

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEAL

APPEAL FROM RICHLAND COUNTY
COURT OF COMMON PLEAS
G. THOMAS COOPER, JR., CIRCUIT COURT JUDGE

APPELLATE CASE NO. 2013-002306

BASIL W. AKBAR

Appellant

v.

SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, et al.

Respondents

APPELLANT REBUTTAL BRIEF

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RECORD ON APPEAL

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REPLY BRIEF IN OPPOSITION

The Appellant's Reply Brief in Opposition hereby address Respondents' misstatement of facts and law in their petition that bears on issues properly before the Court.

STANDARD OF REVIEW

ON appeal from an ORDER granting Rule 12(b)(6) SCRPC Motion, and Summary Judgment, will not be sustained if the facts alleged and the inference reasonably deducible from the pleadings would entitle the plaintiff relief on any theory of the case. Stiles v. Onorato, 318 SC 297, 457 SE2d 601 (1995); Plyer v. Burns, 373 SC 637, 647 SE2d 188 (2007). The Appellate Court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to Appellant, Bergstrom v. Palmetto Health Alliance, 358 SC 388, 496 SE2d 42 (2004); Platt v. CSX Transp. Inc., 379 SC 249, 665 SE2d 631 (Ct. App. 2008). The Appellate Court reviews for ... an abuse of discretion that occurs when the conclusion of the circuit court either lack evidentiary support, or are controlled by an error of law, State v. McDonald, 343 SC 319, 540 SE2d 464 (2000); Clark v. Cantrell, 339 SC 369, 529 SE2d 528.

I. RULE 8, AND RULE 15(b) SCRPC; AND, STATUTE OF LIMITATION :

Plain reading of Appellant's Complaint pursuant to Rule 8 SCRPC set forth cause of action, and justiciable controversy, referencing constitutional violation, fiduciary duty and obligations subsequently breached. The circuit court should granted Appellant's Rule 15(b) motion for continuance reasonably necessary to enable the objecting party to meet such evidence, after completion of discovery. McClaslan v. Latimer, 17 SC 123 (1882)

II. DISCOVERY / MOTION TO COMPEL IS MATERIAL:

ONCE A FINAL ORDER ON THE MERITS IS ISSUED, THE PRIOR DISCOVERY ORDER BECOME APPEALABLE, Hamm v. S.C. Pub. Serv. Comm'n., 312 S.C. 238, 439 S.E.2d 852 (1994). THE RESPONDENTS NEVERtheless URGES, IN EFFECT THAT THE RESPONDENTS CAN PROVOKE, AND CONCEAL... AND THE APPELLANT STILL HAS THE BURDEN TO DISCOVER THE EVIDENCE IN THEIR POSSESSION. THE FIFTH, AND FOURTEENTH AMENDMENTS REQUIRES THE GOVERNMENT TO DISCLOSE CERTAIN SPECIFIC TYPE OF EVIDENCE WHEN, (1) EVIDENCE IS FAVORABLE, IT IS EXCUPATORY OR IMPARTIAL; (2) EVIDENCE WAS SUPPRESSED BY THE STATE; (3) PREJUDICE ENSUED; AND (4) REASONABLE PROBABILITY THAT DISLOSURE OF THE EVIDENCE WOULD HAVE CHANGED THE OUTCOME OF THE

THE RESPONDENTS' FAIL TO MEET THEIR OBLIGATION FOR NOTICE PROCESS, FOR ARGUENDO, IF AT ALL, THE APPELLANT WAS PUT ON NOTICE FOR PURPOSE OF COMMENCEMENT OF SUIT OF LIMITATION, THE RECORD IS VOID OF ANY NOTICE. THE RESPONDENTS' CLEARLY OWED DUTY OF CARE PURSUANT TO SCD's POLICY ADM-15.12. SEC. 17.4 REPORTING MISTAKE IN ACCOUNT... SEC. 17.4.3. SCD INVESTIGATION OF ACCOUNT MISTAKE... CLOSE OUT OF IMATE ACCOUNT, SEC. 20. WORK RELEASE PROGRAM IMATE UNCLAIM ACCOUNTS, AND PURSUANT TO FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. BREACH OF RESPONDENTS DUTIES DIRECTLY RESULTED IN APPELLANT'S MONETARY LOSS. FURTHERMORE, AN EXCEPTION LIES IN DISCOVERY RULE WHICH TOLLS THE STARTING OF LIMITATION UNTIL A PERSON DISCOVERS OR SHOULD HAVE KNOWN THROUGH REASONABLE DILIGENCE A CLAIM MIGHT EXIST, S.C. CODE ANN. 315-3-535 (2005). THE RECORD SPEAK FOR ITSELF, THE ONLY NOTICE GIVEN APPELLANT WAS AFTER THE FACT [FEBRUARY 9, 2009], THIS NEWLY DISCOVERED EVIDENCE, THEREFORE, THE CIRCUIT COURT ERRED IN FINDING THE PLAINTIFF DID NOT BRING ACTION WITHIN TWO YEARS LIMITATION PERIOD. MOREOVER, AT ALL TIMES RELEVANT THE PLAINTIFF WAS STILL IN LEGAL CUSTODY OF SCD, SEE, Sanders v. Mac Dougal, 135 S.E.2d 836 (1964).

proceeding, Strickler v. Green, 527 US 263; State v. Bagley, 473 US 667. The question is whether in discovery absence Appellant received a fair airing of the facts, and trial... evidence are unavailable to him from other sources.

III. EXHAUSTION OF ADMINISTRATIVE REMEDIES, AND, RESPONDENTS IN DEFAULT:

The record again speak for itself, that Appellant timely filed both step-one and step-two grievances, in question... upon notice. However, Grievance was not handled in prescribe [SCDC Policy GA-01.12] time authorized from inception [November 2009 thru December 2011], and Final Agency decision not received until January 2012, constituting gross default for failing to keep within time restraint of SCDC Policy GA-01.12, Quote:

"Under no circumstances will the grievance process exceed 180 days."

SEE, HARRAH V. MCGINNIS, 271 SE2d 222; UNDERWOOD V. WILSON, 151 F.3d 292 (5th Cir.); Abney v. McGinnis, 380 F.3d 663 (2004).

MOREOVER, the Respondents are estopped from raising "Non-exhaustion" as an affirmative defense, and cut short the right to legal dispute, --v--, 90 N.Y.S. 589, 590, and; when inhibiting Appellant's ability to utilize grievance process, SC Code Ann. §16-5-60; James v. Davis, 2006 WL 2171082 at 16; Fair v. Hallman, 2006 WL 1172198 at 5 (D.S.C. May 2, 2006) citing Abney v. McGinnis, Id.. Also, Grievance may be considered exhausted under the PLRA when a prisoner files a grievance, but has not received a timely determination, SEE, Boyd v. Corr. Corp. of America, 380 F.3d 989 (6th Cir. 2004), 125 S.Ct. 1639; Jernigen v. Stuchell, 304 F.3d 1030 (10th Cir. 2002) ("We agree that the failure to respond to a grievance within the time limits contain in grievance policy render an administrative remedy unavailable.

The court must be mindful that, (1) alleged incident did not occur until February 9, 2009, first notice account was close in 1994; (2) timely attempted/

exhausted all available remedies, and; (3) at all times relevant the Appellant was still in legal custody of SDC, SEE, Wilson v. Flaherty, 689 F.2d 332 (4th Cir. 2012); Jones v. Cunningham, 317 US 236, 83 S.Ct. 373; Sanders v. Mac Douglas, id.

IV. THE CIRCUIT COURT MADE REVERSIBLE ERRORS:

The Trial Court erred in granting Respondents' Summary Judgment, and Rule 12(b)(6) Motion to Dismiss when Relying on Newly amended [S.C. Code ANN. § 24-3-40 (A) & (B), 1994], law that did not govern the conduct in the scope of authority between 1979 thru 1981 time of statute in question governing Work Release Provision that dictated the disposition of wages of prisoners allowed to work at paid employment, specifically South Carolina Work Release Program signed into law March 6, 1966. The Appellant's claims are brought under Title 24 of 1976 S.C. Code of Law as amended in 1979-1981. The Lower Court used incorrect provision not applicable in rendering its decision, and Judgment was formed without due examination, —v.—, 232 P.2d 949, such Plain Error Requires Appellate Court to Reverse, —v.—, 635 P.2d 1161, and that effected fundamental right to fair trial, —v.—, 597 F.2d 1170.

V. NAMING DIRECTOR IN SUIT, and; JOINT TORTFEASORS:

Pursuant to S.C. Code ANN. § 24-1-220, mandates that suit be brought in Name of Agency Director, and be properly served. Under Joint Tortfeasory when two or more persons who owe to another person the same duty, and whose negligence results in injury acting in concert, were named, —v.—, 277 F. Supp. 457; See Also, City of Camden v. Brassell, 485 S.2d 371.

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CONCLUSION

The Appellant submits that the Circuit Court ERRED in granting Respondents' Rule 12(b)(6) Motion to dismiss, and Summary Judgment, and is GRIEVED by the judgment that operates on his rights to have personal account made transparent, and funds in account, and where Justiciable Controversy exist which is appropriate for judicial determination. The Circuit Court did abuse its discretion in a manner that substantially affecting Appellant's legal rights, Equal Protection of the Law, and Due Process Rights, thereby actual prejudice ensued. which if uncorrected would result in a miscarriage of justice, and which justifies REVERSING judgment in the lower courts.

Date: April 24, 2014



Basil W. Akbar, #065498
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CERTIFICATE OF SERVICE

I, Basil W. Akbar, hereby certify that ANNEX Rebuttal Brief, was SERVED ON RESPONDENTS' COUNSEL OF RECORD, by the United States Postal Service, postage prepaid at: Daniel R. Settnawa, Attorney at Law, 1303 Blanding St., Columbia, S.C. 29202.

Date: April 24, 2014



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