

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Unpublished Opinion No. 2013-UP-381 (S.C. Ct.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.

PETITION FOR A WRIT OF CERTIORARI

M. Brooks Derrick
Law Office of M. Brooks Derrick
36 Broad Street
Charleston, South Carolina 29401
(843) 410-2545
Attorney for Petitioner

Other Counsel of Record:
G. Wade Cooper
Post Office Box 2424
Mount Pleasant, South Carolina 29465
Attorney for Respondent

RECEIVED

FEB 21 2014

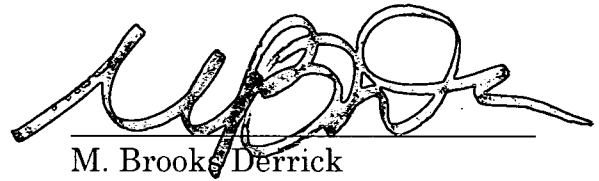
S.C. Supreme Court

INDEX

Certificate of Counsel	1
Question Presented	2
Statement of the Case	2
Argument	
I. The Court of Appeals erred in its refusal to find the statute of limitations was three years because respondents were acting in their official capacity but not within the scope of their official duties.....	6
Conclusion	11

CERTIFICATE OF COUNSEL

Counsel for petitioner certifies that the Petition for Rehearing was made and finally ruled by the Court of Appeals on January 24, 2014.



M. Brooke Derrick

RECEIVED

FEB 21 2014

S.C. Supreme Court

QUESTION PRESENTED

1. Did the Court of Appeals err in refusing to recognize a distinction between doing an act within the “scope of official duties” pursuant to § 15-78-110 and within one’s “official capacity” pursuant to §15-3-540 when it applied the two-year statute of limitations of the South Carolina Tort Claims Act to this action?

STATEMENT OF THE CASE

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

Respondents 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 Petitioner’s Complaint failed to state facts sufficient to constitute a cause of action. Respondents’ 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 Petitioner’s claims. However, Petitioner argued that the applicable statute of limitations was three years pursuant to § 15-

3-540 of the Code of Laws of South Carolina because Respondents' 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 Respondent Berkeley County, but denied the motion as to Respondents' Berkeley County Sheriff's Department and H. Wayne Dewitt. The court stated that the allegations in Petitioner'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, Petitioner, 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. Because the court found no evidence in the record that Respondents were acting outside the scope of their official duties, the court granted Respondents' Motion for Summary Judgment stating that § 15-78-110 of the Code of Laws of South Carolina (and the applicable two year statute of limitations) applied.

On May 24, 2012, Petitioner received written notice of entry of the Summary Judgment Order, and on June 19, 2012, Petitioner served his Notice of Appeal.

On October 9, 2013, the Court affirmed the grant of Respondents' Motion for Summary Judgment.

Petitioner filed a Petition for Rehearing, which was denied on January 24, 2014. This Petition for Writ of Certiorari follows.

Facts

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, employees of Comcast arrived at the property and tried to access the cable box that was on Plaintiff's property. Plaintiff

told them that they could not 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 the Comcast employees, and asked Plaintiff to let them on the property. Plaintiff refused. (R. p. 61, lines 12-13.)

5. Following that conversation, Deputy Timmons spoke with the Comcast employees, 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.)

ARGUMENT

I. The Court of Appeals erred in its refusal to find the statute of limitations was three years because respondents were acting in their official capacity but not within the scope of their official duties.

This case turns on whether the Berkeley County Sheriff's Office was acting within the "scope of official duties" or in its "official capacity" when it restrained Petitioner to allow a private company to trespass on Petitioner's land. If the Sheriff's Office was acting in its official capacity, this action is barred by the two-year statute of limitations of the South

Carolina Tort Claims Act (“Tort Claims Act”). Petitioner argues, however, that the Berkeley County Sheriff’s Office was not acting within the scope of official duties. Instead, their actions constitute acting in their official capacity, a lower threshold which bars Respondents from seeking tort immunity and brings the action within the three-year statute of limitations of § 15-3-540 of the Code of Laws of South Carolina. This issue merits consideration by the Court because the uncommon facts present a novel issue of law, which has not been satisfactorily addressed in South Carolina case law.

Although the South Carolina Tort Claims Act is the exclusive remedy for any tort committed by a governmental entity, its employees, or its agents, it is not meant to shield an employee’s conduct that 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) (emphasis added). Moreover, §15-78-20(f) of the Code of Laws of South Carolina expressly limits tort claims immunity to employees “acting within the scope of official duty.” Therefore, 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*.

The Tort Claims Act provides a two-part test to determine whether a government employee is acting within the scope of his official duty or employment: The employee must be (1) “acting in and about the official business of the government entity,” and (2) “performing official duties.” S.C. Code Ann. § 15-7-30(i).

The rights, powers, and duties of a deputy sheriff are outlined in § 23-13-280 of the Code of Laws of South Carolina. While the Sheriff's Office is permitted to act as a conservator of the peace, it is beyond the scope of their duties to detain an individual for the purpose of allowing another to trespass on that individual's land. Therefore, the Berkeley County Sheriff's Department and H. Wayne Dewitt were acting outside the scope of their official duties in their interactions with L.G. Elrod.

Petitioner originally called the Sheriff's Department in an attempt to prohibit Comcast from trespassing on his property. (R. p. 61 lines 8-9.) Deputy Randall Timmons asked Petitioner to allow the Comcast employees on his property, but Petitioner refused. (R. p. 61 lines 13-14.) When Petitioner would not permit Comcast to use his property, deputies of the Sheriff's Department restrained Petitioner (without a court order) multiple times to permit Comcast to trespass on his property. (R. p. 62 line 4, p. 63 lines 3-5)

It is clear the Sheriff's Office was acting with the *appearance* of authority by responding to the scene in marked cars and in uniform. However, when they began to perform acts that were beyond the scope of their official duties, they could no longer claim avail themselves of the protections of the Tort Claims Act and claim tort immunity. Therefore, the statute of limitations governing the action is not the two-year limit of the South Carolina Tort Claims Act. Instead, § 15-3-540 of the Code of Laws of South Carolina, which applies a three-year statute of limitations to civil actions against a sheriff doing an act "in his official capacity and in virtue of his office," is appropriate.

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). In doing so, "[i]t is presumed that the Legislature is familiar with prior legislation, and that if it intends to repeal existing laws it would . . . expressly do so. . . ." *Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 572, 743 S.E. 2d 778, 784 (2013) (quoting *Hodges v. Rainey*, 341 S.C. 79, 533 S.E. 2d 578 (2000), *Justice v. Pantry*, 330 S.C. 37, 43-44, 496 S.E. 2d 871, 874 (Ct. App. 1998), *State v. Hood*, 181 S.C. 488, 491, 188 S.E. 134, 136 (1936)). It is a firm principle of statutory construction that "statutes dealing with the same subject matter are in

pari materia and must be construed together, if possible, to produce a single, harmonious result.” *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000). “[H]ence, if by any fair or liberal construction two acts may be made to harmonize, no court is justified in deciding that the later repealed the first.” *Shirley’s Iron Works, Inc.*, 403 S.C. at 572, 743 S.E.2d at 784 (2013).

Petitioners argue that “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 of Appeals failed to acknowledge this distinction, and therefore constrained its analysis only to the South Carolina Tort Claims Act.

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).

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.” The official duties of the Sheriff’s office in the state of South Carolina do not encompass restraining a property owner so that another may trespass on his property. Therefore, these acts are not covered by the Tort Claims Act and are instead governed by § 15-3-540 of the Code of Laws of South Carolina.

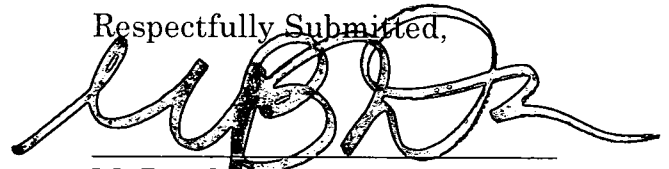
The unusual facts and circumstances surrounding this case present a novel issue of law. South Carolina Courts have not thoroughly and adequately addressed whether and when § 15-3-540 applies rather than the South Carolina Tort Claims Act.

CONCLUSION

Petitioner respectfully requests that this Court grant a Writ of Certiorari, reverse the decision below, and direct the entry of judgment for Petitioner.

[Signature block on following page.]

Respectfully Submitted,

A stylized, handwritten signature in black ink, appearing to read 'MBR', with a horizontal line drawn underneath it.

M. Brooks Derrick

Law Office of M. Brooks Derrick

36 Broad Street

Charleston, SC 29401

(843) 410-2545

(843) 410-5664 (Facsimile)

bderrick@derricklawoffice.com

Attorney for Petitioner

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Roger M. Young, Circuit Court Judge

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

L.G. Elrod

Appellant,

v.

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

Respondent,

PROOF OF SERVICE

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



M. Brooks Derrick
Law Office of M. Brooks Derrick
36 Broad Street
Charleston, South Carolina 29401
Office: (843) 410-2545
Fax: (843) 410-5664
bderrick@derricklawoffice.com

February 19, 2014

Attorney and Counselor for Appellant