainable. On appeal, Owens now claims that he never argued a sexual assault, which is untenable (and quite frankly disingenuous) when Owens relied on and made an issue of Prison Rape Elimination Act (PREA) regulations which are only applicable where a detainee alleges a "rape" as defined by the Act. *See*, 42 U.S.C. § 30309(9) (defining "rape"). In his closing argument, Owens' counsel even argued to the jury that "[t]he Prison Rape Elimination Act exists to eliminate *sexual assault* in jail by inmates or guards and it's extremely important." (R. 979). (Emphasis added). Thus, this Court should not buy what Owens is claiming – he very much tried this case as a sexual assault case but claims it is a "gross negligence" action solely to circumvent Section 15-78-60(17) immunity.

Owens is also mistaken in his argument that Section 15-78-60(17) is not applicable because it should be read as having a gross negligence exception interpolated therein. Of note, neither Owens nor this Court has cited any South Carolina appellate decision that "interpolates" the gross negligence exception of Section 15-78-60(25) into Section 15-78-60(17). Frankly, the reason for that is such an interpolation is both illogical and unworkable. Section 15-78-60(17) is designed to provide immunity to the government for conduct constituting the intent to harm, crimes of moral turpitude, acts of actual malice, and acts of actual fraud. Those constitute intentional conduct by a governmental employee, and the General Assembly has determined that the government (i.e., the taxpayers) may not be held liable for such intentional conduct. From a logical and legal standpoint, intentional conduct may not be committed in a grossly negligent

manner. The Appellants have cited numerous cases clearly stating that negligence and intentional torts are mutually exclusive. In other words, an intentional tort may not be committed negligently, and accordingly, there is no such thing as a negligent assault and battery in our jurisprudence. Thus, it defies logic as well as the legislative intent and public policy underlying Section 15-78-60(17) immunity to conclude that Section 15-78-60(17), which provides immunity from liability for an employee's intentional conduct, should be read as bearing a gross negligence exception. As indicated, there is no precedent whatsoever for reading and applying Section 15-78-60(17) as having a gross negligence exception under any scenario.

Finally, Owens futilely attempts to distinguish or limit the holding in *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132 (Ct. App. 2000), by stating that it is an “insurance case.” He suggests that the meaning of “intent to harm” is somehow different under the law for an insurance case vis-a-vis a Tort Claims Act case. Not surprisingly, no authority is cited for that “distinction without a difference” proposition. 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.” *Barrett*, 530 S.E.2d at 136. That holding is binding precedent and is just as applicable in construing the term “intent to harm” in Section 15-78-60(17) as it is in an “insurance case.” As case in point, in a *per curiam* opinion from Judges Williams, Geathers, and Hill in the case of *Farr v. Lott*, 2019 WL 2051300 (S.C. Ct. App. 2019), this Court – including two of three judges on the panel in the case at bar – cited *Barrett* in a Tort Claims Act case applying Section 15-78-60(17) immunity. That demonstrates that the intent to harm inference from *Barrett* is obviously applicable to this case.

Based on the foregoing discussion, the Appellants respectfully renew their request that the Court rehear its decision in this case for the reasons argued in the petition for rehearing and herein.

Respectfully submitted,

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