

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

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S.C. Supreme Court

Unpublished Opinion No. 2013-UP-381 (S.C. Ct. App. filed Oct. 9, 2013)

L.G. Elrod

Petitioner,

v.

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

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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Attorney for Petitioner

Other Counsel of Record:
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Attorney for Respondent

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APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2010-CP-08-4453

L.G. Elrod

Appellant,

v.

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

Respondent,

RECORD ON APPEAL

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1. J. Jefferson Order, filed June 16, 2011;
2. J. Jefferson Order, filed June 30, 2011;
3. J. Young Order, filed May 21, 2012;
4. Complaint, filed December 16, 2010;
5. Motion to Dismiss, filed January 11, 2011;
6. Motion to Reconsider, filed June 22, 2011;
7. Motion for Judgment on the pleadings, filed October 28, 2011;
8. Hearing Transcript – May 9, 2012;
9. Affidavit of Timmons with attachments – April 21, 2011;
10. Affidavit of McElvogue with attachments – April 21, 2011;
11. Affidavit of Williams – April 21, 2012;
12. Affidavit of Elrod – April 24, 2012;
13. Affidavit of DeWitt – April 27, 2012;
14. Affidavit of Derrick with attachments – May 8, 2012.

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

L.G. ELROD,

Plaintiff,

v.

BERKELEY COUNTY, BERKELEY
COUNTY SHERIFF'S DEPARTMENT,
AND H. WAYNE DEWITT.

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CASE NO. 2010-CP-08-04453

ORDER

FILED
2011 JUN 16 PM 1:14
HARRY P. BROWN
CLERK OF COURT
BERKELEY COUNTY, SC

Presiding Judge:
Date of Hearing:
Plaintiff's Attorney:
Defendants' Attorney:
Court Reporter:

Deadra L. Jefferson
April 26, 2011
Pro Se
G. Wade Cooper, Esquire
Anne Meyer

The instant matter came before the Court on April 26, 2011 on the Defendants' Motion to Dismiss with prejudice pursuant to Rule 12(b)(6), SCRPC. Present at the hearing were the Plaintiff, who appeared *pro se*, and G. Wade Cooper, Esquire, who appeared on behalf of the Defendants. For the reasons set forth below, the Defendants' Motion is granted as to Defendant Berkeley County and denied as to Defendants Berkeley County Sheriff's Department and H. Wayne Dewitt.

FACTUAL BACKGROUND

The Plaintiff alleges that on or about January 10, 2008 and January 15, 2008, the Defendant sent two (2) squad cars and Sheriff's deputies from Berkeley County Sheriff's Department to Plaintiff's property and restrained Plaintiff from his property while Comcast Cable worked on their equipment on Plaintiff's property. (Compl. ¶¶ 6, 9.) Plaintiff alleges that

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the Defendant did this without court order or any legal papers of any kind. (Id.) Plaintiff further alleges that this was done after Comcast Cable was put on trespass notice by Attorney Mary Leigh Arnold. (Compl. ¶ 6.)

Plaintiff initiated this action by the filing of a Summons and Complaint on December 16, 2010 which sets forth causes of action for False Imprisonment and Unlawful Detention-Abuse of Process. On January 11, 2011, the Defendants, in lieu of an Answer, filed Defendants' Notice of Motion and Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC on grounds that the Complaint fails to state facts sufficient to constitute a cause of action. The basis of Defendants' Motion is the Defendants are governmental entities as defined by the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq., and are barred by the applicable statute of limitations.

STANDARD OF REVIEW

According to South Carolina law, "[u]nder Rule 12(b)(6) of the South Carolina Rules of Civil Procedure, a defendant may move to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action." Brazell v. Windsor, 376 S.C. 83, 87, 655 S.E.2d 736, 737 (2007), rev'd on other grounds, 384 S.C. 512, 682 S.E.2d 824 (2009). Furthermore, "[t]he decision to grant a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint." Id. at 87, 655 S.E.2d at 737-38. In ruling on a motion to dismiss, the trial court must determine "whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief." Id. at 87, 655 S.E.2d at 738. Accordingly, "if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory," a South Carolina court must refuse to grant a motion to dismiss. Id.

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JH

CONCLUSIONS OF LAW

The Tort Claims Act is the exclusive remedy available for any tort committed by a governmental entity, its employees or its agents unless the employee's conduct was not within the scope of his official duties or constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann. §§ 15-78-20(b), 15-78-70(b). A governmental entity means the State and its political subdivisions. Id. at § 15-78-30(d). Defendants Berkeley County and Berkeley County Sheriff's Department are governmental entities as defined by Section 15-78-30(d). Likewise, Defendant Dewitt, as Sheriff of Berkeley County, is considered a "state official." Cone v. Nettles, 308 S.C. 109, 112, 417 S.E.2d 523, 524 (1992).

The Defendants argue that S.C. Code Ann. § 15-78-110 provides the applicable statute of limitations as to all Defendants, and, thus, all Defendants should be dismissed with prejudice for failure to file the Summons and Complaint within the applicable time period. Section 15-78-110 provides in relevant part, "[A]ny action brought pursuant to [the South Carolina Tort Claims Act] is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered" S.C. Code Ann. § 15-78-110.

The Plaintiff argues that Section 15-3-540 should apply, which provides that actions against sheriffs, coroners or constables, upon a liability incurred by virtue of an act or omission while acting in their official capacity, must be brought within three (3) years. S.C. Code Ann. § 15-3-540(1); see also Allen v. Fidelity and Deposit Co. of Maryland, 515 F. Supp. 1185 (D.S.C. 1981), aff'd, 694 F.2d 716 (4th Cir. 1982). However, to the extent the wrongful acts of a sheriff, coroner, or constable fall within the South Carolina Tort Claims Act and are committed in their official capacity, they are shielded from liability. S.C. Code Ann. § 15-78-20(b). A sheriff, coroner, or constable will not be personally liable for a tort unless their actions were not within

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[Signature]

the scope of their duties. Id. § 15-78-70(b). Therefore, if the sheriff was acting in an official capacity and his actions were within the scope of his duties, he would be subject to the two (2) year statute of limitations from the date of discovery of loss as provided in Section 15-78-110 rather than the (3) year statute of limitations period provided in Section 15-3-540. The Plaintiff contends that Section 15-3-540 is the applicable statute because the Defendants, though acting in their official capacity at the time of the incident, were not acting within the scope of their duties.

Plaintiff filed the instant action in Berkeley County on December 16, 2010. A review of the Complaint indicates Plaintiff's alleged loss occurred between January 10, 2008 and January 15, 2008. (Compl. ¶¶ 6, 9.) A verified Complaint was not filed within one (1) year of the dates of the alleged loss pursuant to S.C. Code Ann. § 15-78-80. This action was filed more than two (2) years but less than (3) years after the date of alleged loss was or should have been discovered.

The Court finds that Section 15-78-110 applies to Defendant Berkeley County as it is a governmental entity subject to the South Carolina Tort Claims Act. See Allen, 515 F. Supp. at 1189 ("By the clear language of the statute, Section 15-3-540 would not apply to an action brought against the County of Aiken.").¹ The Plaintiff's deadline for filing this action against Defendant Berkeley County expired on or before January 16, 2010 pursuant to Section 15-78-110. Therefore, the instant action against Defendant Berkeley County is barred by the statute of limitations and should be dismissed with prejudice.

The Court finds that the applicable statute of limitations as applied to Defendants Berkeley County Sheriff's Department and H. Wayne Dewitt is determined by whether the

¹ The wrongful acts alleged in the Complaint are those of the Berkeley County Sheriff, Defendant Dewitt, and the Sheriff's deputies whom he sent to the Plaintiff's property. According to South Carolina case law, Sheriffs and deputies are state, not county, officials. See Edwards v. Lexington County Sheriff's Dep't, 386 S.C. 285, 288 n.1, 688 S.E.2d 125, 127 n.1 (2010); see also Cone, 308 S.C. at 112, 417 S.E.2d at 525; Heath v. Aiken County, 295 S.C. 416, 368 S.E.2d 904 (1988) (holding that deputies act as the sheriff's agent and are not employees of the county). Accordingly, the County of Berkeley may not be held liable for the acts of the Sheriff and his deputies.

Sheriff and his deputies were acting in their official capacity and whether their actions were within the scope of their duties. In ruling on a motion to dismiss, the trial court must determine "whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief." Brazell, 376 S.C. at 87, 655 S.E.2d at 738. Accordingly, "if facts alleged and inferences reasonably deducible therefrom entitle the plaintiff to relief under any theory," a South Carolina court must refuse to grant a motion to dismiss. Id. Moreover, "where the allegations of the complaint give rise to competing inferences on a question of material fact, dismissal of the case under Rule 12(b)(6) is not appropriate." Osprey, Inc. v. Cabana Ltd. P'ship, 333 S.C. 323, 332, 509 S.E.2d 275, 279 (Cl. App. 1998), overruled on other grounds by I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000). The Court finds that the allegations in the Complaint give rise to competing inferences on a question of the material fact of whether the Sheriff and his deputies were acting in their official capacity and whether their actions were within the scope of their duties. As such, the Defendants' Motion to Dismiss is denied as to Defendants Berkeley County Sheriff's Department and H. Wayne Dewitt.

CONCLUSION

Based on the analysis set forth above, the Defendants' Motion to Dismiss with Prejudice is GRANTED as to Defendant Berkeley County and DENIED as to Defendants Berkeley County Sheriff's Department and H. Wayne Dewitt.

IT IS SO ORDERED.

June 14, 2011
Charleston, South Carolina in Chambers

D. L. Jefferson
The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

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6 518

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

L.G. ELROD,

Plaintiff,

v.

BERKELEY COUNTY, BERKELEY
COUNTY SHERIFF'S DEPARTMENT,
AND H. WAYNE DEWITT,

Defendants.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
CASE NO. 2010-CP-08-04453

**ORDER DENYING DEFENDANTS'
MOTION TO RECONSIDER**

Presiding Judge:

Date of Hearing:

Plaintiff's Attorney:

Defendants' Attorney:

Court Reporter:

Deadra L. Jefferson

April 26, 2011

Pro Se

G. Wade Cooper, Esquire

Anne Meyer

MAILEY P. BRUNN
CLERK OF COURT
BERKELEY COUNTY, SC

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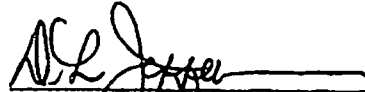
FILED

THIS MATTER is before the Court on the Defendants' Motion to Reconsider pursuant to Rules 52, 59, and 60, SCRPC. Defendants' Motion to Dismiss pursuant to Rule 12(b)(6), SCRPC, filed January 11, 2011, was decided by the Court after a non-jury motion hearing on April 26, 2011. A Court Order granting Defendants' motion as to Berkeley County and denying the motion as to Defendants Berkeley County Sheriff's Department and H. Wayne Dewitt was filed on June 16, 2011 and received by counsel for the Defendants on June 20, 2011. The Defendants' Motion to Reconsider, as to Defendants Berkeley County Sheriff's Department and H. Wayne Dewitt, was filed on June 23, 2011 and received by the Court on June 23, 2011.

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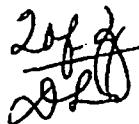
Having considered the Defendants' Motion, the timeliness of the Motion, as well as the various interests balanced by the Court at the time of the ruling, the Defendants' Motion to Reconsider is hereby denied.¹

IT IS SO ORDERED.


The Honorable Deadra L. Jefferson
Presiding Judge, Ninth Judicial Circuit

6/28, 2011
Charleston, South Carolina at Chambers

¹ This Motion is disposed of without the necessity of a hearing and decided on the record and briefs. Rule 59(t), SCRCP; Pollard v. City of Florence, 314 S.C. 397, 444 S.E.2d 534 (Cl. App. 1994).

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STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

L.G. Elrod,

Plaintiffs,

Versus

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

Defendants.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) C/A No. 10-CP-08-4453

**ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Presiding Judge:

Date of Hearing:

Plaintiff's Attorney:

Defendants' Attorney:

Court Reporter:

Hon. Roger M. Young

May 9, 2012

M. Brooks Derrick, Esquire

G. Wade Cooper, Esquire

Anne Myers

The instant matter came before the Court on May 9, 2012 on the Defendants' Motion for Judgment on the Pleadings / Motion for Summary Judgment pursuant to Rule 12 (c) and Rule 56 of the SCRCP, respectively.¹ Present at the hearing were the Plaintiff and his counsel, Mr. Brooks Derrick, Esquire, as well as G. Wade Cooper, Esquire, appearing on behalf of the Defendants. In addition to oral arguments on the record, both parties presented affidavits and exhibits for the Court's consideration. For the reasons set forth below, the Defendants' Motion is granted.

FACTUAL BACKGROUND

The Plaintiff alleges that on or about January 10, 2008 and January 15, 2008, the Defendant Sheriff did send Berkeley County Sheriff's Deputies to Plaintiff's property and unlawfully restrained Plaintiff while allowing a third party - Comcast Cable - to restore power to its cable box on a utility pole located on Plaintiff's property. Plaintiff initiated this action by the filing of a Summons and Complaint on December 16, 2010 which sets forth causes of action

¹ Defendants' Motion for Judgment on the Pleadings was heard by the Court on January 17, 2012. During the hearing, matters outside the pleadings were presented by the non-moving party. Counsel for Defendants moved on the record pursuant to SCRCP Rule 12 (c) that the motion should be treated as one for summary judgment and disposed of as provided in Rule 56. As Plaintiff was, at the time, prosecuting the matter *pro se* and in order to allow the parties reasonable opportunity to present all pertinent material, this Court continued the motion for summary judgment to the next available term of court.

Ami!
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GUE
MBW

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2012 MAY 21 PM 3:24
CLERK OF COURT
BERKELEY COUNTY

R

for False Imprisonment and Unlawful Detention – Abuse of Process. Defendants filed the instant motion pursuant to Rule 12 (c) and Rule 5, SCRCF, on the grounds that the Defendants are a governmental entity (Sheriff's Office) and employee of a governmental entity (Sheriff) as defined by the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq., who were at all times acting within the course and scope of their official duties with respect to Plaintiff's claims, and as such, Plaintiff's action is barred by the applicable two (2) year statute of limitations.

STANDARD OF REVIEW

Summary judgment is appropriate when there is "no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Electrical Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986). A fact is deemed "material" if proof of its existence or nonexistence would affect the disposition of the case under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is "genuine" if the evidence offered is such that a reasonable jury might return a verdict for the non-movant. Id. at 257.

The party seeking summary judgment shoulders the initial burden of demonstrating to the district court that there is no genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the movant has made this threshold demonstration, the non-moving party, to survive the motion for summary judgment, may not rest on the allegations averred in the pleadings; rather, he must demonstrate that specific, material facts exist which give rise to a genuine issue. Id. at 324. The existence of a mere scintilla of evidence in support of the plaintiff's position is insufficient to withstand the summary judgment motion. Anderson, 477 U.S. at 252. Accordingly,



when Rule 56(c) has shifted the burden of proof to the non-movant, he must provide existence of every element essential to his action which he bears the burden of adducing at a trial on the merits.

CONCLUSIONS OF LAW

The Tort Claims Act is the exclusive remedy available for any tort committed by a governmental entity, its employees or its agents unless the employee's conduct was not within the scope of his official duties or constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann. §§ 15-78-20(b), 15-78-70(b). A governmental entity means the State and its political subdivisions. *Id.* at § 15-78-30(d). Defendant Berkeley County Sheriff's Department is a governmental entities as defined by Section 15-78-30(d). Likewise, Defendant Dewitt, as Sheriff of Berkeley County, is considered a "state official." Cone v. Nettles, 308 S.C. 109, 112, 417 S.E.2d 523, 524 (1992).

The Defendants argue that S.C. Code Ann. § 15-78-110 provides the applicable statute of limitations as to all Defendants, and, thus, summary judgment should be granted and all Defendants dismissed with prejudice for Plaintiff's failure to file the Summons and Complaint within the applicable time period. Section 15-78-110 provides in relevant part, "[A]ny action brought pursuant to [the South Carolina Tort Claims Act] is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered" S.C. Code Ann. § 15-78-110.

The Plaintiff argues that S.C. Code Section 15-3-540 should apply, which provides that actions against sheriffs, coroners or constables, upon a liability incurred by virtue of an act or omission while acting in their official capacity, must be brought within three (3) years. S.C. Code Ann. 15-3-540(0; *see also Allen v. Fidelity and Deposit Co. of Maryland*, 515 F. Supp. 1185 (D.S.C. 1981), *aff'd*, 694 F.2d 716 (4th Cir. 1982). However, to the extent the wrongful acts of a sheriff, coroner or constable fall within the South Carolina Tort Claims Act and are committed in their official capacity, they are shielded from liability. S.C. Code Ann. § 15-78-20

(b). A sheriff, coroner, or constable will not be personally liable for a tort unless their actions were not within the scope of their duties. Id. § 15-78-70 (b). Therefore, if the sheriff was acting in an official capacity and his actions were within the scope of his duties, he would be subject to the two (2) year statute of limitations from the date of discovery of loss as provided in Section 15-78-110 rather than the (3) year statute of limitations period provided in Section 15-3-540. The Plaintiff contends that Section 15-3-540 is the applicable statute because the Defendants, though acting in their official capacity at the time of the incidents, were not acting within the scope of their official duties.

Plaintiff filed the instant action in Berkeley County on December 16, 2010. A review of the Complaint indicates Plaintiff's alleged loss occurred between January 10, 2008 and January 15, 2008. (Compl. ¶¶ 6, 9.) A verified Complaint was not filed within one (1) year of the dates of the alleged loss pursuant to S.C. Code Ann. § 15-78-80. This action was filed more than two (2) years but less than (3) years after the date of alleged loss was or should have been discovered.

The Court finds no evidence in the record that the Defendants were acting in any capacity other than their official capacities as Sheriff and Sheriff's deputies of Berkeley County. Likewise, the Court can find no evidence in the record to reasonably suggest that Defendants were acting outside of the scope of their official duties with regard to the Plaintiff and these two incidents on January 10, 2008 and January 15, 2008. Plaintiff contends that the Sheriff, and by extension, deputy sheriffs, are precluded from responding to requests for service by citizens and businesses involving civil disputes with another. The Court finds this argument unpersuasive. In this instance, the record reflects that although there was an apparent civil dispute between Plaintiff and Comcast Cable concerning an agreement over use of the utility pole, the Sheriff and Deputy Sheriff's were merely responding to calls for service and acting in such manner as to ensure the safety of all. The Court finds that the Sheriff and Deputies with Berkeley County



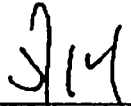
Sheriff's Office were at all times acting in their official capacities and within the course and scope of their official duties.

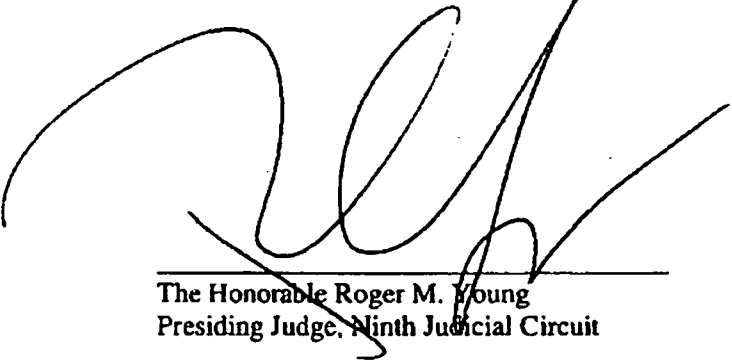
Furthermore, a careful review of the Plaintiff's Complaint appears on its face to be dispositive of this issue as well. Paragraph 3 states, "That upon information and belief, defendant H. Wayne Dewitt, (hereinafter defendant) is a citizen and resident of Berkeley County, South Carolina and at all times mentioned herein was the Sheriff employed by the defendant, Berkeley County Sheriff, who was acting within the scope and course of his employment and under color of state law. (Compl. ¶ 3)(emphasis added). Upon review of the record, the Court agrees and finds that the Sheriff and Berkeley County Deputies were at all times acting in their official capacities and within the course and scope of their official duties. Therefore, the Court finds the two (2) year Tort Claims Act statute of limitations is applicable to Defendants in this case. As such, summary judgment is appropriate as a matter of law as there is no genuine issue as to any material fact. Plaintiff's action is time barred as it was filed more than two (2) years after the date the loss was or should have been discovered.

CONCLUSION

Based on the analysis set forth above, the Defendants' Motion for Summary Judgment is GRANTED.

IT IS SO ORDERED.


_____, 2012
Charleston, South Carolina



The Honorable Roger M. Young
Presiding Judge, Ninth Judicial Circuit

STATE OF SOUTH CAROLINA)
COUNTY OF BERKELEY)

L.G. ELROD)

PLAINTIFF)

VS)

BERKELEY COUNTY, BERKELEY COUNTY)
SHERIFF'S DEPARTMENT AND)
H. WAYNE DEWITT)

DEFENDANT(S))

IN THE COURT OF COMMON PLEAS
CASE NO.

COMPLAINT

FALSE IMPRISONMENT

UNLAWFUL DETENTION-
ABUSE OF PROCESS

JURY TRIAL DEMANDED

20 CP-08
2010 DEC 16 PM 12:20
FILED
CLERK OF COURT
BERKELEY COUNTY, SC

THE PLAINTIFF WOULD RESPECTFULLY SHOW THAT:

1. That the parties hereto, subject matter hereof, and all matters and things hereinafter complained of are within the jurisdiction of this court.
2. That the plaintiff, L.G. Elrod, (hereinafter plaintiff) is a citizen and resident of the county of Berkeley, State of South Carolina.
3. That upon information and belief, defendant H. Wayne Dewitt, (hereinafter defendant) is a citizen and resident of Berkeley County, South Carolina and at all times mentioned herein was the Sheriff employed by the defendant, Berkeley County Sheriff, who was acting within the scope and course of his employment and under color of state law.
4. That the defendant, Berkeley County Sheriff's Department, (hereinafter defendant) is a government entity organized under the laws of the state of South Carolina, that said defendant, as part of its governmental functions, operates a police department known as the Berkeley County Sheriff's Department.
5. That the defendant Berkeley County, (hereinafter defendant), is a government entity organized under the laws of the State of South Carolina.

FIRST CAUSE OF ACTION

FALSE IMPRISONMENT

6. The defendant, on or about January 10, 2008 and January 15, 2008, did send two (2) squad cars and deputies from the Berkeley County Sheriff's department with them, without a court order or any legal papers and restrained Plaintiff from going on his own private property while Comcast Cable worked on their equipment on Plaintiff's private property. This was done after Comcast Cable was put on "trespass notice," and a "cease and desist" notice from attorney Mary Leigh Arnold was given to Comcast Cable.

7. The restraint, by defendant was intentional as they met with Comcast Cable at another location and brought them, with two (2) squad cars, to Plaintiff's property for the sole purpose of restraining Plaintiff while Comcast Cable worked on Plaintiff's property.

8. The restraint was unlawful as Defendant sent two (2) squad cars, with deputies, from the Berkeley County Sheriff's department with them to restrain Plaintiff without a court order or any legal papers.

Wherefore, Plaintiff prays for judgment against Defendant for actual damages, special and consequential damages, punitive damages on each and every cause of action, for the cost and disbursements of this action, together with such other and further relief as this court deems just and proper.

SECOND CAUSE OF ACTION

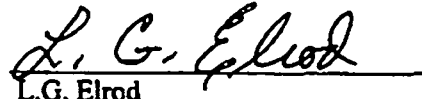
UNLAWFUL DETENTION- ABUSE OF PROCESS

9. Defendant did, on or about January 10, 2008 and January 15, 2008, send two (2) squad cars from Berkeley County Sheriff's department and unlawfully detained plaintiff each time with the threat of the plaintiff being locked up if he came on his own private property where Comcast Cable was working and trespassing. This was done without any court order or any legal papers of any kind.

Wherefore, Plaintiff prays for judgment against Defendant for actual damages, special and consequential damages, punitive damages on each and every

cause of action, for the cost and disbursements of this action, together with such other and further relief as this court deems just and proper.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "L. G. Elrod", is written over a horizontal line.

L.G. Elrod
307 Elrod Drive
Goose Creek, SC 29445
843-553-4669

DECEMBER 16, 2010

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

L.G. Elrod,

Plaintiffs,

Versus

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

Defendants.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

) C/A No. 10-CP-08-4453

) DEFENDANTS' NOTICE OF MOTION
) AND MOTION TO DISMISS

TO: L.G. ELROD, PRO SE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendants in this action (hereinafter "the Defendants"), will move before the United States District Court, at a time and place to be arranged with the Court and parties involved, for an Order dismissing this action with prejudice pursuant to Rule 12 (b)(6) on the grounds that Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action. Defendants' motion is based on the grounds that, pursuant to the South Carolina Tort Claims Act, Plaintiff's claims are barred by the applicable statute of limitations.

Defendants Berkeley County and Berkeley Sheriff's Department are governmental entities as defined by the South Carolina Tort Claims Act. S.C. Code Ann. §15-78-10, et seq.. Likewise, under South Carolina law, Defendant DeWitt, as Sheriff of Berkeley County, is considered an "arm of the state." *Cone v. Nettles*, 308 S.C. 109, 417 S.E.2d 523 (1992), adopting the District Court's holding in *Gulledge v. Smart* 691 F.Supp. 947 (D.S.C. 1988) (holding that South Carolina sheriffs are state officials for Eleventh Amendment purposes), *aff'd mem.*, 878 F.2d 379 (4th Cir. 1989). The Tort Claims Act is the exclusive civil remedy available for any tort committed by a governmental entity, its employees or its agents. S.C. Code Ann. §15-78-20 (b). The provisions of the Tort Claims Act establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official

duty, must be liberally construed in favor of limiting the liability of the State. S.C. Code Ann. §15-78-20 (f). Any action brought pursuant to the Tort Claims Act is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered. S.C. Code Ann. §15-78-110.

Plaintiff filed the instant action in Berkeley County on December 16, 2010. A careful review of the Complaint indicates that Plaintiff's alleged "loss" occurred sometime between January 10, 2008 and January 15, 2008. (See Complaint, paragraphs 6 and 9). Upon information and belief, no verified claim was filed within one (1) year of the dates of the alleged loss pursuant to S.C. Code Ann. § 15-78-80. Thus, this action was filed well more than two (2) years after the date of loss was or should have been discovered. Plaintiff's deadline for filing this action against these entities expired on or before January 16, 2010. Defendants contend, therefore, that the instant action is barred by the statute of limitations and respectfully request that all causes of action be dismissed with prejudice.

Respectfully submitted

BUYCK & SANDERS LAW FIRM, LLC
757 Johnnie Dodds Blvd., Ste. 100
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Attorneys for the Defendants
Berkeley County, Berkeley County Sheriff's
Department, and H. Wayne Dewitt

January 7, 2011
Mt. Pleasant, South Carolina
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	NINTH JUDICIAL CIRCUIT
	)	
L.G. Elrod,	)	C/A No. 10-CP-08-4453
	)	
	)	
Plaintiffs,	)	
	)	DEFENDANTS' NOTICE OF MOTION
Versus	)	AND MOTION TO RECONSIDER
	)	
Berkeley County, Berkeley County Sheriff's	)	
Department, and H. Wayne Dewitt,	)	
	)	
Defendants.	)	

TO: L.G. ELROD, PRO SE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendants in this action (hereinafter "the Defendants"), will move before the Circuit Court as soon as counsel may be heard pursuant to Rules 52, 59 and 60 SCRPC for reconsideration of its Order dated June 14, 2011, denying dismissal of Defendants Berkeley County Sheriff's Department and Sheriff H. Wayne DeWitt.

PROCEDURAL ISSUES

This matter was originally brought through issuance of a Summons and Complaint dated December 16, 2010, concerning events that occurred on January 10, 2008 and January 15, 2008. (attached). Defendants filed a Motion to Dismiss in lieu of an Answer pursuant to Rule 12(b)(6) SCRPC on the grounds that Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action. The basis of Defendants' motion is that the Defendants are governmental entities as defined by the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq.*, acting in their official duties and within the scope of their employment, and, as such Plaintiff's action is time barred by the applicable statute of limitations. Plaintiff argued that the three year statute of limitations found in S.C. Code Ann. § 15-3-540 should apply.

A hearing was held on the matter on April 26, 2011 with both parties presenting oral arguments. On June 14, 2011, the Court issued a written Order in which it granted Defendants motion to dismiss as to Berkeley County, but denied the motion as to Berkeley County Sheriff's

Department and Sheriff DeWitt.¹ Defendants present the following memorandum, respectfully requesting reconsideration of the Court's denial of the motion to dismiss Sheriff's Department and Sheriff DeWitt.

ARGUMENT & LEGAL ANALYSIS

Notwithstanding any provision of law, the South Carolina Tort Claims Act is the exclusive and sole remedy available for any tort committed by a governmental entity, its employees or its agents unless the employee's conduct was not within the scope of his official duties or constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. S.C. Code Ann. §§ 15-78-20(b), 15-78-70(b), and 15-78-200. Defendant Berkeley County Sheriff's Department is a governmental entity as defined by Section 15-78-30(d). Likewise, Defendant DeWitt, as Sheriff of Berkeley County, is considered a "state official." Cone v. Nettles, 308 S.C. 109, 112, 417 S.E.2d 523, 524 (1992). The provisions of the Tort Claims Act must be liberally construed in favor of limiting the liability of the governmental entity and its employees while acting within the scope of their official duty. S.C. Code Ann. §§ 15-78-20(f) and 15-78-200.

As the Court correctly notes in its Order, Defendants take the position that S.C. Code Ann. § 15-78-110 provides the applicable statute of limitations as to all Defendants, and, thus, all Defendants should be dismissed with prejudice for Plaintiff's failure to file the Summons and Complaint within two years of the alleged tort. Section 15-78-110 provides in relevant part, "[A]ny action brought pursuant to [the South Carolina Tort Claims Act] is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered" S.C. Code Ann. § 15-78-110. There is no doubt that Plaintiff filed his Summons and Complaint more than two years outside of the statute of limitations provided by the Tort Claims Act.

¹ The Order was filed on June 16, 2011 and received by counsel for Defendants on June 20, 2011.

As the Court correctly concludes, the applicable statute of limitations (2 or 3 years) as applied to Defendants Sheriff's Department and Sheriff DeWitt is determined by whether the Sheriff and his deputies were acting in their official capacity and whether their actions were within the scope of their duties. In ruling on a motion to dismiss, the trial court must determine "whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief." Brazell v. Windsor, 376 S.C. 83, 87, 655 S.E.2d 736, 738 (2007), rev'd on other grounds, 384 S.C. 512, 682 S.E.2d 824 (2009). Furthermore, "[t]he decision to grant a Rule 12(b)(6) motion to dismiss *must be based solely upon the allegations set forth in the complaint.*" Id. at 87, 655 S.E.2d at 737-38. (emphasis added).

Reviewing Paragraph 3 of Plaintiff's Complaint, he specifically states, "That upon information and belief, defendant H. Wayne Dewitt, (hereinafter defendant) is a citizen and resident of Berkeley County, South Carolina and at all times mentioned herein was the Sheriff employed by the defendant, Berkeley County Sheriff, who was acting within the scope and course of his employment and under color of state law. (Complaint, para. 3)(emphasis added). Nowhere in the Complaint does he attribute any wrongful act on the part of Sheriff DeWitt, rather it is clear he is merely suing the Sheriff as the administrator charged with the responsibility over the Sheriff's Department. More importantly, nowhere in the Complaint does Plaintiff state that Sheriff DeWitt was acting in any other capacity than his official capacity and nowhere does he allege that Sheriff DeWitt was acting outside the scope of his official duties. On the contrary, Plaintiff explicitly states that he is suing Sheriff DeWitt in his official capacity as Sheriff and that "at all times" Sheriff DeWitt was "acting within the scope of his employment." Therefore, in taking the allegations of Plaintiff's Complaint in their most favorable light, the two year Tort Claims Act statute of limitations applies and this action must be dismissed against Sheriff DeWitt.

Likewise, as to Defendant Berkeley County Sheriff's Department, Plaintiff's Complaint states only that it "is a governmental entity organized under the laws of the State of South Carolina, that said defendant, as part of its governmental functions, operates a police department known as the Berkeley County Sheriff's Department." (Complaint, para. 4). Nowhere in the Complaint does Plaintiff state that Sheriff's Department, by and through its deputies, was acting in any other capacity than its official capacity. Nowhere does he allege that the Sheriff's Department, by and through its deputies, was acting was acting outside the scope of its official duties. Simply put, Plaintiff's Complaint fails to state that either Defendant was acting in any other capacity than their official capacity and fails to state that either Defendant was acting outside the scope of their official duties.

"The decision to grant a Rule 12(b)(6) motion to dismiss *must be based solely upon the allegations set forth in the complaint.*" Brazell at 87, 655 S.E.2d at 737-38. (emphasis added). As to whether "reasonable" inferences can be deduced from the facts alleged in Plaintiff's Complaint, Defendants contend that even when taken in the light most favorable to the Plaintiff, they do not give rise to a competing inference as to whether the Sheriff and his deputies were acting within their official capacity and whether their actions were within the scope of their duties. Again, as to Sheriff DeWitt, Plaintiff is explicit and clear that Sheriff DeWitt was acting within his official capacity, as he alleges no "action" on the part of the Sheriff whatsoever. He is equally clear that Sheriff DeWitt was at all times within the scope and course of his employment. As to Sheriff's Department, the only facts alleged are that deputies, on two separate occasions, were dispatched to Plaintiff's address to allow Comcast to work on their equipment. Aside from the plain language of the Complaint, the only reasonable inferences to be deduced therefrom are that the deputies were acting in their official capacities as Sheriff's deputies and that they were acting within the scope of their employment as deputies of Berkeley County Sheriff's Department.

CONCLUSION

Plaintiff's action is barred by the statute of limitations as to all Defendants and Defendants respectfully request that the Court reconsider its decision as expressed in its June 14, 2011 Order.

Respectfully submitted

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G. Wade Cooper (S.C. Bar # 69692)

Attorneys for the Defendants
Berkeley County, Berkeley County Sheriff's
Department, and H. Wayne Dewitt

June 22, 2011
Mt. Pleasant, South Carolina
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CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ emailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 22 day of JUNE, 2011.



STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

L.G. Elrod,

☐ Plaintiff,

Versus

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

☒ Defendants.

) IN THE COURT OF COMMON PLEAS

) NINTH JUDICIAL CIRCUIT

CASE NO. 10-CP-08-4453

) DEFENDANTS' MOTION FOR JUDGMENT ON THE
) PLEADINGS

check box above indicating submitting party

Pro Se Plaintiff:

L.G. Elrod
307 Elrod Drive
Goose Creek, SC 29445
Phone: (843) 553-4669

Defendants' attorney:

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- ☒ MOTION HEARING REQUESTED (attach written motion and complete SECTION I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II AND III)

SECTION I: Hearing Information

Nature of Motion: Motion for Judgment on the Pleadings

Estimated Time Needed: 15 minutes

Court Reporter Needed: YES ☒ NO ☐

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order -

I hereby move for relief or action by the court as set forth in the attached proposed order.

G. Wade Cooper
Signature of Attorney for ☐ Plaintiff ☒ Defendants

10/27/11
Date submitted

SECTION III: Motion Fee

- ☒ PAID - AMOUNT: \$25
☐ EXEMPT: (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter: _____
☐ Other: _____

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other: _____

JUDGE

CODE: _____

DATE: _____

CLERK'S VERIFICATION

Collected by: _____
(print name)

DATE FILED

- ☐ MOTION FEE COLLECTED: _____
☐ CONTESTED-AMOUNT DUE: _____

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	NINTH JUDICIAL CIRCUIT
	)	
L.G. Elrod,	)	C/A No. 10-CP-08-4453
	)	
	)	
Plaintiffs,	)	
	)	DEFENDANTS' NOTICE OF MOTION
Versus	)	AND MOTION FOR JUDGMENT ON THE
	)	PLEADINGS
Berkeley County Sheriff's Department, and H.	)	
Wayne Dewitt,	)	
	)	
	)	
Defendants.	)	

15-78-20
15-78-200

TO: L.G. ELROD, PRO SE PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that the Defendants in this action (hereinafter "the Defendants"), will move before the Circuit Court, at a time and place to be arranged with the Court and parties involved, for an Order dismissing this action with prejudice pursuant to Rule 12 (c) on the grounds that Plaintiff's Complaint is time barred by the applicable statute of limitations as prescribed by the South Carolina Tort Claims Act. S.C. Code Ann. §15-78-10, *et seq.* On its face, Plaintiff's Complaint identifies the Defendants as such:

3. That upon information and belief, defendant H. Wayne Dewitt, (hereinafter defendant) is a citizen and resident of Berkeley County, South Carolina and at all times mentioned herein was the Sheriff employed by the defendant, Berkeley County Sheriff, who was acting within the scope and course of his employment and under color of state law. (emphasis added).

4. That the defendant, Berkeley County Sheriff's Department, (hereinafter defendant) is a governmental entity organized under the laws of the state of South Carolina, that said defendant, as part of its governmental functions, operates a police department known as the Berkeley County Sheriff's Department. (emphasis added).

Defendant Berkeley Sheriff's Department is a governmental entity as defined by the South Carolina Tort Claims Act. S.C. Code Ann. §15-78-10, *et seq.* Likewise, under South Carolina law, Defendant DeWitt, as Sheriff of Berkeley County, is considered an "arm of the

state.” *Cone v. Nettles*, 308 S.C. 109, 417 S.E.2d 523 (1992), adopting the District Court’s holding in *Gulledge v. Smart* 691 F.Supp. 947 (D.S.C. 1988) (holding that South Carolina sheriffs are state officials for Eleventh Amendment purposes), *aff’d mem.*, 878 F.2d 379 (4th Cir. 1989). The Tort Claims Act is the exclusive civil remedy available for any tort committed by a governmental entity, its employees or its agents. S.C. Code Ann. §15-78-20 (b) and § 15-78-200. The provisions of the Tort Claims Act establishing limitations on and exemptions to the liability of the State, its political subdivisions, and employees, while acting within the scope of official duty, must be liberally construed in favor of limiting the liability of the State. S.C. Code Ann. §15-78-20 (f). Any action brought pursuant to the Tort Claims Act is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered. S.C. Code Ann. §15-78-110.

Plaintiff filed the instant action against Defendants on December 16, 2010. A careful review of the Complaint indicates that Plaintiff’s alleged “loss” occurred sometime between January 10, 2008 and January 15, 2008. (See Complaint, paragraphs 6 and 9). Upon information and belief, no verified claim was filed within one (1) year of the dates of the alleged loss pursuant to S.C. Code Ann. § 15-78-80. Thus, this action was filed well more than two (2) years after the date of loss was or should have been discovered. Plaintiff’s deadline for filing this action against these entities expired on or before January 16, 2010. Defendants contend, therefore, that the instant action is barred by the statute of limitations and respectfully request that judgment be entered on the pleadings and that all causes of action be dismissed with prejudice.

Respectfully submitted,

[signature page follows]

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Hugh W. Buyck (S.C. Bar # 66462)
G. Wade Cooper (S.C. Bar # 69692)

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

October 27, 2011
Mt. Pleasant, South Carolina

CERTIFICATE OF SERVICE

I certify that on this date a copy of the foregoing was served on each party or counsel of record by ☒ mailing, ☐ emailing, ☐ facsimile, or ☐ hand delivery in the manner prescribed by the applicable Rule of Civil Procedure.

This 27 day of October, 2011.



STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

COURT OR COMMON PLEAS
2010-CP-08-04453

L.G. ELROD.

Plaintiff,

v.

BERKELEY COUNTY SHERIFF'S
DEPARTMENT, et al.,

Defendants.

TRANSCRIPT OF RECORD

May 9, 2012
Moncks Corner, South Carolina

B E F O R E:

THE HONORABLE ROGER M. YOUNG, JUDGE

A P P E A R A N C E S:

Mr. M. Brooks Derrick, Esquire
Representing the Plaintiff

Mr. Gordon Wade Cooper, Esquire
Representing the Defendants

Anne Bouley Meyer, RPR
Circuit Court Reporter

1 THE COURT: Okay. We got a motion for summary
2 judgment?

3 MR. COOPER: Yes, Your Honor.

4 THE COURT: All right, go head.

5 MR. COOPER: I'm Wade Cooper here on behalf of
6 the defendants in this case, who are the Berkeley
7 County Sheriff's Department, and H. Wayne Dewitt as
8 Sheriff of Berkeley County.

9 To my right is Mr. Brooks Derek who is now
10 representing Mr. Elrod, who until recently had been
11 proceeding pro se.

12 Judge, back in January you heard a motion that I
13 had filed, a motion for judgment on the pleadings.
14 Basically our argument, since the case was filed, was
15 that the case was filed too late.

16 Mr. Elrod has sued over two incidents in which
17 Berkeley County Sheriff's Deputies were called out to
18 his property. One of which occurred on January 10th,
19 2008. Actually two on that same day, January 10th,
20 2008. And another five days later on January 15th,
21 2008.

22 The deputies were called out to initially by the
23 request of Mr. Elrod due to his claim that Comcast
24 cable was trespassing on his property in order to fix a
25 cable box on a utility pole that he had switched off.

1 Later that afternoon, Comcast Cable requested sheriff's
2 deputies to escort them back to the property as the
3 work to switch the box back on had not been completed
4 earlier, it was to avoid a confrontation with Mr.
5 Elrod.

6 The work was completed that afternoon, and five
7 days later Comcast was again alerted that Mr. Elrod had
8 switched the box off. They again requested, due to
9 threats made by Mr. Elrod five days earlier, requested
10 an escort from Berkeley County sheriff's deputies who
11 responded and the box was turned back on.

12 Mr. Elrod filed this case in Berkeley County on
13 December the 16th, 2010. I filed a motion to dismiss
14 based on the fact that the defendants in this case fell
15 within the tort claims act, and that 15-78-110
16 establishes a two year statute of limitations.

17 Mr. Elrod, based upon the date of the incidents
18 I gave you and the date that the complaint was filed,
19 filed it almost three years, but not yet three years,
20 after the incidents. And thus our argument was that
21 the statute of limitations inherent in the tort claims
22 act barred Mr. Elrod's action.

23 As I understand it, the opposition to our
24 motion, the statute of limitation argument, is that
25 there is a competing statute, statute 15-3, I believe,

1 540, which allows actions against sheriffs and
2 constables to be brought within three years. And it's
3 specific to the fact that those actions must be against
4 sheriffs and constables acting outside of the scope of
5 their official duties.

6 So the question then before the Court is whether
7 or not, based on the evidence established so far in the
8 record, supports the fact that the defendants, the
9 sheriff and the two deputies, were acting outside of
10 the scope of their official duties when they responded
11 to these two incidents back in 2008.

12 Should the Court find that they were acting
13 within the scope of their official duties, then they
14 would be covered by the tort claims act. The Court has
15 already issued an order, Judge Jefferson, establishing
16 the fact that there was no verified complaint filed
17 within a year. And these actors were found to be
18 within the scope of their official duties, then the two
19 year statute of limitations would apply.

20 If, on the other hand, they were found to be
21 outside of the scope of their official duties, this
22 other statute, 15-3-540, would allow the plaintiff
23 three years and thus his complaint was timely filed.

24 So I initially filed what you heard in January,
25 it was a motion for judgment on the pleadings.

1 Basically saying, Your Honor, take a look at what the
2 plaintiff has alleged in this case, and specifically
3 looking at, and not outside of, the complaint.

4 Which states that the sheriff, H. Wayne Dewitt,
5 at all times mentioned herein was the sheriff employed
6 by defendant Berkeley County Sheriff, who was acting
7 within the scope and course of his employment, and
8 under color of state law.

9 So my argument has been that the complaint, on
10 its face alone, is alleging that the sheriff is being
11 sued in his official capacity, acting within the course
12 and scope of his employment, i.e., his official duties
13 as the sheriff. And thus the two year statute of
14 limitations inherent to the tort claims act is
15 applicable.

16 There are no allegations in the complaint
17 specifically stating that the sheriff was acting at any
18 time outside of the scope of his official duties.
19 There are no allegations specific to the complaint that
20 either of the deputies were acting outside of the scope
21 of their official duties.

22 Nonetheless, at the last hearing discussion
23 began with Mr. Elrod where we were discussing
24 affidavits and incident reports, things outside of the
25 pleadings. The rule, I believe it's rule 12(c), motion

1 for judgment on the pleadings, if the Court is to
2 consider or if matters are brought up in the hearing
3 outside of the pleadings, then it basically converts to
4 a motion for summary judgment.

5 Mr. Elrod was not prepared at that time to argue
6 a motion for summary judgment. The Court continued
7 that motion and here we are today.

8 So this is a converted motion for judgment on
9 the pleadings, converted to a motion for summary
10 judgment. I would point out, Your Honor, that we have
11 filed, a long time ago I filed the affidavits two
12 deputies, Deputy Timmons (phonetic), and Deputy McVoy
13 (phonetic). There is an affidavit with each of their
14 incident reports that they authored attached to each
15 affidavit.

16 More recently I filed an affidavit from Sheriff
17 Dewitt. All three are consistent in that they state
18 that each of the three were at all times acting within
19 the course and scope of their official duties as
20 sheriff and as deputies, deputy sheriffs of the
21 Berkeley County Sheriff's Office.

22 So it is our position that there is no genuine
23 fact, material fact in evidence in this case. There is
24 nothing on the record to prove that these three
25 individuals were acting in any other capacity than in

1 their official duties as sheriff and sheriff's deputies
2 in this case.

3 As such, the tort claims act establishes the two
4 year statute of limitations. And plaintiff's action is
5 time barred as a result because it was filed more than
6 two years, almost three years after the incidents at
7 issue.

8 THE COURT: What was the date it was filed?

9 MR. COOPER: December 16th, 2010.

10 THE COURT: Okay.

11 MR. COOPER: Last evening I was provided, and I
12 understand the Court was as well, a memorandum opposing
13 the summary judgment argument. I have discussed this
14 with Mr. Derek, and I think we have both agreed that
15 that is the issue before the Court; is whether based on
16 the record there is evidence to support the plaintiff's
17 contention that these individuals were acting outside
18 of the course and scope of their official duties.

19 THE COURT: Okay.

20 MR. COOPER: I would just point out that the two
21 cases cited by and provided to the Court, the McCall
22 case and the Allen case, both provided by the
23 plaintiffs in support of their motion, one of those,
24 the Allen case, preceded the tort claims act by about
25 five years. And that the McCall case, actually both

1 Allen and McCall, the Court upheld the lower court's
2 ruling that the actions were time barred against
3 sheriffs and sheriff's deputies.

4 THE COURT: Okay.

5 MR. DEREK: Your Honor, I think that defendants'
6 counsel has encapsulated the issue that we are facing
7 here; is whether or not it's a three year statute of
8 limitation or two year statute of limitations.

9 I disagree with the defendants' counsel in that
10 there certainly is a genuine issue of material fact as
11 to whether or not the sheriff's department was acting
12 within the scope of their official duties at the time.

13 THE COURT: How so? They got called out.

14 MR. DEREK: The issue that was surrounding the
15 call-out was a civil dispute between Comcast and Mr.
16 Elrod.

17 THE COURT: Yeah, but they were asked to escort
18 these people on because they were worried about their
19 safety. It might have been they weren't investigating
20 a crime, but they were still acting in their capacity
21 as sheriff's deputies, correct?

22 MR. DEREK: I think that they were definitely
23 acting in their capacity as sheriff's deputies, but I
24 don't know if the actions of settling a civil dispute
25 on private property encapsulates whether or not they

1 were acting in their official duties.

2 Is it an official duty for an officer to
3 intervene with a civil dispute. And in their police
4 reports that both the deputies put forward, in those
5 report themselves it states that it was a civil matter
6 that they were out on call for.

7 THE COURT: Yeah, but sheriff's deputies can go
8 and respond to civil disputes, get involved in things
9 like that and still be acting within the scope of their
10 official duties.

11 Do you understand, if you prevail on this you
12 don't get to sue the county anymore, you are just suing
13 these people as individuals?

14 MR. DEREK: I understand that, Your Honor.

15 THE COURT: Usually -- okay. You really don't
16 have much of a choice to argue otherwise, I suppose,
17 because of the statute of limitations.

18 MR. DEREK: I would just raise the issue again
19 that whether or not the police responding to a civil
20 call is in their official duties would be a question
21 for the jury and not a question for today.

22 Thank you, Your Honor.

23 THE COURT: All right.

24 MR. COOPER: Your Honor, if I could briefly
25 respond. I'm looking at the two incident reports that

1 are -- that Mr. Derek is referencing. I guess in
2 essence the dispute between Mr. Elrod and Comcast, and
3 I don't think we need to get involved with what that
4 was, but basically it was a verbal agreement that
5 Comcast had, or its predecessor had, with Mr. Elrod to
6 have a box on the utility pole on his property. And he
7 had been receiving cable for 20-some-odd years for free
8 because of it.

9 And some channels got switched off. And there
10 was a dispute between Mr. Elrod and Comcast.

11 Now as Judge Jefferson pointed out, Mr. Elrod
12 why don't you sue Comcast, sounds like a dispute
13 between you and them. And it is my understanding that
14 he did so in Charleston County and that case was
15 settled. I'm not familiar with the settlement.

16 But the report by Deputy McVoy states, and I
17 will quote, Deputy informed the suspect, in this case
18 that's Mr. Elrod, that the verbal agreement between him
19 and Comcast was a civil matter. And that the only
20 reason deputies were on scene was because of the
21 threats that he had made towards Comcast workers
22 earlier.

23 So there is reference to a civil matter, but the
24 deputy points out that whatever agreement Comcast had
25 with Mr. Elrod, that that's not for them to decide.

1 They were there at the request initially of Mr. Elrod
2 because of suspected trespassing. And then
3 subsequently at the request of Comcast on two separate
4 occasions, the 10th and the 15th, because of threats to
5 their safety.

6 And obviously I think everyone is aware that one
7 of the first duties of a deputy, or of any law
8 enforcement officer, is to protect and serve. And in
9 that respect, I think it's very clear throughout the
10 record that both deputies and the sheriff were doing
11 their best to keep any sort of physical confrontation
12 from occurring and that was it.

13 They didn't get involved with the agreement
14 between Comcast and Mr. Elrod. They were simply there
15 on site to make sure that the earlier threats of
16 violence did not come to bear.

17 MR. DEREK: Your Honor, I would disagree with
18 that position. I think that they certainly were there
19 trying to settle the civil matter. Whether or not
20 there were threats made by Mr. Elrod would also be a
21 question for the jury.

22 And I think they were there escorting Comcast on
23 to private property to allow Comcast to make money on
24 the service to 20 or 30 or 40 or 50 different houses
25 that that box was servicing.

1 THE COURT: Didn't you allege that in the
2 complaint, that they were acting in their capacity,
3 official capacity?

4 MR. DEREK: He did allege in the complaint
5 official capacity.

6 THE COURT: Okay. Well why isn't that
7 dispositive?

8 MR. DEREK: I believe once we take the
9 affidavits and other evidence outside of the complaint
10 and the motion for summary judgment, that it raises a
11 genuine issue of material fact as to whether or not
12 they were acting within the scope of their official
13 duties while under their official capacity.

14 THE COURT: All right. Well it's pretty clear.
15 I think the evidence is uncontroverted based on what I
16 have heard and the affidavits that have been submitted,
17 that at all times they were acting within their
18 official capacity.

19 Even if they were responding to a call that
20 involved a civil matter between those two, they were
21 always called out because they work for the sheriff's
22 office, and they were sheriff's deputies and they were
23 responding to a request to assist by a customer that
24 was -- or an employee who was going out to work.

25 Now the fact that those folks might have had

1 some sort of dispute between the two of them and it
2 might have been civil in nature, doesn't mean that that
3 converts whatever the Berkeley County Sheriff's
4 officers were doing when they were responding to a call
5 to assist.

6 I think that just stretches the definition of
7 acting outside of your course of official duties beyond
8 its intended meaning. So I think the defendant's
9 motion for summary judgment should be granted. And
10 give me a chance to, if you would, prepare an order and
11 send that to me and send it to opposing counsel. Send
12 it to the Charleston office.

13 MR. COOPER: Thank you, Your Honor.

14 THE COURT: All right.

15 MR. DEREK: Your Honor, is that the sheriff
16 himself personally as well? Or is that just the
17 Sheriff's Department?

18 THE COURT: Yes. Well technically you sued the
19 sheriff because they were the head of the Sheriff's
20 Department. It doesn't even say on here that he
21 was sued individually. But to the extent that he was
22 sued individually, he was not acting outside the scope
23 of his authority, to the extent that he was sued in his
24 capacity as the sheriff, and that's the proper party to
25 name when you are suing the Sheriff's Department,

1 you're entitled to summary judgment because it's
2 outside the statute of limitations.

3 Either way he wins.

4 MR. DEREK: Thank you, Your Honor.

5 (Whereupon, the proceedings in this matter
6 before the Court were adjourned.)

7 * * * * *

C E R T I F I C A T E

I, the undersigned, ANNE BOULEY MEYER,
Official Court Reporter for the Ninth Judicial
Circuit of the State of South Carolina, do hereby
certify that the foregoing is a true, accurate, and
complete transcript of record, and of all the
proceedings had and evidence introduced in the above
captioned case, relative to appeal, in the Circuit
Court for South Carolina, on the indicated date.

I do further certify that I am neither
of kin, counsel, nor interest to any party hereto.

--- Anne Bouley Meyer ---

Anne Bouley Meyer, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA

COUNTY OF BERKELEY

L.G. Elrod,

Plaintiff,

Versus

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

Defendants.

) IN THE COURT OF COMMON PLEAS

)

) NINTH JUDICIAL CIRCUIT

)

) C/A No. 10-CP-08-4453

)

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**AFFIDAVIT OF
RANDAL TIMMONS**

FILED
2011 APR 21 PM 2:11
CLERK OF COURT
BERKELEY COUNTY, SC

PERSONALLY APPEARED before me, Randal Timmons, who, being duly sworn,

deposes and says as follows:

1. My name is Randal Timmons. Although I am currently employed with the Moncks Corner Police Department, I was employed with Berkeley County Sheriff's Department for approximately seven years. I was an employee of Berkeley County Sheriff's Department in January, 2008, during the timeframe of the events alleged in Plaintiff's Complaint.

2. I am familiar with the facts of this case and have reviewed the Complaint filed by the Plaintiff. I authored two Incident Reports relative to my interactions with Plaintiff. (both attached).

3. On January 10, 2008, at approximately 12 pm. I was dispatched to Elrod Drive in response to a call received from Plaintiff about his not wanting Comcast employees on his property. Apparently, Plaintiff, or someone at his direction, had disabled service to the Comcast server box located on the utility pole located at the corner of his property.

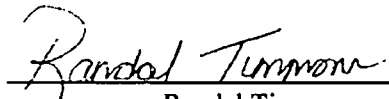
4. Restoration of service was of high importance due to the fact that, in addition to numerous households' loss of cable television and internet, telephone service had also been disabled which included access to emergency services such as 9-1-1.

5. When Comcast employees approached the property to work on the server box, Plaintiff became belligerent and stated that if we arrested him "we would have problems." Rather than provoke the Plaintiff further and have the situation escalate, I convinced Comcast to attempt to come back a later date. (See Incident Report #1 for further details).

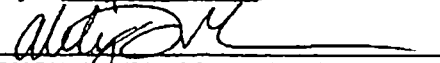
6. Five days later, on January 15, 2008, two other officers and myself again responded to Plaintiff's address in reference to a request by Comcast Cable to have officers on scene as Comcast placed a lock on its server box disconnect so that it could not be disabled again. (See Incident Report #2 for further details).

7. I stand behind each and every additional detail of my attached Incident Reports.
8. At 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.
9. At no time did I act in a grossly negligent manner towards Plaintiff, nor did I act or fail to act in such a manner as to violate his constitutional rights.

WHEREFORE AFFIANT SAYETH NOT!


Randal Timmons

SWORN TO BEFORE THIS
21 day of April, 2011.


NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 06/2015

Incident Report #1

(January 10, 2008)

AGENCY I.D.
SC0080000

INCIDENT REPORT

CASE NUMBER

INCE

2008010901318

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INCIDENT TYPE		COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM
1. INFORMATION (INF)		☐ YES ☒ NO	☐ YES ☒ NO			☐ Business ☐ Financial Inst. ☐ Government ☐ Religious ☐ Other
2. CHGO JAN 17 2008		☐ YES ☒ NO	☐ YES ☒ NO			☐ Business ☐ Financial Inst. ☐ Government ☐ Religious ☐ Other
3.		☐ YES ☒ NO	☐ YES ☒ NO			☐ Business ☐ Financial Inst. ☐ Government ☐ Religious ☐ Other
INCIDENT LOCATION (RESIDENCE, APPOINTMENT AND BUSINESS, STREET NAME AND NUMBER)				ZIP CODE		WEAPON TYPE
233 ELROD DRIVE, GOOSE CREEK				29445		
INCIDENT DATE		TIME CLOCK	TO	DATE	TIME CLOCK	LOCATION NO.
01/10/2008		10:00		01/10/2008	11:00	4/235
COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX
ELROD, LG.				☒ YES ☐ NO	W	M
ADDRESS		CITY		STATE	ZIP CODE	LOCATION NO.
307 ELROD DR		GOOSE CREEK		SC	29445	
VICTIM'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX
ELROD, LG.				☒ YES ☐ NO	W	M
ADDRESS		CITY		STATE	ZIP CODE	LOCATION NO.
307 ELROD DR		GOOSE CREEK		SC	29445	
VICTIM'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT		RESIDENT	RACE	SEX
ELROD, LG.				☒ YES ☐ NO	W	M
ADDRESS		CITY		STATE	ZIP CODE	LOCATION NO.
307 ELROD DR		GOOSE CREEK		SC	29445	
VISIBLE INJURY (NCT. 1) ☐ YES ☒ NO		EXPLAIN --				
VICTIM (NO. 1) USING ALCOHOL ☐ YES ☒ NO		UNUSUAL ☐ YES ☒ NO				
TWO-ARM VEH. ☐ ONE-ARM VEH. ☐ DETECTIVE/PLAINT ☐ OTHER ☐ ALONE ☐ ASSISTED ☐		*J - This Jurisdiction S - State O - One of State U - Unknown				
☐ SUSPECT		NAME (LAST, FIRST, MIDDLE)		RACE	SEX	AGE
☐ REMOVED				ETH.	DATE OF BIRTH	HEIGHT
☐ WANTED		FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.		WEIGHT	HAIR	EYES
☐ WARRANT		ADDRESS		CITY	STATE	ZIP CODE
☐ ARREST						LOCATION NO.
☐ JAIL		SUBJECT NO. 1 USING ALCOHOL ☐ YES ☒ NO		APPROPRIATE WEAPON OFFENSE ☐ YES ☒ NO		DATE/TIME OF OFFENSE
☐ SHARPS		SUBJECT NO. 1 USING ALCOHOL ☐ YES ☒ NO		TOTAL # ARRESTED		DATE/TIME OF ARREST
ON 01/10/2008 DEPUTY RESPONDED TO THE ABOVE LOCATION IN REFERENCE TO COMPLAINANT NOT WANTING COMCAST ON HIS PROPERTY OR CONDUCTING SERVICES ON THEIR SERVER BOX LOCATED ON POWER POLE ON THE CORNER OF HIS RESIDENCE. UPON ARRIVAL COMPLAINANT HAD HIS VEHICLE PARKED IN FRONT OF THE POLE AND WAS SEATED ON THE TAILGATE. DEPUTY SPOKE WITH MR ELROD WHO WAS VERY DISTURBED AND ADAMANT THAT COMCAST WAS NOT GOING TO CONDUCT SERVICES. DEPUTY ASKED COMPLAINANT IF COMCAST COULD PARK THEIR WORK TRUCK ON THE ROADWAY, EXTEND THEIR BUCKET TO THE POLE AND CONDUCT SERVICES IN THE PRESENCE OF OFFICERS ON SCENE AND ELROD AGREED. UPON HAVING COMCAST APPROACH THE RESIDENCE ELROD QUICKLY DECLINED THE AGREEMENT. THE COMPLAINANT BECAME BELLIGERENT AND STATED THAT, "IF WE ARRESTED HIM WE WOULD HAVE PROBLEMS." AT THAT TIME DEPUTY CONVINCED COMCAST TO ATTEMPT TO COME BACK AT A LATER DATE. NOTHING FURTHER AT THIS TIME.						
JURISDICTION OF THIS LAW ENFORCEMENT AGENCY		JURISDICTION OF RECEIVING LAW ENFORCEMENT AGENCY				
TYPE INQUIRY		TOTAL VALUE				
STOLEN						
DAMAGED						
BURKED						
RECOVERED						
SEIZED						
SUBJECT IDENTIFIED ☐ YES ☒ NO		SUBJECT LOCATED ☐ YES ☒ NO		ACTIVE ☐ AGED CLOSED ☐ UNFOUNDED		
REASON FOR EXCEPTIONAL CLEARANCE 1. ☐ OFFENDER DEATH		2. ☐ NO PROSECUTION		3. ☐ EXTRADITION DENIED		4. ☐ VICTIM DECLINES COOPERATION
REPORTING OFFICER		DATE		APPROVING OFFICER		DATE
TIMMONS, RANDAL		01/10/08		DREW, CASSANDRA		01/11/08
THOMAS, TABATHA		01/10/08		FOLLOW-UP INVESTIGATION ☐ YES ☒ NO		OFFICER

AGENCY I.D.
SC0080000

SUPPLEMENTARY REPORT

CASE NUMBER

200801001318

NCC

NO. EXT.
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☐ ORIGINAL
REPORT
☐ MODIFIED
ORIGINAL

☒ SUPPLEMENTAL
REPORT
☐ CASE STATUS
CHANGE

☐ ADDITIONAL
VICTIMS
☐ ADDITIONAL
OFFENDERS

☐ ADDITIONAL
STOLEN PROPERTY
☐ ADDITIONAL
RECOVERED PROPERTY

PAGE 1 of 1 PAGES

REFERENCE: INFORMATION REPORT

VICTIM: ELROD, LG

MODIFICATION: CORRECTION/MODIFIED THE INCIDENT LOCATION

THE INCIDENT LOCATION ON THE ORIGINAL REPORT THAT WAS FILED BY OFFICER TIMMONS IS INCORRECT. THE CORRECT INCIDENT LOCATION SHOULD BE 233 ELROD DRIVE. THIS SUPPLEMENTAL WILL SHOW THE CORRECTED INCIDENT LOCATION.

233 ELROD DRIVE

GOOSE CREEK, SC 29445

WADFORD A13

REC'D JAN 17 2008

NARRATIVE

ADMINISTRATIVE

SUBJECT IDENTIFIED
☐ YES ☒ NO

SUBJECT LOCATED
☐ YES ☒ NO

☒ ACTIVE ☐ ADM CLOSED
☐ UNFOUNDED

☐ ARRESTED UNDER 18
☐ ARRESTED 18 AND OVER

☐ EX-CLEAR UNDER 18
☐ EX-CLEAR 18 AND OVER

REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ JUVENILE - NO CUSTODY

REPORTING OFFICER(S)

DATE

UNIT
NUMBER

APPROVED OFFICER

DATE

UNIT
NUMBER

WADFORD, GRESHA

01/17/08

159

BLANCHARD, MELISSA

01/17/08

8

THOMAS, TABATHA

01/10/08

FOLLOW-UP
INVESTIGATION

☐ YES ☒ NO

OFFICER

Incident Report #2

(January 15, 2008)

INCIDENT REPORT

NCIC

BR	EN
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49

) IN THE COURT OF COMMON PLEAS

)
) NINTH JUDICIAL CIRCUIT

) C/A No. 10-CP-08-4453

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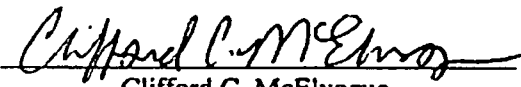
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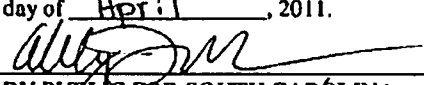
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7. I stand behind each and every additional detail of my attached Incident Report.
8. At all times relative to my interaction with the Plaintiff, and which is the subject of his Complaint, I was acting as an employee of the Berkeley County Sheriff's Department and within the scope of my official duties as a Berkeley County Sheriff's Deputy.
9. At no time did I act in a grossly negligent manner towards Plaintiff, nor did I act or fail to act in such a manner as to violate his constitutional rights.

WHEREFORE AFFIANT SAYETH NOT!


Clifford C. McElvogue

SWORN TO BEFORE THIS
21 day of April, 2011.


NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 06/2015

AGENCY I.D.
SC0080000

INCIDENT REPORT

CASE NUMBER

2008010901385

ACTIVITY

NO. OF
N N

INCIDENT TYPE		COMPLETED	FORCED ENTRY	PREMIER TYPE	UNITS	TYPE VICTIM
1. INFORMATION ONLY (INF)		☐ YES ☒ NO	☐ YES ☒ NO	Residence/Home		☐ Individual ☐ Business ☐ Financial Inst. ☐ Government ☐ Relig. Org. ☐ School/College ☐ Other
2.		☐ YES ☒ NO	☐ YES ☒ NO			☐ Unknown ☐ Public
3.		☐ YES ☒ NO	☐ YES ☒ NO			
INCIDENT LOCATION (SUBDIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER)				ZIP CODE	WEAPON TYPE	
233 ELROD DRIVE, GOOSE CREEK				29445		
INCIDENT DATE	TIME	DATE	TIME	DATE	TIME	LOCATION NO.
01/10/2008	11:00	01/10/2008	20:58	01/10/08	20:58	4/235
COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUSPECT	RESIDENT	RACE	SEX	AGE
MCKEOWN, JONATHAN.			☒ J ☐ S ☐ O ☐ U	W	M	32
ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
4400 BELLE OAKES		N.CHARLESTON	SC	29418	S	
VICTIM'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUSPECT	RESIDENT	RACE	SEX	AGE
COMCAST CABLE.			☒ J ☐ S ☐ O ☐ U			
HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.		
ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
4400 BELLE OAKES DRIVE		N.CHARLESTON	SC	29405	S	
VEHICLE INJURY (PMT, 1) ☐ YES ☒ NO ☐ EXPLAIN --						
COMPLAINT OF ANY NON-VEHICLE INJURY: ☐ YES ☒ NO						
VICTIM (PMT, 1) ☐ YES ☒ NO ☐ LINE ☐ OFFENSE ☐ YES ☒ NO ☐ TYPE						
TWO-MAIN VEH. ☐ ONE-MAIN VEH. ☐ DETEST/REPLACEMENT ☐ OTHER ☐ ALONE ☐ ASSISTED ☐						
* J - This Jurisdiction, S - State, O - Out of State, U - Unknown						
SUSPECT		NAME (LAST, FIRST, MIDDLE)	RACE	SEX	AGE	ETH.
☐ RUNNING		ELROD, LOUIE, G	W	M	71	N
☐ WANTED		FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.				
☐ THREATENED						
☐ ARREST		ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.
☐ JAIL		307 ELROD DR	GOOSE CREEK	SC	29445	4/235
☐ BARRING		SUBJECT (PMT, 1) ☐ YES ☒ NO ☐ LINE ☐ OFFENSE ☐ YES ☒ NO ☐ TYPE	APPROVED BY OFFICER		DATE/TIME OF OFFENSE	
		TOTAL # ARRESTED		DATE/TIME OF ARREST		
ON 1/10/08 THIS DEPUTY WAS DISPATCHED TO THE BALL FIELD ON LUCY DRIVE TO MEET WITH COMCAST CABLE						
IN REFERENCE TO GIVING THE COMPLAINANT A ESCORT TO 224 ELROD DRIVE IN ORDER TO CONDUCT SERVICE						
TO THEIR CABLE BOX. THE COMPLAINANT REQUESTED A ESCORT DUE TO THE SUSPECT MAKING THE COMMENT						
THAT HE WOULD DO WHATEVER IT TAKES TO PREVENT ANYONE FROM TRESPASSING ON HIS PROPERTY. THIS						
DEPUTY, PFC SAUNDERS, THE COMPLAINANT AND SEVERAL WORKERS FROM COMCAST ARRIVED ON SCENE. THE						
COMPLAINANT QUICKLY USED HIS BUCKET TRUCK AND EXTENDED TO THE POLL TO ATTEMPT TO RESTORE						
SERVICE TO SEVERAL FAMILIES THAT WERE OUT CABLE, INTERNET, AND PHONE SERVICE. WHILE THE						
COMPLAINANT WAS WORKING ON THE BOX DEPUTY OBSERVED THE POLE BEING APPROXIMATELY 5 TO 8 FEET IN						
THE GRASS FROM THE HIGHWAY. THE COMPLAINANT OBSERVED THE SUSPECT DRIVING UP IN HIS TRUCK, THE						
COMPLAINANT THEN LOWERED HIS BUCKET TO PREVENT A CONFRONTATION WITH THE SUSPECT. THE						
JURISDICTION OF TRAFFIC LAW ENFORCEMENT AGENCY						
JURISDICTION OF TRAFFIC LAW ENFORCEMENT AGENCY						
TYPE (GROUP)		TOTAL VALUE				
STOLEN		Certified True Record for this County				
DAMAGED		BERKELEY COUNTY, SC				
BURNED		Date 2-17-11				
RECOVERED		Berkeley County Sheriff's Office				
SEIZED						
SUBJECT IDENTIFIED		SUBJECT LOCATED		ACTIVE		
☒ YES ☐ NO		☒ YES ☐ NO		☐ OPEN ☒ CLOSED		
REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ AVAILABLE - NO CUSTODY		DATE		DATE		
MCELVOGUE, CLIFFORD		01/11/08		C115 GEIGER, JAMES		
FOLLOWUP INVESTIGATION		OFFICER		DATE		
☐ YES ☒ NO				01/11/08		

SUPPLEMENTAL INCIDENT REPORT

CASE NUMBER _____

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2 0 0 8 0 1 0 0 1 3 8 5

NO.	EXTD.
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☐ ORIGINAL REPORT		☐ SUPPLEMENTAL REPORT	☐ ADDITIONAL VICTIMS	☐ ADDITIONAL STOLEN PROPERTY	PAGE <u>2</u> OF _____ PAGES
☐ MODIFIED ORIGINAL		☐ CASE STATUS CHANGE	☐ ADDITIONAL OFFENDERS	☐ ADDITIONAL RECOVERED PROPERTY	

VICT/SUBJ I.D. OVERFLOW	☐ COMPLAINANT	NAME (LAST, FIRST, MIDDLE)		FIRST INITIALS TO SUBJECT		ACCIDENT	FACE	SEX	AGE	D.O.B.	ETH	
	☐ VICTIM #					* J S O B						
	☐ SUBJECT #	HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	☐ RUNAWAY											
	☐ WANTED											
	☐ WARRANT											
☐ ARREST	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	DAY PHONE		(EVENING PHONE)			
☐ JAIL	☐ VICTIM NO.: VEHICLE BLAME? ☐ NO ☐ YES		COMPLAINT OF NON-VEHICLE BLAME? ☐ NO ☐ YES		☐ VICTIM USING ALCOHOL? ☐ NO ☐ YES ☐ UNL		☐ TWO-MAN VEHICLE ☐ DETECTIVE/FLASHER ☐ ALONE					
☐ RUNAWAY	EXPLAIN				☐ DRUGS? ☐ NO ☐ YES TYPE: _____		☐ ONE-MAN VEHICLE ☐ OTHER		☐ ADMITTED			
☐	☐ SUBJECT NO.: USING ALCOHOL? ☐ NO ☐ YES				☐ USING DRUGS? ☐ NO ☐ YES TYPE: _____		☐ UNL					

VICT/SUBJ I.D. OVERFLOW	☐ COMPLAINANT	NAME (LAST, FIRST, MIDDLE)		FIRST INITIALS TO SUBJECT		ACCIDENT	FACE	SEX	AGE	D.O.B.	ETH	
	☐ VICTIM #					* J S O B						
	☐ SUBJECT #	HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.						
	☐ RUNAWAY											
	☐ WANTED											
	☐ WARRANT											
☐ ARREST	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	DAY PHONE		(EVENING PHONE)			
☐ JAIL	☐ VICTIM NO.: VEHICLE BLAME? ☐ NO ☐ YES		COMPLAINT OF NON-VEHICLE BLAME? ☐ NO ☐ YES		☐ VICTIM USING ALCOHOL? ☐ NO ☐ YES ☐ UNL		☐ TWO-MAN VEHICLE ☐ DETECTIVE/FLASHER ☐ ALONE					
☐ RUNAWAY	EXPLAIN				☐ DRUGS? ☐ NO ☐ YES TYPE: _____		☐ ONE-MAN VEHICLE ☐ OTHER		☐ ADMITTED			
☐	☐ SUBJECT NO.: USING ALCOHOL? ☐ NO ☐ YES				☐ USING DRUGS? ☐ NO ☐ YES TYPE: _____		☐ UNL					

COMPLAINANT WAS CONCERNED ABOUT THE SUSPECTS ACTIONS DUE TO A PRIOR INCIDENT WITH HIS WORKERS EARLIER THAT DAY. THIS DEPUTY ADVISED THE COMPLAINANT TO CONTINUE WORKING ON THE CABLE BOX DUE TO SEVERAL FAMILIES WOULD NOT BE ABLE TO CALL 911 IF THEY HAD A EMERGENCY. THE SUSPECT ARRIVED AT THE LIGHT POLE AND JUMPED OUT OF HIS TRUCK HOLDING A CAM CORDER, THE SUSPECT WALKED UP TO DEPUTY AND GOT APPROXIMATELY 2 INCHES FROM DEPUTIES FACE AND STARTED RECORDING. THIS DEPUTY ADVISED THE SUSPECT TO STEP BACK OUT OF DEPUTIES FACE, THE SUSPECT PROCEEDED TO GET CLOSER TO DEPUTY WITH THE RECORDER. THIS DEPUTY USED A OPEN HAND AND PUSHED THE CAMERA OUT OF DEPUTIES FACE. INFORMING HIM THAT HE COULD RECORD AT A DISTANCE BUT NOT IN DEPUTIES FACE.											
				JURISDICTION OF THIFT LAW ENFORCEMENT AGENCY				JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY			

ADMINISTRATIVE	STATUS		TYPE		VIN AND/OR LICENSE NO.		BODY MARK NO. AND/OR REG. NO.	
	☐ STOLEN	☐ VEHICLE						
	☐ RECOVERED	☐ GUN	SERIAL AND/OR OWNER APPLIED NO.				STATE	
	☐ FOUND	☐ BOAT	YEAR OF REGISTRATION		YEAR OF EXPIRATION		YEAR	MAKE
	☐ TOWED	☐ LICENSE PLATE	MODEL		STYLE		COLOR	BRAID NAME
	☐ SUSPECT	☐ SECURITIES/BONDS, STOCKS	MIC NO.		DENOMINATION		ISSUER	SECURITY DATE
	☐ VICTIM	☐ ARTICLE	MISCELLANEOUS					
TYPE GROUP								TOTAL VALUE
STOLEN								
DAMAGED								
BURNED								
RECOVERED								
NEEDS								
SUBJECT IDENTIFIED		SUBJECT LOCATED		ACTIVE		APPROVED UNDER 18		EXP-CLEAR UNDER 18
☐ YES ☐ NO		☐ YES ☐ NO		☐ ADOL CLOSED ☐ UNPUNISHED		☐ APPREHENDED 18 AND OVER		☐ ESC-CLEAR 18 AND OVER
REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEAD 2. ☐ NO PROB CAUTION 3. ☐ EXTRAJURIS DICED 4. ☐ VICTIM DECLINES COOPERATION 5. ☐ AVAILABLE - NO OUTPOOF				REPORTING OFFICER(S) DATE UNIT NUMBER APPROVING OFFICER DATE UNIT NUMBER				
MCELVOGUE, CLIFFORD 01/11/08 C115				GEIGER, JAMES 01/11/08				
				FOLLOWUP INVESTIGATION ☐ YES ☐ NO OF PCOR				

AGENCY I.D.
SC0080000

SUPPLEMENTAL INCIDENT REPORT

CASE NUMBER	200801001385	NCC	INC. N	EXTD. N
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☐ ORIGINAL REPORT	☐ SUPPLEMENTAL REPORT	☐ ADDITIONAL VICTIMS	☐ ADDITIONAL STOLEN PROPERTY	PAGE 3 OF 3 PAGES
☐ MODIFIED ORIGINAL	☐ CASE STATUS CHANGE	☐ ADDITIONAL OFFENDERS	☐ ADDITIONAL RECOVERED PROPERTY	

VICT/SUBJ. I.D. OVERFLOW	☐ COMPLAINT	NAME (LAST, FIRST, MIDDLE)		VICTIM RELATIONSHIP TO SUSPECT		RESIDENT	AGE	SEX	DOB	ETH	
	☐ VICTIM #										
	☐ SUBJECT #	HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.					
	☐ RACE										
	☐ WANTED	ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.	DAY PHONE	EVENING PHONE			
	☐ WARRANT										
	☐ ARREST	☐ VICTIM NO. / VEHICLE INJURY: ☐ NO ☐ YES	☐ COMPLAINT OF NON-VEHICLE INJURY: ☐ NO ☐ YES		☐ VICTIM USES ALCOHOL: ☐ NO ☐ YES ☐ UNK.		☐ TWO-WAY VEHICLE ☐ DETECTIVE/PLASMA ☐ ALONE				
	☐ JAIL	☐ EXPLAIN									
	☐ SUMMONS	☐ SUBJECT NO. / VEHICLE ALCOHOL: ☐ NO ☐ YES	☐ DRUGS: ☐ NO ☐ YES ☐ TYPE		☐ UNK.		☐ ONE-WAY VEHICLE ☐ OTHER		☐ ASSAULT		

VICT/SUBJ. I.D. OVERFLOW	☐ COMPLAINT	NAME (LAST, FIRST, MIDDLE)		VICTIM RELATIONSHIP TO SUSPECT		RESIDENT	AGE	SEX	DOB	ETH	
	☐ VICTIM #										
	☐ SUBJECT #	HEIGHT	WEIGHT	HAIR	EYES	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL PECULIARITIES, ETC.					
	☐ RACE										
	☐ WANTED	ADDRESS	CITY	STATE	ZIP CODE	LOCATION NO.	DAY PHONE	EVENING PHONE			
	☐ WARRANT										
	☐ ARREST	☐ VICTIM NO. / VEHICLE INJURY: ☐ NO ☐ YES	☐ COMPLAINT OF NON-VEHICLE INJURY: ☐ NO ☐ YES		☐ VICTIM USES ALCOHOL: ☐ NO ☐ YES ☐ UNK.		☐ TWO-WAY VEHICLE ☐ DETECTIVE/PLASMA ☐ ALONE				
	☐ JAIL	☐ EXPLAIN									
	☐ SUMMONS	☐ SUBJECT NO. / VEHICLE ALCOHOL: ☐ NO ☐ YES	☐ DRUGS: ☐ NO ☐ YES ☐ TYPE		☐ UNK.		☐ ONE-WAY VEHICLE ☐ OTHER		☐ ASSAULT		

NARRATIVE

THE SUSPECT BECAME ANGRY AND ADAMANT THAT COMCAST WAS NOT GOING TO TURN THE CABLE BACK ON. AFTER SPEAKING WITH THE COMPLAINANT THE COMPLAINANT INFORMED DEPUTY THAT THE SUSPECT HAD BEEN AND STILL IS RECEIVING FREE CABLE FROM COMCAST BECAUSE THEY HAD THEIR BOX ON A BERKELEY ELECTRIC POLE ON HIS PROPERTY. DEPUTY CONFRONTED THE SUSPECT ABOUT THE DEAL BETWEEN HIM AND COMCAST. THE SUSPECT STATED THAT WHAT THE COMPLAINANT STATED WAS TRUE, THE SUSPECT STATED THAT COMCAST REMOVED TWO CHANNELS FROM HIS PLAN AND HE STATED THAT WAS A BREACH OF CONTRACT. DEPUTY INFORMED THE SUSPECT THAT THE VERBAL AGREEMENT BETWEEN HIM AND COMCAST WAS A CIVIL MATTER AND THE ONLY REASON DEPUTIES WERE ON SCENE WAS BECAUSE OF THE THREATS THAT

JURISDICTION OF THEFT LAW ENFORCEMENT AGENCY		JURISDICTION OF RECOVERY LAW ENFORCEMENT AGENCY	
STATUS	TYPE	VIN AND/OR LICENSE NO.	BOAT HULL NO. AND/OR REG. NO.
☐ STOLEN	☐ VEHICLE	SERIAL AND/OR OWNER APPLIED NO.	STATE
☐ RECOVERED	☐ GUN	YEAR OF REGISTRATION	YEAR OF EXPIRATION
☐ FOUND	☐ BOAT	YEAR	MAKE
☐ TOWED	☐ LICENSE PLATE	MODEL	STYLE
☐ SUSPECT	☐ SECURITIES/BONDS, STOCKS	COLOR	SAFETY NAME
☐ VICTIM	☐ ARTICLES	NO. NO.	SECURITY DATE
MISCELLANEOUS			

ADMINISTRATIVE PROPERTY EST. VEH./GUN/ETC. 1	TYPE (GROUP)							TOTAL VALUE
	STOLEN							
	DAMAGED							
	SUPPRESSED							
	RECOVERED							
	INDEXED							
	SUBJECT IDENTIFIED	☐ YES ☐ NO	SUBJECT LOCATED	☐ YES ☐ NO	ACTIVE	☐ ADM. CLOSED ☐ UNFOUNDED	ARRESTED UNDER 18	☐ ES-CLEAR UNDER 18
	REASON FOR EXCEPTIONAL CLEARANCE	1. ☐ OFFENDER DEATH	2. ☐ NO PROSECUTION	3. ☐ EXTRADITION DENIED	4. ☐ VICTIM DECLINES COOPERATION	5. ☐ ANYTHING - NO CUSTODY		
	REPORTING OFFICER(S)	DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER		
	MCELVOGUE, CLIFFORD	01/11/08	C115	GEIGER, JAMES	01/11/08			

SUPPLEMENTAL INCIDENT REPORT

HCIC

NO.	DATA
N	N

55

AGENCY I.D.
SC0080000

SUPPLEMENTARY REPORT

CASE NUMBER

200801001385

NCIC

INQ. N
ENTD. N

☐ ORIGINAL
REPORT
☐ MODIFIED
ORIGINAL

☒ SUPPLEMENTAL
REPORT
☐ CASE STATUS
CHANGE

☐ ADDITIONAL
VICTIMS
☐ ADDITIONAL
OFFENDERS

☐ ADDITIONAL
STOLEN PROPERTY
☐ ADDITIONAL
RECOVERED PROPERTY

PAGE 1 OF 1 PAGES

REFERENCE: INFORMATION REPORT

SUSPECT: ELROD, LG

MODIFICATION: CORRECTION/MODIFIED THE INCIDENT LOCATION

THE INCIDENT LOCATION ON THE ORIGINAL REPORT THAT WAS FILED BY OFFICER CC MCELVOGUE INCORRECT. THE CORRECT INCIDENT LOCATION SHOULD BE 233 ELROD DRIVE. THIS SUPPLEMENTAL WILL SHOW THE CORRECTED INCIDENT LOCATION.

233 ELROD DRIVE

GOOSE CREEK, SC 29445

WADFORD A13

REC'D JAN 17 2008

NARRATIVE

ADMINISTRATIVE

SUBJECT IDENTIFIED ☒ YES ☐ NO		SUBJECT LOCATED ☒ YES ☐ NO		☒ ACTIVE ☐ ADM CLOSED ☐ UNFOUNDED		☐ APPRETTED UNDER 18 ☐ APPRETTED 18 AND OVER		☐ EX-CLEAR UNDER 18 ☐ EX-CLEAR 18 AND OVER			
REASON FOR EXCEPTIONAL CLEARANCE: 1. ☐ OFFENDER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTRADITION DENIED 4. ☐ VICTIM OF CRIME COOPERATION 5. ☐ APPEAL - NO CUSTODY											
REPORTING OFFICER'S		DATE		UNIT NUMBER		APPROVING OFFICER		DATE		UNIT NUMBER	
WADFORD, GRESHA		01/17/08				BLANCHARD, MELISSA		01/17/08		8	
FOLLOW-UP INVESTIGATION ☐ YES ☒ NO										OFFICER	

STATE OF SOUTH CAROLINA	)	THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NO.: 2010-CP-08-4453
L.G. ELROD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	AFFIDAVIT OF
	)	JERRY R. WILLIAMS
BERKELEY COUNTY SHERIFF'S	)	
DEPARTMENT and H. WAYNE	)	
DEWITT,	)	
	)	
Defendants.	)	

PERSONALLY APPEARED before me, Jerry R. Williams, being first duly sworn, deposes and says that:

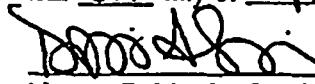
1. The contents of this statement are true and stated under the penalty of perjury.
2. I make these statements based on my own personal knowledge.
3. On January 10, 2008, my dad, L.G. Elrod, and I posted a "no trespassing" sign on his property at 233 Elrod Dr., Goose Creek, South Carolina.
4. On January 10, 2008, after we posted the "no trespassing sign," I witnessed the Berkeley County Sheriff's Department restrain L.G. Elrod, without a court order, in order to allow Comcast Cable Company to trespass and work on his private property.
5. On January 15, 2008, I again witnessed the Berkeley County Sheriff's Department restrain L.G. Elrod, without a court order, in order to allow Comcast Cable Company to trespass and work on his private property.

[Signature block on following page.]

This 21 day of April 2012.


Jerry R. Williams

Sworn to and subscribed before me,
this 21 day of April 2012.


Notary Public for South Carolina
My Commission Expires: 2/03/2017

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

) THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO.: 2010-CP-08-4453

L.G. ELROD,

Plaintiff,

v.

BERKELEY COUNTY SHERIFF'S
DEPARTMENT and H. WAYNE
DEWITT,

Defendants.

AFFIDAVIT OF L.G. ELROD

PERSONALLY APPEARED before me, L.G. Elrod, being first duly sworn,
deposes and says that:

1. The contents of this statement are true and stated under the penalty of perjury.
2. I make these statements based on my own personal knowledge.
3. In early January 1991, Storer Cable put a box on my private property at 233 Elrod Dr., Goose Creek, South Carolina to service about 15 to 20 customers in the area.
4. When I discovered this, I informed them that they were not allowed to use the property, as they didn't have an easement or permission.
5. On January 9, 1991, the company offered to provide television service at my home at 307 Elrod Dr., Goose Creek, South Carolina in exchange for the use of my property at 233 Elrod Dr., Goose Creek, South Carolina, and I agreed.

6. Years later, Comcast bought Storer Cable and continued to use the property, and I continued to receive television in exchange for the use of my property.

7. In December 2007, some of my channels began to turn off, and I called Comcast to let them know the situation.

8. The customer service lady informed me that all of my channels were being turned off, and when I told her of our agreement, she said I needed to speak with Mr. Anthony Douglas who was out of town for a week.

9. When I spoke to Mr. Douglas, he told me that I wasn't going to be getting "free" television service anymore, and I told him that my service was not "free." The service was provided for me in exchange for the use of my property, and through that use, Comcast was able to provide service to 15 to 20 customers and was making money by doing so.

10. He said they were going to remove the box when they decided where to reroute the lines.

11. I told him he needed to leave my service on as long as they used my private property, and he wouldn't agree.

12. At the end of our conversation, I informed him that if they didn't turn my service back on they were in breach of the agreement and couldn't use my private property any longer.

13. More importantly, I was going to turn the service off on the box, and they wouldn't be able to access the box to turn the service back on.

14. On January 10, 2008, my son, Jerry Williams, helped me put a "No Trespassing" sign by the pole that the cable box was on, and I wrote Comcast Cable, my initials, and took pictures.

15. Then, I turned the box off.

16. Later that day, Comcast arrived at the property and tried to get on the property to access the cable box, and I told them they were on trespass notice and couldn't come on the property without a court order.

17. Then, I called Berkeley County Sheriff's Department and told them Comcast was on trespass notice and trying to get on the property

18. I requested a deputy to advise them that they needed a court order to get on the property as it was private property and they had been put on trespass notice.

19. Deputy Randal Timmons came out, talked to them, and asked me to let them on the property. I told him no.

20. Following that conversation, he spoke with Comcast again, and they left.

21. Days later, I learned through his incident report that he told them to come back later instead of telling them that they needed a court order.

22. Later that day (January 10, 2008), 2 squad cars, and several deputies from the Berkeley County Sheriff's Department came out with their lights flashing to assist Comcast.

23. Deputy Clifford McElvogue informed me that this equipment belonged to Comcast, and they were going to work on it. He then told me that if I interfered with Comcast, the Sheriff's Department would "lock me up."

24. The Sheriff's Department restrained me with the threat of jail while Comcast worked on my private property right over the "No Trespassing" sign.

25. I requested Deputy Clifford McElvogue to provide me with the court order authorizing their actions, but I was ignored.

26. When the Sheriff's Department left, Deputy Clifford McElvogue informed me that if I tampered with the Comcast equipment they would come back and "lock me up."

27. After this incident, I called Sheriff H. Wayne DeWitt at his office and asked him for an explanation as to why he sent deputies out to my private property to restrain me on a civil matter without a court order.

28. He informed me that some of the customers had their phone service with Comcast, and when the service was turned off, they could no longer access the 911 service.

29. I told him that this was a civil matter and that the Sheriff's Department should not be involved with civil matters. Moreover, the 911 service had not been interrupted.

30. In addition, when I requested this information, Lieutenant Clifford McElvogue told me that the 911 service had in fact not been interrupted.

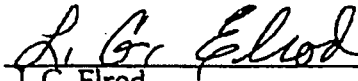
31. On January 14, 2008, Attorney Mary Leigh Arnold faxed a Cease and Desist from any further trespass to Comcast.

32. On January 15, 2008, I turned the box off again as the service to my home had not been restored.

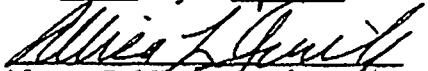
33. And again, Berkeley County Sheriff's Department sent out squad cars and deputies, without a court order, to restrain me while Comcast trespassed and worked on my private property directly above the "No Trespassing" sign.

34. And this time, I was recording with my audio/video camera.

This 24 day of April 2012.


L.G. Elrod

Sworn to and subscribed before me,
this 24th day of April 2012.



Notary Public for South Carolina
My Commission Expires: 4-20-2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF BERKELEY	)	NINTH JUDICIAL CIRCUIT
	)	
L.G. Elrod,	)	C/A No. 10-CP-08-4453
	)	
	)	
Plaintiffs,	)	
	)	
Versus	)	AFFIDAVIT OF SHERIFF
	)	H. WAYNE DEWITT
	)	
Berkeley County Sheriff's Department, and H.	)	
Wayne Dewitt,	)	
	)	
Defendants.	)	

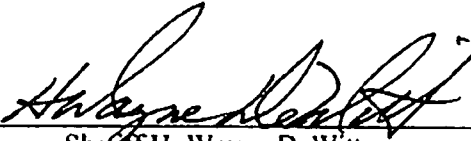
FILED
 2012 MAY -4 PM 1:19
 CLERK OF COURT
 BERKELEY COUNTY SC

PERSONALLY APPEARED before me, SHERIFF WAYNE DEWITT who, being duly sworn, deposes and says as follows:

1. I, Wayne DeWitt, am employed by the Berkeley County Government and am a named Defendant in this case.
2. I was elected Sheriff of Berkeley County in 1994 and continue to hold this position. As the Chief Law Enforcement Officer of Berkeley County, I am responsible for enforcement of County, State and Federal laws.
3. I have reviewed the Complaint against me in this case. I have reviewed the Berkeley County Sheriff's Office Incident Reports relative to the Plaintiff's Complaint.
4. Based upon my investigation of the matter, all Berkeley County Sheriff's Deputies who interacted with Plaintiff on January 10 and 15, 2008 were acting in the scope of their official duties as Sheriff's Deputies with the Berkeley County Sheriff's Office. At all times relative to the Plaintiff's Complaint I was acting in the scope of my official duties as Sheriff of Berkeley County.
5. Other than my review of the case materials cited above, I had no personal interaction with Mr. Elrod related to the facts alleged in his Complaint.

[signature page follows]

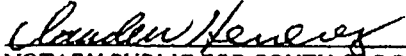
WHEREFORE AFFIANT SAYETH NOT.



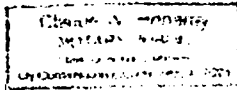
Sheriff H. Wayne DeWitt

SWORN TO BEFORE THIS

27 day of APRIL, 2012.



NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: FEB 4, 2021



STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

L.G. ELROD,

Plaintiff,

v.

BERKELEY COUNTY SHERIFF'S
DEPARTMENT and H. WAYNE
DEWITT,

Defendants.

) THE COURT OF COMMON PLEAS
) NINTH JUDICIAL CIRCUIT
) CASE NO.: 2010-CP-08-4453

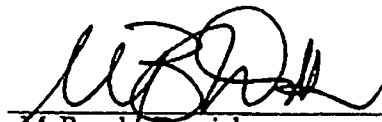
AFFIDAVIT OF M. BROOKS
DERRICK, ATTORNEY FOR
PLAINTIFF

FILED
2012 MAY -9 PM 3:23
MARY P. DUDMAN
CLERK OF COURT
BERKELEY COUNTY, SC

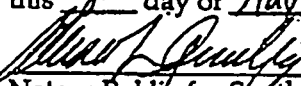
PERSONALLY APPEARED before me, M. Brooks Derrick, being first duly
sworn, deposes and says that:

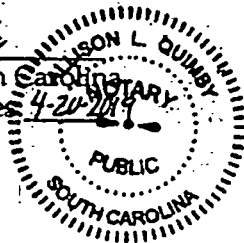
1. The contents of this statement are true and stated under the penalty of perjury.
2. I am the attorney of record for Plaintiff L.G. Elrod.
3. The attached documents are in the possession of the parties.
4. Plaintiff produced the attached documents in response to Defendant First Set of Interrogatories and Requests for Production.

This 8 day of May 2012.


M. Brooks Derrick
Attorney and Counselor for Plaintiff

Sworn to and subscribed before me,
this 8 day of May 2012.


Notary Public for South Carolina
My Commission Expires 4-20-2014



DO	UNO
N	N



EXHIBIT
1

INCIDENT REPORT

CLUB MEMBER

1000

N	N
---	---

REC'D JAN 14 2008

~~Q160 JAN 17 2008~~

68

AGENCY I.D.
SC0080000

SUPPLEMENTARY REPORT

CASE NUMBER

200801001318

REC

NO. 100
N N

☐ CRIMINAL REPORT	☒ SUPPLEMENTAL REPORT	☐ ADDITIONAL WORK	☐ ADDITIONAL STOLEN PROPERTY	PAGE 1
☐ MISDEMEANOR	☐ CASE STATUS CHANGE	☐ ADDITIONAL OFFENSES	☐ ADDITIONAL RECOVERED PROPERTY	PAGE

REFERENCE: INFORMATION REPORT

VICTIM: ELROD, LO

MODIFICATION: CORRECTION/MODIFIED THE INCIDENT LOCATION

THE INCIDENT LOCATION ON THE ORIGINAL REPORT THAT WAS FILED BY OFFICER TIMMONS IS INCORRECT. THE CORRECT INCIDENT LOCATION SHOULD BE 233 ELROD DRIVE. THIS SUPPLEMENTAL WILL SHOW THE CORRECTED INCIDENT LOCATION.

233 ELROD DRIVE
GOOSE CREEK, SC 29445

WADFORD A13

REC'D JAN 17 2008

☐ SUBJECT IDENTIFIED ☐ YES ☒ NO	☐ SUBJECT LOCATED ☐ YES ☒ NO	☒ ACTIVE ☐ ADJ. CLOSED ☐ UNFOUNDED	☐ ARRESTED UNDER 14 ☐ ARRESTED 15 AND OVER	☐ CH-CLERK UNDER 14 ☐ CH-CLERK 15 AND OVER
SEARCH FOR EXTERNAL CLEARANCE & ☐ OUTSIDE DATA		☐ NO PROSECUTION	☐ EXEMPTION REVIEW	☐ RECORD REVIEW COMPLETION
APPROVED OFFICER		APPROVED OFFICER		DATE
WADFORD, GRESHA		01/17/08	BLANCHARD, MELISSA	01/17/08
THOMAS, TABATHA		01/10/08	150	8

INCIDENT REPORT

CASE HISTORY

2 0 0 8 0 1 0 0 1 3 8 5

	
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EXHIBIT
2

[illegible]

SUPPLEMENTAL INCIDENT REPORT

2 0 0 8 0 1 0 0 1 3 8 5

NO	DR
N	N

72

CASE NUMBER	REC
200801001386	N N

73

AGENCY I.D.
SC0080000

SUPPLEMENTARY REPORT

CASE NUMBER

200801001388

ACQ

REL. DATE
N N

☐ ORIGINAL
REPORT
☐ MODIFIED
ORIGINAL

☒ SUPPLEMENTAL
REPORT
☐ CASE STATUS
CHANGE

☐ ADDITIONAL
WITNESS
☐ ADDITIONAL
OFFICERS

☐ ADDITIONAL
STOLEN PROPERTY
☐ ADDITIONAL
RECOVERED PROPERTY

PAGE 1 OF 1 PAGES

REFERENCE INFORMATION REPORT

SUSPECT: ELROD, LG

MODIFICATION: CORRECTION/MODIFIED THE INCIDENT LOCATION

THE INCIDENT LOCATION ON THE ORIGINAL REPORT THAT WAS FILED BY OFFICER CC MCELVOGUE INCORRECT. THE CORRECT INCIDENT LOCATION SHOULD BE 233 ELROD DRIVE. THIS SUPPLEMENTAL WILL SHOW THE CORRECTED INCIDENT LOCATION.

233 ELROD DRIVE

GOOSE CREEK, SC 29445

WADFORD A13

REC'D JAN 17 2008

SUBJECT IDENTIFIED ☒ YES ☐ NO		SUBJECT LOCATED ☒ YES ☐ NO		ACTION ☒ OPEN ☐ ACQ. CLOSED ☐ SUSPENDED		APPROVED NUMBER IS ☐ APPROVED NUMBER IS		CHARGE NUMBER IS ☐ CHARGE NUMBER IS	
REASON FOR REOPENING/CHARGE CHANGE ☐ OFFICER'S ERROR ☐ NO PROSECUTION ☐ INFORMATION CHANGED ☐ VICTIM DECLINES COOPERATION ☐ OFFENSE - NEW CHARGE				DATE		OFFICER		DATE	
WADFORD, GRESHA				01/17/08		BLANCHARD, MELISSA		01/17/08	
FOLLOWUP INVESTIGATION				☐ YES ☒ NO		OFFICER			

AGENCY I.D.
SC0080000

INCIDENT REPORT

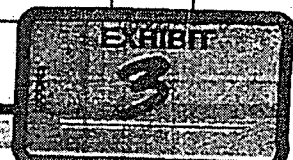
CASE NUMBER

200801002023

WFLC

NO. ENCL
N N

EVENT	INCIDENT TYPE		COMPLETED	FORCED ENTRY	PREMISE TYPE	UNITS ENTERED	TYPE VICTIM
	1. INFORMATION ONLY (INF)		☒ YES ☐ NO	☐ YES ☐ NO	Highway/Road/Air		☐ Individual ☐ Business ☐ Financial Inst. ☐ Government ☐ Relig. Org. ☐ Soc. Public ☐ Other ☐ Unknown ☐ Police
	2. REC'D JAN 18 2008		☐ YES ☐ NO	☐ YES ☐ NO			
	3.		☐ YES ☐ NO	☐ YES ☐ NO			
VICTIM NO. 1	INCIDENT LOCATION (DIVISION, APARTMENT AND NUMBER, STREET NAME AND NUMBER)					ZIP CODE	WEAPON TYPE
	233 ELROD DRIVE, GOOSE CREEK					29445	
	INCIDENT DATE	TIME	DATE	TIME	LOCATION NO.		
	01/15/2008	13:30	01/15/2008	14:30	4/235		
	COMPLAINANT'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT	AGE	SEX	ETH.	DAYTIME PHONE
	CANNON, DAVID, MICHAEL			39	M	N	(843) 208-2382
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
	113 ELAINE STREET		GOOSE CREEK	SC	29445	4/235	
	VICTIM'S NAME (LAST, FIRST, MIDDLE)		RELATIONSHIP TO SUBJECT	AGE	SEX	ETH.	DAYTIME PHONE
	COMCAST CABLE,						
SUBJECT NO. 1	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
	4400 BELLE OAKES DRIVE		N. CHARLESTON	SC	29405	STATE	
	VEHICLE PLATE (N.C. 1) ☐ YES ☐ NO ☐ EXPLAIN --						
	VICTIM NO. 11 (N.C. 1) ☐ YES ☐ NO ☐ EXPLAIN --						
	THREATENED ☐ ONE-ARMED ☐ DETECTED ☐ OTHER ☐ ALONE ☐ ASSISTED ☐ *J - This Jurisdiction S - State O - Out of State U - Unknown						
	SUSPECT		RACE	SEX	AGE	ETH.	DATE OF BIRTH
	ELROD, LOUIE, G.		W	M	71	N	12/06/36
	FACIAL HAIR, SCARS, TATTOOS, GLASSES, CLOTHING, PHYSICAL IDENTIFIERS, ETC.						
	ADDRESS		CITY	STATE	ZIP CODE	LOCATION NO.	
	307 ELROD DR		GOOSE CREEK	SC	29445	4/235	
NARRATIVE	ON 01/15/2008 LT. MCELVOGUE, PFC. COLLINS AND THIS DEPUTY RESPONDED TO 233 ELROD DRIVE IN						
	REFERENCE TO A CIVIL MATTER. COMCAST CABLE CONTACTED THE BERKELEY COUNTY SHERIFF'S OFFICE FOR						
	OFFICERS TO STANDBY AT PEARL AND ELROD DRIVE IN REFERENCE TO SERVICES THAT NEEDED TO BE						
	CONDUCTED FOR THEIR COMPANY. LT. MCELVOGUE ADVISED MR. ELROD THAT COMCAST CABLE WAS THERE TO						
	PUT A LOCK ON THEIR DISCONNECT SWITCH DUE TO THE FACT THAT NOBODY WILL BE ABLE TO CUT SERVICES						
	OFF AND WAS NOT GOING TO REMOVE ANY EQUIPMENT. MR. ELROD ADVISED LT. MCELVOGUE THAT HE WANTED						
	TO GO AND GET HIS CAM CORDER SO HE COULD DO A VIDEO OF THE WORK BEING DONE WHICH HE DID. MR.						
	ELROD & JERRY WILLIAMS CAME ON SCENE BUT DID NOT GET INVOLVED.						
	COMCAST CABLE COMPLETED THEIR WORK AND LEFT THE SCENE. LT. MCELVOGUE ADVISED MR. ELROD FOR						
	HIM NOT TO TOUCH COMCAST CABLES EQUIPMENT.						
ADMINISTRATIVE	SUBJECT IDENTIFIED		SUBJECT LOCATED		APPROVING OFFICER		DATE
	☒ YES ☐ NO		☒ YES ☐ NO		TIMMONS, RANDAL		01/15/08
	REASON FOR EXCEPTIONAL CLEARANCE 1. ☐ OFFICER DEATH 2. ☐ NO PROSECUTION 3. ☐ EXTORTION DEMAND 4. ☐ VICTIM DECLINED COOPERATION 5. ☐ JUVENILE - NO CUSTODY						
	APPROVING OFFICER		DATE	UNIT NUMBER	APPROVING OFFICER	DATE	UNIT NUMBER
	TIMMONS, RANDAL		01/15/08	124	SGT. DREW		70
	FOLLOWUP INVESTIGATION ☐ YES ☒ NO		OFFICER				



THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2010-CP-08-4453

L.G. Elrod

Appellant,

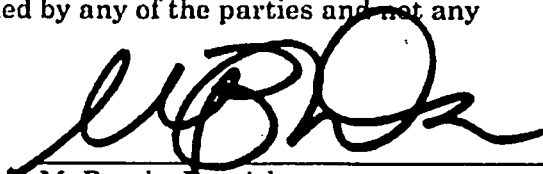
v.

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

Respondent,

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.



M. Brooks Derrick
Law Office of M. Brooks Derrick
36 Broad Street
Charleston, South Carolina 29401
Office: (843) 723-5152
Fax: (843) 410-5664
bderrick@derricklawoffice.com

Attorney and Counselor for Appellant

February 4, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2010-CP-08-4453

L.G. Elrod

Appellant,

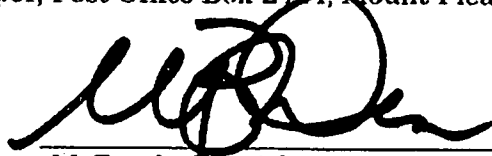
v.

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

Respondent,

PROOF OF SERVICE

I certify that I have served the Record on Appeal was served on Berkeley County Sherriff's Department by depositing a copy in the United States Mail, postage prepaid, on November 20, 2012, addressed to their attorney of record, G. Wade Cooper, Post Office Box 2424, Mount Pleasant, South Carolina 29464-2424.



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February 4, 2013

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APPENDIX B

No. 2012-212325

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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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.

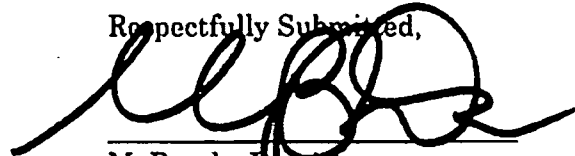
The legislature chose to use different language in describing the acts covered by the South Carolina Tort Claims Act than it had in § 15-3-540. The South Carolina Tort Claims act refers to actions which are "official business" or "official duties," while § 15-3-540 refers to acts in "official capacity 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, SOA CR.

November 7, 2013



M. Brooks Derrick

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2010-CP-08-4453

L.G. Elrod

Appellant,

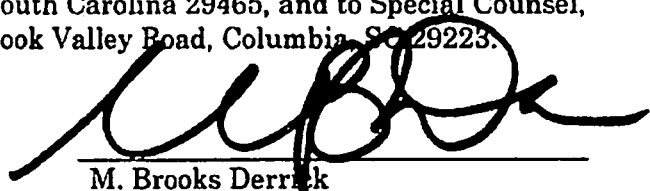
v.

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

Respondent,

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

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from Berkeley County
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2010 CP 031453

I. C. Elrod

Appellant

Berkeley County Sheriff's Department and
R. Wayne DeWitt

Respondents

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STATEMENT OF THE ISSUES ON APPEAL

The Respondent would restate the issues on appeal as:

Did the trial court properly grant summary judgment to the Defendants on the ground that the claims are barred by the applicable statute of limitation because the Plaintiff did not commence his action until more than two years after the events in issue?

- I. Does the two-year statute of limitations found in the S.C. Tort Claims Act, S.C. Code Ann. § 15-78-110, or the three-year statute of limitations found in § 15-3-540(1) apply to the causes of action as asserted against the Berkeley Sheriff's Department and the County Sheriff in his official capacity?
- II. Is there any evidence that the Sheriff and his deputies were acting outside the scope and course of their official duties?

STATEMENT OF THE CASE

The Plaintiff, L.G. Elrod, filed a pro se complaint on December 16, 2010, asserting causes of action for false imprisonment and unlawful detention- abuse of process against Berkeley County, the Berkeley County Sheriff's Department, and the Berkeley County Sheriff, H. Wayne Dewitt. The events which form the basis of his claims occurred on January 10, 2008, and January 15, 2008. As alleged in the complaint, the Berkeley County Sheriff's Department sent two squad cars and deputies to Mr. Elrod's property on those dates to restrain him from interfering with workers from Comcast Cable while they worked on their equipment which was located on his property. [ROA 14; Complaint.]

The Defendants filed a Rule 12(b)(6) motion to dismiss on the ground that the action was barred by the S.C. Tort Claims Act two-year statute of limitations, S.C. Code Ann. § 15-78-110. [ROA 17; Motion, filed January 11, 2011.] The Plaintiff argued that the applicable statute of limitations is three years under S.C. Code Ann. §15-3-540. The trial court granted the motion to dismiss the claims against Defendant Berkeley County as barred by §15-78-110, but denied the motion as to the Sheriff and his Department. [ROA 2; Judge Jefferson's Order, filed June 16, 2011.] The trial court reasoned that "if the sheriff was acting in an official capacity and his actions were within the scope of his duties, he would be subject to the two (2) year statute of limitations from the date of discovery of loss as provided in Section 15-78-110 rather than the (3) year statute of limitations period provided in Section 15-3-540," and found that "the allegations of the complaint give rise to competing inferences on the question of material fact of whether

the Sheriff and his deputies were acting in their official capacity and whether their actions were within the scope of their duties." [ROA 5; Order, p. 4.] The Sheriff and his Department filed a motion to reconsider which was denied. [ROA 19; Motion filed June 22, 2011. ROA 7; Order, filed June 30, 2011.]

Thereafter, the Defendants Sheriff and his Department filed a Motion for Judgment on the Pleadings, Rule 12(c), SCRCF, based on the allegation of the complaint that "defendant H. Wayne Dewitt, (hereinafter defendant) is a citizen and resident of Berkeley County, South Carolina and at all times mentioned herein was the Sheriff employed by the defendant, Berkeley County Sheriff, who was acting within the scope and course of his employment and under color of state law." [ROA 24; Motion, filed October 28, 2011.] When the Plaintiff sought to present matters outside the pleadings, the Defendants moved to convert the motion to a motion for summary judgment, and the trial court granted a continuance to allow the parties time to present other materials. [See ROA 9; Order filed May 21, 2012 n. 1. ROA 31-33; May 9, 2012 Tr. 4:24 – 6:10.] Thereafter, the Plaintiff obtained legal counsel, and the motion was heard by Judge Roger M. Young on May 9, 2012, at which time, both parties presented various evidence including the affidavits of Plaintiff and his son, and the Sheriff and his deputies with the official incident reports. The trial court granted the motion, ruling that the two-year statute, §15-78-110, applied because there was no evidence that the Respondents were acting outside the scope of their official duties. [ROA 9; Order, filed May 21, 2012.]

The Plaintiff timely served a notice of appeal from the order.

STATEMENT OF THE FACTS

By affidavit, the Plaintiff testifies that in 1991, he entered into an agreement with Storer Cable whereby Mr. Elrod agreed to allow the cable company to place a box on his property in Goose Creek to provide service to its customers in the area and in exchange Mr. Elrod was to provide him with free television service. Thereafter, when Comcast bought Storer Cable, they continued to provide Mr. Elrod television for the use of his property. However, in December 2007, difficulties arose between Comcast and Mr. Elrod, when some of his channels were cut off. [ROA 59; Elrod Affidavit.]

When Comcast refused to continue providing Mr. Elrod with free television service, he posted a "no trespassing" sign by the cable company's pole and turned off the box (which left the Company's customers without cable, internet, and phone service including 911 service.)¹ Later that day – January 10, 2008, Comcast arrived to access the property but Mr. Elrod told them they could not come on his property without a court order. Mr. Elrod also called the Berkeley County Sheriff's Department and requested that a deputy come out to advise Comcast that they would need a court order. Deputy Randal Timmons came out and asked Mr. Elrod to let the cable company on the property, but he refused and the cable workers left. However, later that same day – January 10, 2008, the cable workers returned accompanied by two squad cars and several deputies at which point a confrontation occurred between Mr. Elrod and the Deputy. According to Mr. Elrod's story, he was told that the Sheriff's Department would lock him up if he interfered. Mr. Elrod contacted the Sheriff personally and asked why his deputies were

¹ ROA 52; Incident Report, 01/10/2008 20:58.

sent to restrain him on a civil matter without a court order, to which the Sheriff told him that the cable customers with phone service could not access the 911 service. On January 14, 2008, Mr. Elrod had his attorney fax Comcast a notice to cease and desist from any further trespass, and the next day Mr. Elrod turned off the service again. On January 15, 2008, Comcast returned to property to restore service and place a lock on their box at which time they were again accompanied by Sheriff's deputies.

Deputy Timmons testifies by his affidavit that he was dispatched to Mr. Elrod's property on January 10, 2008, at approximately noon in response to a call from Mr. Elrod himself about his not wanting Comcast employees on his property. Restoring the cable service was a high importance because numerous households were left with no access to emergency services through 9-1-1. However, Mr. Elrod was so belligerent and threatened problems that the Deputy convinced the cable workers to come back at a later time. [ROA 43, 46; Timmons Affidavit, Incident Report 01/10/2008 10:00.]

Deputy McElvogue testifies by his affidavit that he was dispatched on January 10, 2008, at approximately 9:00 pm to Mr. Elrod's property to meet with a representative of Comcast to provide as an escort while the cable workers restored service to their equipment because of concerns that Mr. Elrod had threatened cable workers earlier in the day. Mr. Elrod confronted the cable workers and the Deputy when they returned, and while they restored service, he declared that he would disable it again when they left. The Deputy advised Mr. Elrod that he could face criminal charges if he vandalized the cable box again. [ROA 50, 52; McElvogue Affidavit, Incident Report 01/10/2008 20:58.]

Five days later, Deputy Timmons and two other officers from the Sheriff's Department responded to Mr. Elrod's property at the request of Comcast while the cable

workers placed a lock on their server box disconnect so that he could not disable it again. [ROA 43; Timmons Affidavit.] When Comcast completed their work, the Deputy advised Mr. Elrod not to touch the cable equipment. [ROA 49; Incident Report 01/15/2008 14:30.]

Sheriff DeWitt testifies by his affidavit that he and his deputies who interacted with Mr. Elrod on January 10 and 15, 2008, were all acting in the scope of their official duties. [ROA 64; Sheriff Affidavit, filed 5/4/12.] In addition, each of the Deputies testifies that they were acting as employees of the Sheriff's Department in the scope of their official duties when they interacted with Mr. Elrod. [ROA43, 50; Timmons Affidavit, McElvogue Affidavit.]

ARGUMENT

**THE CLAIMS AS STATED AGAINST THE SHERIFF AND HIS DEPARTMENT
ARE BARRED BY THE APPLICABLE TWO-YEAR STATUTE OF LIMITATIONS.**

The Applicable Statutes

The S.C. Tort Claims Act, S.C. Code Ann. §§15-78-10 et seq. provides a limited waiver of immunity and the exclusive remedy for governmental entities and their agents, while acting within the scope of official duty:

The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, *while acting within the scope of official duty*, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved. The remedy provided by this chapter is the exclusive civil remedy available for any tort

committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b).

S.C. Code Ann. § 15-78-20 (emphasis added).

As defined in the Act "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. S.C. Code Ann. § 15-78-30(i).

Under § 15-78-70(b), government employees can be sued personally if they act outside the scope of their official duties:

(b) Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct *was not within the scope of his official duties* or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. (Emphasis added.)

The corresponding provision of § 15-78-60(17) provides that:

The governmental entity is not liable for a loss resulting from:

(17) employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude;

The Tort Claims Act, § 15-78-110, contains a two-year statute of limitations:

Except as provided for in Section 15-3-40², any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

² § 15-3-40 provides for exceptions as to persons under disability.

The general statutes of limitations for most civil remedies are found in Title 15, Chapter 3, including § 15-3-540 which provides that:

Within three years: (1) An action against a sheriff, coroner or constable upon a liability incurred *by the doing of an act in his official capacity* and in virtue of his office or by the omission of an official duty, including the nonpayment of money collected upon an execution, subject to the provisions of § 15-3-560.... (Emphasis added.)

S.C. Code Ann. § 15-3-550(a) provides a two-year statute of limitations for false imprisonment. Claims for abuse of process are subject to the three-year statute of limitations in § 15-3-530(5) ("an action for any injury to the person or to rights of another, not arising on contract and not enumerated by law"). See Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 525 S.E.2d 888, 897 n. 18 (Cl. App. 1999)

Summary of Argument

The Sheriff, H. Wayne DeWitt is a state official,³ and the Berkeley County Sheriff's Department is a governmental entity, and thus the Tort Claims Act provides the exclusive remedy for any tort committed by the Sheriff or his deputies while acting within the scope of their official duties. § 15-78-20(b). The applicable statute of limitations for any action under the Tort Claims Act is two years. § 15-78-110. The actions on which the Plaintiff bases his claims occurred on January 10 and 15 of 2008, yet he did not file his complaint until December 16, 2010 – more than two years after the date the loss was or should have been discovered.

The Plaintiff argues that the three-year statute of limitations in § 15-3-540 applies because while the Defendants were acting in their official capacity, they were not acting

³ Cone v. Nettles, 308 S.C. 109, 417 S.E.2d 523 (1992).

within the scope of their official duties. More specifically, the Plaintiff argues that the Sheriff and his deputies were not acting within the scope of their official duties because the dispute between Mr. Elrod and Comcast was a civil dispute.

However, the Plaintiff specifically and affirmatively plead that the Sheriff "was acting within the scope and course of his employment and under color of state law." In addition, as the trial court found, there is no evidence in the record that the Defendants were acting in any capacity other than as Sheriff and Sheriff's deputies of Berkeley County, or that the Defendants were acting outside the scope of their official duties. Accordingly, the trial court properly granted summary judgment to these Defendants.

- A. The Tort Claims Act two-year statute of limitations, §15-78-110, applies to the claims against the Berkeley County Sheriff's Department and the Sheriff in his official capacity.**

This case presents an apparent conflict between the Tort Claims Act which governs any action against the Sheriff and his Department for conduct "within the scope of his official duties," and § 15-3-540 which purports to apply to actions against the Sheriff "in his official capacity." The Plaintiff argues that the three-year period under § 15-3-540 applies to actions against a sheriff in his official capacity and/or the sheriff's department for actions by the deputies outside the scope of their official duties. However, the Defendants maintain that any action against a sheriff in his official capacity and/or against his department falls within the exclusive remedy provisions of the Tort Claims Act and is subject to the two-year period of § 15-78-110.

Plaintiff cites to Allen v. Fid. & Deposit Co. of Maryland, 515 F. Supp. 1185, 1188 (D.S.C. 1981), aff'd, 694 F.2d 716 (4th Cir. 1982), wherein the federal district court

stated that: "In South Carolina, all actions which are brought against a sheriff by 'virtue of his office or by omission of official duty' must be brought within three (3) years. S.C. Code Ann. § 15-3-540 (1976).'" However, that decision predated enactment of the S.C. Tort Claims Act, and Defendants would submit that § 15-3-540(1) is no longer applicable to any claims against the Sheriff in his official capacity since the Tort Claims Act was enacted with its own statute of limitations in § 15-78-110. See Stone v. City of Orangeburg, 313 S.C. 533, 443 S.E.2d 544, 545 (1994) (where two statutes are in conflict, the more recent and specific statute should prevail); compare Denman v. City of Columbia, 387 S.C. 131, 138-39, 691 S.E.2d 465, 468-69 (2010) ("Specific statutes are not to be considered repealed by a later general statute unless there is a direct reference to the earlier statute or the intent of the legislature to do so is explicitly implied."). See also Hackworth v. Greenville County, 371 S.C. 99, 102-03, 637 S.E.2d 320, 322 (Ct. App. 2006) (applying §15-78-110 to action against Sheriff's Department).

Plaintiff also cites to McCall v. Williams, 52 F. Supp.2d 611 (1999), but to the contrary, that decision does not support his theory. In that case, the court held that § 15-78-110 was inapplicable to the plaintiff's assault and battery claim against a deputy sheriff in his individual capacity, and that instead, the two-year statute of limitations for assault and battery applied. *Id.* at 615, citing S.C. Code Ann. § 15-3-550(1). In so holding, the court noted that § 15-3-540 was not applicable:

Because this aspect of Plaintiff's claims relates to Lieutenant Williams in his *individual* capacity, the three-year statute of limitations for suits against a sheriff for acts committed in his *official* capacity is also inapplicable to this case. See S.C. Code Ann. § 15-3-540(1) (1976).

Id. at 615 n. 4.

Plaintiff argues that "nothing in the Tort Claims Act may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties." [Appellant's initial brief p. 8.] To the extent that may be a correct statement of § 15-78-70(b), the Plaintiff fails to appreciate the implications of his contention that the Sheriff's deputies were acting outside the scope of their official duties. As Judge Young inquired: "Do you understand, if you prevail on this you don't get to sue the County anymore, you are just suing these people as individuals?" To which Plaintiff's Counsel responded that: "I understand that, Your Honor." [ROA 36; Tr. 9:11-14.] However, it appears that Plaintiff does not, in fact, understand because if the Sheriff and his deputies were acting outside the scope of their official duties, as he now asserts, then he has no legal basis for any claim against the Sheriff in his official capacity or against Department under the provision of § 15-78-60(17). Accordingly, the Defendants would be entitled to judgment on that basis. See Rule 220(c), SCACR; *see also Proctor v. Steedley*, 398 S.C. 561, 577, 730 S.E.2d 357, 366 (Ct. App. 2012) ("this court may affirm an order upon any ground appearing in the Record on Appeal").

If the Plaintiff seeks to pursue an action against the Sheriff personally, in his individual capacity, then he would need to replead. And, in such case, as the court noted in *McCall v. Williams*, § 15-3-540 would not apply; instead, the two-year period of limitations, § 15-3-550, would apply to any false imprisonment claim and the three-year period of § 15-3-530, would apply to any abuse of process claim.

B. The Sheriff and his deputies were acting in their official capacity and within the scope of their official duties.

The trial court found that the two-year statute of limitation in §15-78-110 applied because the Sheriff and his deputies were at all times acting in their official capacities and within the course and scope of their official duties. That decision is fully supported by the record.

In his complaint, the Plaintiff affirmatively, and specifically alleged that the Sheriff "was acting within the scope and course of his employment and under color of state law." [ROA 14; Complaint ¶ 3.] In addition, at the motion hearing, Plaintiff's Counsel conceded that "they were definitely acting in their capacity as sheriff's deputies." [ROA 35; Tr. 8:22-23.] Yet, the Plaintiff argues that there is a jury issue as to "whether or not the police responding to a civil call is in their official duties." [ROA 36; Tr. 9:18-21.]

First, it is fundamental that the plaintiff is bound by the allegations of his complaint. Elrod v. All, 243 S.C. 425, 437, 134 S.E.2d 410, 417 (1964); Corley v. Centennial Const. Co., 247 S.C. 179, 187, 146 S.E.2d 609, 613 (1966).

It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. 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.

Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) (citing Elrod v. All.) See also Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997) (applying judicial estoppel – "When a party has formally asserted a certain

version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.”)

Second, it is equally well-settled that Plaintiff is bound by the statement of his attorney at the motion hearing:

The parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial. Such practice is almost of everyday occurrence; and this statement is so elementary and understood so thoroughly by the profession, as to need no citation of authority.

Hall v. Benefit Ass'n of Ry. Employees, 164 S.C. 80, 161 S.E. 867, 868 (1932).

Third, there is no legal or evidentiary basis for the Plaintiff's contention that the Deputies were acting outside the scope of their official duty because they were responding to a "civil" call. Plaintiff provides no authority for the proposition that the Sheriff and his deputies are prohibited from assisting in civil matters, but instead, argues that the Sheriff and his deputies do not have any official duty to assist in a civil dispute, citing to S.C. Code Ann. § 23-13-280 which addresses the "Rights, powers and duties of deputies." However, the Plaintiff's argument is not supported by the broad duties enumerated in that statute:

Any such deputy sheriff:

- (1) Shall have, do and exercise all the rights, duties and powers prescribed by law for constables or magistrates and such powers as are usually exercised by marshals and policemen of towns and cities;
- (2) Shall act as a conservator of the peace;
- (3) Shall take into custody and carry before the nearest magistrate any person who may, in his view, engage in riotous conduct or violation of the peace, refusing upon his command to desist therefrom;

(4) Shall arrest any person who may, in his view, commit any felony or misdemeanor and carry him before a court of competent jurisdiction; and

(5) Shall execute any and all criminal process from magistrates' courts.

Notably, deputy sheriffs are charged with acting as conservators of the peace, and the evidence establishes, as a matter of law, that that is exactly what the Berkeley County Sheriff's deputies were doing – attempting to preserve the peace.

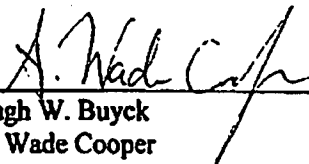
Plaintiff, by his own affidavit, establishes that he initiated contact with the Sheriff's Department on January 10, 2008, by calling and asking them to dispatch a deputy because Comcast was trespassing on his property. The affidavits and incident reports further establish that the deputies' subsequent involvements on the evening of January 10th and January 15th were requested by Comcast because of threats made by Mr. Elrod. The evidence of record could not reasonably lead to any finding that the deputies were assisting with a civil matter outside the scope of their official duties, and thus, there is no question for a jury to consider. Accordingly, summary judgment was proper and should be affirmed.

CONCLUSION

Wherefore, based on the foregoing, the Defendants submit that the Tort Claims Act two-year statute of limitations, § 15-78-110, applies to the claims as stated against the Sheriff in his official capacity and his Department for the actions of his deputies within the scope of their official duties. And, since the complaint was not filed until more than two years after the incidents occurred, the claims are barred and the trial court properly granted summary judgment. Accordingly, the judgment should be affirmed.

Respectfully submitted,

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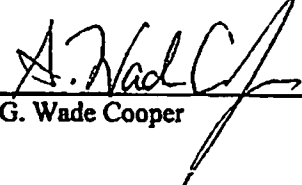
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Certification of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

February 22, 2013

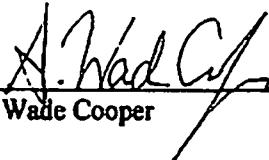


G. Wade Cooper

Certificate of Service

I, G. Wade Cooper, attorney for the Respondents, do hereby certify that on February 22, 2013, I served a copy of the foregoing Final Brief of Respondents on Counsel for Appellant, via U.S. Mail, first class, postage prepaid to the following address:

M. Brooks Derrick
36 Broad Street
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G. Wade Cooper

APPENDIX C

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

L.G. Elrod, Appellant,

v.

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

Appellate Case No. 2012-212325

Appeal From Berkeley County
Roger M. Young, Sr., Circuit Court Judge

Unpublished Opinion No. 2013-UP-381
Submitted September 1, 2013 – Filed October 9, 2013

AFFIRMED

M. Brooks Derrick, of the Law Office of M. Brooks
Derrick, LLC, of Charleston, for Appellant.

Hugh Willcox Buyck and Gordon Wade Cooper, both of
Buyck, Sanders & Simmons, LLC, of Mt. Pleasant; and
Deborah Harrison Sheffield, of the Hood Law Firm,
LLC, of Columbia, for Respondents.

PER CURIAM: Affirmed pursuant to Rule 220(b), SCACR, and the following authorities:

1. Regarding the applicable statute of limitations: S.C. Code Ann. § 15-78-110 (2005) (providing a two year statute of limitations for actions brought pursuant to the South Carolina Tort Claims Act); S.C. Code Ann. § 15-78-20(b) (2005) (stating the Tort Claims Act "is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents"); S.C. Code Ann. § 15-78-200 (2005) ("Notwithstanding any provision of law, [the Tort Claims Act] is the *exclusive and sole remedy* for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty." (emphasis added)); *Fleteau v. Harrelson*, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct. App. 2003) ("The Tort Claims Act governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees.").

2. Regarding whether the trial court erred in determining no genuine issue of material fact existed: Rule 56(c), SCRCR (stating the trial court should grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law"); *Carolina Alliance for Fair Emp't v. S.C. Dep't of Labor, Licensing, & Regulation*, 337 S.C. 476, 485, 523 S.E.2d 795, 800 (Ct. App. 1999) ("The plain language of Rule 56(c), SCRCR, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial."); *Hedgepath v. AT&T*, 348 S.C. 340, 355, 559 S.E.2d 327, 336 (Ct. App. 2001) ("[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted."); *id.* at 354, 559 S.E.2d at 335 ("Once the moving party carries its initial burden, the opposing party must . . . do more than simply show that there is some metaphysical doubt as to the material facts[;] [the opposing party] must come forward with specific facts showing that there is a genuine issue for trial." (internal quotation marks, emphasis, and citation omitted)).

AFFIRMED.¹

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

SHORT, WILLIAMS, and THOMAS, JJ., concur.

APPENDIX D

No. 2012-212325

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

L.G. Elrod

Appellant,

v.

Berkeley County Sheriffs
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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<i>City of Camden v. Brassell</i> , 326 S.C. 556, 560, 486 S.E.2d 492, 494 (Ct. App. 1997).....	8
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<i>Hodges v. Rainey</i> , 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000).....	8
<i>State v. Scott</i> , 351 S.C. 584, 588, 571 S.E.2d 700, 702 (2002).	8
<i>Stephen v. Avins Constr. Co.</i> , 324 S.C. 334, 478 S.E.2d 74 (Ct. App. 1996)...	8

Statutes

S.C. Code Ann. § 15-3-540	1, 7, 9
S.C. Code Ann. § 15-78-30 (i).....	9
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.

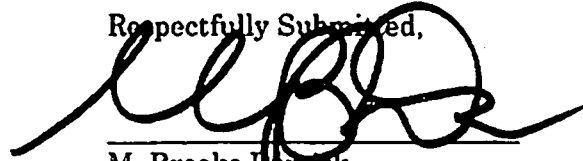
The legislature chose to use different language in describing the acts covered by the South Carolina Tort Claims Act than it had in § 15-3-540. The South Carolina Tort Claims act refers to actions which are "official business" or "official duties," while § 15-3-540 refers to acts in "official capacity 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, SOACR.

November 7, 2013



M. Brooks Derrick

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2010-CP-08-4453

L.G. Elrod

Appellant,

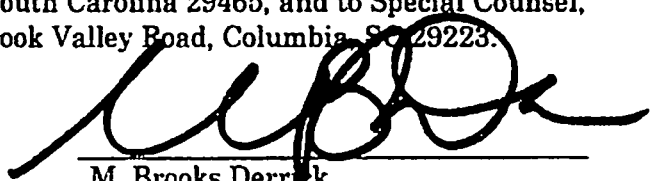
v.

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

Respondent,

PROOF OF SERVICE

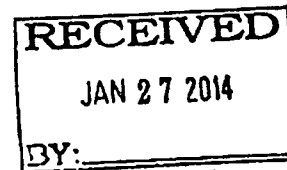
I certify that I have served the Petition for Rehearing and Rehearing En Banc by U.S. Mail, postage prepaid, on November 7, addressed to the Attorney for Respondents, G. Wade Cooper, Post Office Box 2424, Mount Pleasant, South Carolina 29465, and to Special Counsel, Deborah H. Sheffield, 117 Brook Valley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



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Attorney and Counselor for Appellant

November 7, 2013



The South Carolina Court of Appeals

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CLERK

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DEPUTY CLERK

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January 24, 2014

Mr. M. Brooks Derrick
36 Broad St.
Charleston SC 29401

Re: L. G. Elrod v. Berkeley County
Appellate Case No. 2012-212325

Dear Counsel:

Enclosed is a copy of an order of the panel denying your petition for rehearing. Your petition for rehearing en banc was distributed to the judges, but it has been rejected. *See* Rule 219, SCACR.

Very truly yours,

A handwritten signature in cursive script, reading "Jenny A. Kitchings".
CLERK

cc: Gordon Wade Cooper, Esquire
Hugh Willcox Buyck, Esquire
Deborah Harrison Sheffield, Esquire

The South Carolina Court of Appeals

L.G. Elrod, Appellant,

v.

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

Appellate Case No. 2012-212325

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

Paul E. Short, Jr. J.
H. Buyck J.
Paul H. Thomas J.

Columbia, South Carolina

cc: M. Brooks Derrick, Esquire
Gordon Wade Cooper, Esquire
Hugh Willcox Buyck, Esquire
Deborah Harrison Sheffield, Esquire

FILED
January 24, 2014