

THE STATE OF SOUTH CAROLINA
In the Supreme Court

Appeal from Berkeley County
Court of Common Pleas

RECEIVED

Roger M. Young, Circuit Court Judge

MAR 26 2014

Case No. 2010-CP-08-4453
S.C. SUPREME COURT Sup. Ct. Appellate Case No. 2014-000310
S.C. Ct. App. No. 2013-UP-381, filed October 9, 2013

L.G. Elrod,

Petitioner,

v.

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

Respondents.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Respondent would restate the issue as:

Should the Supreme Court exercise its discretion to grant the Petition for a Writ of Certiorari where there are no special or important reasons to review the unpublished decision of the Court of Appeals affirming the trial court's grant of summary judgment to the Defendant Sheriff and Berkeley County Sheriff's Department?

OR, as otherwise stated:

Did the Court of Appeals correctly hold that the false imprisonment and unlawful detention-abuse of process claims against the Berkeley Sheriff's Department and the County Sheriff in his official capacity are barred by the applicable two-year statute of limitation found in the S.C. Tort Claims Act, S.C. Code Ann. § 15-78-110?

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. It is undisputed that 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 a cable company while they worked on their equipment which was located on his property. [ROA 14.]

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.] The Plaintiff argued that the applicable statute of limitations on his claims against the Sheriff and his Department (collectively, "the

Sheriff”) 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.] 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.] The Sheriff filed a motion to reconsider which was denied. [ROA 7, 19.]

Thereafter, the Sheriff filed a Rule 12(c) Motion for Judgment on the Pleadings, 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.] 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, 31-33.]

At that point, the Plaintiff obtained legal counsel, and when the summary judgment motion hearing was reconvened for hearing before the trial court, 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 summary judgment, finding that there was no evidence that the Sheriff and his deputies were acting outside the scope of their official duties, and concluding that the Tort Claims Act two-year statute, §15-78-110 applied:

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 Sheriffs 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. 91 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. [ROA 12-13 -- Judge Young.]

The Plaintiff timely served a notice of appeal from the order. The Court of Appeals affirmed, ruling that:

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)); *Flateau 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.").

STATEMENT OF THE FACTS

The facts are established by the incident reports and affidavits from the Plaintiff, his son, the Sheriff, and the deputies:

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 9-1-1 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

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

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 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 9-1-1 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.]

SUMMARY OF ARGUMENT

Inasmuch as the Sheriff, H. Wayne DeWitt is a state official, and the Berkeley County Sheriff's Department is a governmental entity, 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, and thus, the two-year statute of limitations in § 15-78-100 bars the Plaintiff's claims.

The Plaintiff concedes that: "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." Petition, pp. 6-7. Yet, he argues that the three-year statute of limitations in § 15-3-540 applies, because while the Sheriff's Office was acting in their official capacity, they were acting outside the scope of their official duties in detaining

the Plaintiff so that the cable company could trespass on his land. 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 pled in his Complaint 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, and the Court of Appeals correctly affirmed that judgment.

ARGUMENT

THE CLAIMS AS STATED AGAINST THE SHERIFF AND HIS DEPARTMENT FOR THEIR ACTIONS IN THE COURSE AND SCOPE OF THEIR OFFICIAL DUTIES ARE BARRED BY THE APPLICABLE TWO-YEAR STATUTE OF LIMITATION.

- A. The Tort Claims Act two-year statute of limitations, §15-78-110, applies to the claims against the Sheriff in his official capacity for the actions of his deputies within the scope of their official duty.**

The S.C. Tort Claims Act provides a limited waiver of immunity and the exclusive remedy for governmental entities and their agents, “while acting within the scope of official duty.” S.C. Code Ann. § 15-78-20 (emphasis added). However, under § 15-78-60(17) and § 15-78-70(b), a governmental entity is not liable for loss resulting from “employee conduct outside the scope of his official duties,” and a government employee does not have immunity for conduct “if they act outside the scope of their official duties.” 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).

Section 15-78-110 generally² contains a two-year statute of limitation for all actions under the Tort Claims Act. While the chapter of Title 15 containing the general statutes of limitation, includes Section 15-3-540, which provides for a three-year statute of limitation for:

(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.)

B. The Sheriff and his deputies were acting in their official capacity and within the scope of their official duties on January 10 and 15, 2008.

As posed by the Plaintiff, § 15-78-30(i) presents a two-part test for application of the TCA two-year statute: whether the Sheriff and his Department were (1) acting in and about the official business of the Sheriff’s Department, and (2) performing official duties? He argues that the Sheriff’s deputies were acting “under the appearance of authority of Berkeley County Sheriff’s Department, but were not in fact performing official duties on January 10, 2008, and January 15, 2008.” [Petition, p. 10.]

First, 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 ¶ 3.] In addition, at the motion hearing, Plaintiff’s Counsel conceded that “they were definitely acting in their capacity as sheriff’s deputies.” [ROA

²With certain provisions for a three-year limitation period if a claim is filed, and exceptions as to persons under disability under § 15-3-40.

35:22-23.] Yet, the Plaintiff argued that there is a jury issue as to “whether or not the police responding to a civil call is in their official duties.” [ROA 36:18-21.]

First, it is fundamental that the plaintiff is bound by the allegations of his complaint unless withdrawn, altered or stricken by amendment or otherwise. Elrod v. All, 243 S.C. 425, 134 S.E.2d 410, 417 (1964); Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992). *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. 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. The trial court found that 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 and there is no reason to review the Court of Appeals decision affirming the trial court’s grant of summary judgment.

Section 23-13-280 which addresses the “Rights, powers and duties of deputies” enumerates the broad duties of the Sheriff’s deputies:

- (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.

S.C. Code Ann. §23-13-280. 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.

The Plaintiff acknowledges that the Sheriff's Department is permitted to act as a conservator of the peace, while arguing that the Sheriff and his deputies are prohibited from assisting in civil matters. Beyond the fact that the Plaintiff does not cite any authority for his argument that the Sheriff's Department is prohibited from assisting in civil matters, the affidavits and incident reports do not support his assertion that the Sheriff's Department was assisting in a civil matter.

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 allegedly trespassing on his property. [ROA 61.] And, while Plaintiff states that the Police Reports from those days “reflect that the Deputies were there on a civil matter only,” [Petition, p. 5 ¶8 and p. 6 ¶13], the actual reports do not support that characterization.

The supplemental incident report for January 10, 2008, cited to by the Plaintiff, provides in pertinent part:

On 1/10/08 this deputy was dispatched to the ball field on Lucy Drive to meet with Comcast Cable by 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. ... 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 he made towards Comcast workers earlier... [ROA 70, 72-73.]

The incident report for January 15, 2008, cited to by the Plaintiff, provides in pertinent part:

On 01/15/2008 Lt. McElvogue, PFC. Collins and this Deputy [Randal] responded to 233 Elrod Drive in reference to a civil matter. Comcast Cable contact 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 this 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 completed their work and let the scene. Lt. McElvogue advised Mr. Elrod for him not to touch Comcast Cables equipment. [ROA 75.]

The actual incident reports establish that the deputies' involvement on January 10th and 15th was requested by Comcast because of threats previously made by Mr. Elrod. In addition, as Lt. McElvogue testified in his affidavit, restoring the cable service was a high importance because numerous households were left with no access to emergency services through 9-1-1. [ROA 50.]

Clearly, beyond any dispute about the characterization of the incident as involving a "civil matter," the Deputies were acting in their official capacities and within this scope of their duty to keep the peace. This evidence of record cannot reasonably lead to any finding that the deputies were assisting with a civil matter outside the scope of their

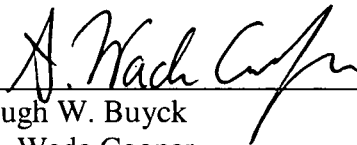
official duties, and thus, there is no question for a jury to consider. Accordingly, summary judgment was properly granted by the trial court

CONCLUSION

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. Thus, the claims are barred and the trial court properly granted summary judgment. Accordingly, the Court of Appeals correctly affirmed, and the Petition should be denied.

Respectfully submitted,

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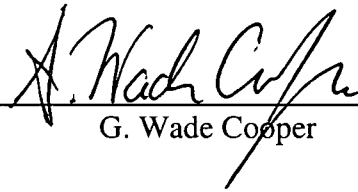
Counsel for the Respondents

March 24, 2014

Certificate of Service

I, G. Wade Cooper , attorney for the Respondents , do hereby certify that on March 24, 2014, I served a copy of the foregoing Return on Counsel for Appellant, via U.S. Mail, first class, postage prepaid to the following address:

M. Brooks Derrick
36 Broad Street
Charleston, SC 29401



G. Wade Cooper