

ORIGINAL

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS
D. Garrison Hill, Judge

Case No. 2013-CP-23-00994
Appellate Case No.: 2013-001765

Jack Edward Earl Parker,..... Appellant,

v.

State of South Carolina,..... Respondent.

APPELLANT'S FINAL BRIEF

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SC Court of Appeals

TABLE OF CONTENTS

Table of Authorities ii
Statement of Issues on Appeal iii
Statement of the Case 1
Statement of the Facts. 2

ARGUMENT

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT.... 7

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

Byrd v. City of Hartsville, 365 S.C. 650, 620 S.E.2d 76 (2005). 8

Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007). 15

Evans v. State, 543 S.E.2d 547, 344 S.C. 60 (S.C. 2001).. 7

Flateau v. Harrelson, 355 S.C. 197, 584 S.E.2d 413 (Ct.App.2003). 15

Garner v. Morrison Knudsen Corp., 456 S.E.2d 907, 318 S.C. 223 (S.C. 1995).. . . 7

Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144,
49, 427 S.E.2d 899, 902 (Ct.App.1992). 10

Hooper v. Rockwell, 513 S.E.2d 358, 334 S.C. 281 (S.C. 1999).. 13

Jackson v. Atlantic Soft Drink Co., 286 S.C. 577, 336 S.E.2d 13 (1985). 7

Marietta Garage, Inc. v. South Carolina Dep't of Pub. Safety, 352 S.C. 95,
572 S.E.2d 306 (Ct.App.2002). 9

Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E.2d 38
(Ct.App.2001). 15

Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746, (Ct.App.1998). . . . 15

Quality Towing Inc. v. City of Myrtle Beach, 340 S.C. 29,
530 S.E.2d 369 (2000). 8

Horry County v. Ins. Reserve Fund, 344 S.C. 493,
544 S.E.2d 637 (Ct.App.2001). 9

South Carolina State Highway Dep't v. Moody, 267 S.C. 130,
226 S.E.2d 423 (1976). 9

Segura v. Texas, 826 S.W.2d 178 [343 S.C. 644] (Tex.App.1992). 11

Singleton v. State, 313 S.C. 75, 437 S.E.2d 53 (1993).. 13

State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct.App.1991).. 11

State v. Barroso, 462 S.E.2d 862, 320 S.C. 1 (S.C.App. 1995).	14
State v. Church, 538 So.2d 993 (La.1989).	13
State v. Coleman, 616 S.E.2d 444, 365 S.C. 258 (S.C.App. 2005).	14
State v. Dykes, 728 S.E.2d 455, 398 S.C. 351 (S.C. 2012).	4
State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997).	11
State v. Forrester, 541 S.E.2d 837, 343 S.C. 637 (S.C. 2001).	11
State v. Inman, 720 S.E.2d 31, 395 S.C. 539 (S.C. 2011).	14
State v. Mathis, 597 S.E.2d 872, 359 S.C. 450 (S.C.App. 2004).	14
State v. Parker, 707 S.E.2d 799, 391 S.C. 606 (S.C. 2011).	14
State v. Plath, 313 S.E.2d 619, 281 S.C. 1 (S.C. 1984).	14
State v. Thrift, 440 S.E.2d 341, 312 S.C. 282 (S.C. 1994).	14
State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007).	12
Tyler v. Macks Stores of South Carolina, Inc., 275 S.C. 456, 272 S.E.2d 633 (1980).	7
Vick v. South Carolina Dep't of Transp., 347 S.C. 470, 556 S.E.2d 693 (Ct.App.2001).	15

Statutes and Rules

U.S. Const. Fourth Amendment.	11
S.C. Const, art, I, Section 10	13
S.C.Code Ann § 15-78-70(b) (Supp.2003).	15
SCRCP Rule 12(b)(6)	7
27 Am. Jur. 2d Eminent Domain § 829 (1996).	9

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in granting summary judgment ?

STATEMENT OF THE CASE

This matter came to court by way of summons and complaint filed by Appellant seeking damages under a theory of inverse condemnation as a result of the Appellant's incarceration for six years in the Department of Corrections. The Respondent filed an Answer to the Appellant's Complaint and a Motion to Dismiss. A hearing was held on May 13, 2013, before the Honorable D. Garrison Hill. An Order was entered granting summary judgment and dismissing the Appellant's case on July 15, 2013. Appellant timely appealed.

Appellant was represented below by Robert C. Childs, III. Respondent was represented below by Russell W. Harter, Jr., of Greenville.

STATEMENT OF FACTS

The Appellant shot and killed Robert Lee Stewart in 2001. Stewart had an extensive violent criminal background and a history of abusive behavior toward Appellant's sister, Angela. The police and emergency medical technicians responded to a call to Angela's mother's house after Angela was beaten by Stewart. The following day, Stewart and four or five others arrived at Angela's mother's house. The Appellant lived next door to Angela's mother. The Appellant shot Stewart multiple times in the driveway. At trial, the Appellant claimed self-defense, testifying he feared for his life as Stewart was pulling something from his back pocket and from the back of the truck. Police officer Wayne Campbell testified an open knife was found in the victim's back pocket at the scene. State v. Parker, 673 S.E.2d 833, 381 S.C. 539 (S.C.App. 2009).

Further evidence at trial showed that Stewart had a CDV warrant for his arrest from the vicious assault of the Appellant's sister the night before and that Stewart arrived in a fast moving pickup truck with a group of people inside and jumped out of the vehicle yelling and screaming and making threats to the Appellant, Appellant's mother and Angela. There were small children in the area and Appellant observed an open knife in Stewart's back pocket that Stewart reached for. The pickup truck fled the scene upon the shooting running over

Stewart. The Appellant was arrested for Murder but remained free on bond pending trial.

In October of 2003, Parker stood trial for murder before Judge Hayes and was represented by Robert C. Childs, III and the State represented by assistant solicitor Mindy Hervey. During the first trial, prior to questioning the first police witness, the solicitor explained that there was a videotape made of the crime scene that included graphic images of Victim's body. The solicitor redacted the original videotape to erase the graphic images and presented defense counsel a redacted copy on the day of trial. However, the original videotape, including the graphic images of Victim's body, was shown to the jury. Defense counsel moved for a mistrial and dismissal with prejudice based on prosecutorial misconduct. Counsel for defense argued the solicitor's case was not going well and the State was now privy to his defense tactics. The solicitor claimed the tapes were switched unintentionally and inadvertently. The court found the explanation offered by the State "shocking" as to why "such a huge, substantial, material piece of evidence would be handled in such carefree fashion...." The circuit court judge admonished the solicitor, but denied the motion for a mistrial issuing a curative instruction that the jury was to disregard the fact that they viewed the body of Victim. State v. Parker, 707 S.E.2d 799, 391 S.C. 606 (S.C. 2011). (R. 6).

During the solicitor's closing argument, the solicitor accused defense counsel of unethical conduct in coaching witnesses and implied to the jury that it was their community duty to convict the Appellant of murder. After the solicitor concluded her closing argument, defense counsel again made a motion for a mistrial. Defense counsel contended a mistrial should be granted based on prosecutorial misconduct in closing argument in that the prosecution accused defense counsel of coaching witnesses, and argued facts not in evidence. Defense counsel ultimately argued that the cumulative effect of the prosecutorial misconduct warranted a mistrial. The circuit court judge charged the jury and then heard arguments on the mistrial motion. The solicitor contended her closing argument was justified by the evidence and was responsive to the defense's closing argument, thus, the mistrial motion should be denied. The jury then sent a note to the judge that it was deadlocked. The judge gave an Allen charge and the jury resumed deliberating. After further deliberation, the jury again reported that it was deadlocked. The judge received the note that the jury remained deadlocked as he was about to rule on the mistrial motion. Judge Hayes granted Appellant's motion for a mistrial. Parker, 707 S.E.2d 799.

The Appellant remained free on bond until he was tried again in 2005 before Judge Few, he moved to dismiss based on double jeopardy. Judge Few

denied the motion and the jury convicted Parker of murder. Parker appealed his murder conviction arguing Judge Few erred in denying his motion to dismiss based on double jeopardy. Since the first trial a principal witness concerning the incident (Appellant's mother) had passed away and additional witnesses and previous witnesses now familiar with defense strategy testified. Appellant was convicted and sentenced to life in prison in October of 2003. Parker, 673 S.E.2d 833 (Appellant argued numerous other errors in the 2005 trial which Appellant believes would have reversed his conviction on other grounds.)

Appellant remained incarcerated until the South Carolina Supreme Court on March 14, 2011 found that because the solicitor intended to goad the defense into moving for a mistrial in the first trial the Appellant's conviction was reserved and the State was barred from further prosecution under the Double Jeopardy Clauses of the United States and South Carolina Constitutions. Parker, 707 S.E.2d 799. The State filed a petition for rehearing in March of 2011 which was denied on April 7, 2011. In July of 2011 the State filed a petition for writ of certiorari to the United States Supreme Court. On October 3, 2011 the United State Supreme Court denied the States petition for certiorari and the reversal of Appellant's conviction was final.

On February 20, 2013 the Appellant filed an action alleging an

unconstitutional taking without compensation of Appellant's liberty, property, employment, family and privacy over the 6 years of incarceration by the State. Among other things, Appellant contends his earnings capacity has been permanently reduced due to his 6 years absence of employment. While incarcerated the Appellant worked at his prison employment but that employment is certainly not the type of employment prospective employers might find acceptable despite his now lack of a serious criminal record. In the interim as well, the Appellant's children were separated and taken into custody by Florida child welfare officials after their mother neglected them.

ARGUMENT

Standard of Review

In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. Dismissal under Rule 12(b)(6) is improper if the facts alleged and inferences reasonably deducible therefrom, when viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). The court should not dismiss the complaint merely because it doubts the plaintiff will prevail in the action. Id

As a general rule, important questions of novel impression should not be decided on a Rule 12(b)(6), SCRPC, motion to dismiss. Instead, a novel issue is best decided in light of the testimony to be adduced at trial. Evans v. State, 543 S.E.2d 547, 344 S.C. 60 (S.C. 2001) Tyler v. Macks Stores of South Carolina, Inc., 275 S.C. 456, 272 S.E.2d 633 (1980). Garner v. Morrison Knudsen Corp., 456 S.E.2d 907, 318 S.C. 223 (S.C. 1995); See Jackson v. Atlantic Soft Drink Co., 286 S.C. 577, 336 S.E.2d 13 (1985).

I. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT.

The Appellant in this case sued the Respondent based on a claim that the State had violated the South Carolina Constitution's double jeopardy prohibition in the second trial, and that Appellant's resulting incarceration was an unconstitutional taking of Appellant's property rights to which he is entitled to compensation. Holding that the facts alleged failed to state a claim on which relief could be granted the circuit court summarily dismissed the action under Rule 12(b)(6). On appeal this case presents the novel issue of whether property as defined by Article of the South Carolina Constitution includes the Appellant's rights which were taken without compensation through his wrongful incarceration.

Appellant's alleged an "inverse condemnation" for the taking of his liberty, employment, familial relations and privacy over the six year period of incarceration. The record establishes the basic elements for an "inverse condemnation" case present. There has been (1) affirmative conduct of a governmental entity, and (2) a taking. *See Byrd v. City of Hartsville*, 365 S.C. 650, 657, 620 S.E.2d 76, 79-80 (2005).

An action for inverse condemnation is appropriate where the government takes private property for public use. *Quality Towing Inc. v. City of Myrtle Beach*, 340 S.C. 29, 38, 530 S.E.2d 369, 373 (2000). Here, through incarceration, the

State has committed a taking through the seizure of the Appellant, his confinement for six years, and servitude without just compensation.

Inverse condemnation is a cause of action against a governmental defendant to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. Horry County v. Ins. Reserve Fund, 344 S.C. 493, 498, 544 S.E.2d 637, 640 (Ct.App.2001). While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. Horry County, 344 S.C. at 498, 544 S.E.2d at 640. "One basic difference between condemnation and inverse condemnation is that in condemnation proceedings, the governmental entity is the moving party, whereas, in inverse condemnation, the property owner is the moving party." South Carolina State Highway Dep't v. Moody, 267 S.C. 130, 136, 226 S.E.2d 423, 425 (1976) (*quoting* 27 Am. Jur. 2d Eminent Domain § 829 (1996)). To establish an inverse condemnation, a plaintiff must show: "(1) an affirmative, positive, aggressive act on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence." Marietta Garage, Inc. v. South Carolina

Dep't of Pub. Safety, 352 S.C. 95, 101, 572 S.E.2d 306, 308 (Ct.App.2002); Gray v. South Carolina Dep't of Highways & Pub. Transp., 311 S.C. 144, 149, 427 S.E.2d 899, 902 (Ct.App.1992).

Here, the question presented is whether the rights taken fall within the scope of the South Carolina Constitutional takings clause. While the South Carolina courts have never fully defined the term “private property” in this regard, the definition of what constitutes a cognizable property interest should be a fact intensive inquiry. As a basic observation, nothing can be more affirmative, positive, or aggressive than the State locking a person behind prison walls in violation of one’s right against Double Jeopardy. The resulting taking of the Appellant’s rights for six years clearly have a substantial degree of permanence.

Here the Appellant was convicted in violation of his constitutionally protected right against double jeopardy. As a result of the second trial and resulting incarceration in violation of the Double Jeopardy clause of the South Carolina Constitution, the Appellant was subjected to an unconstitutional deprivation without compensation.

In the present case the trial court relied on case law interpreting the U.S. and Missouri constitutions. This apparently because there are no South Carolina cases defining the nature of property protected from uncompensated takings. As a result,

there appears to be no case law which would prohibit a plaintiff from maintaining an inverse condemnation action based upon the deprivation of liberty, property, employment, family and privacy. The present case therefore presents an issue of first impression in South Carolina. As such, it is important to begin the analysis with an understanding of the relationship between the U. S. Constitution and South Carolina's Constitution. While some protections may be similar between South Carolina's constitution and the U.S. Constitution, "[s]tate courts may afford more expansive rights under state constitutional provisions than the rights which are conferred by the Federal Constitution." State v. Easler, 327 S.C. 121, 131 n. 13, 489 S.E.2d 617, 625 n. 13 (1997); *see also* State v. Austin, 306 S.C. 9, 409 S.E.2d 811 (Ct.App.1991). Therefore, state courts can develop state law to provide their citizens with a second layer of constitutional rights. *Id.*

While the federal constitution sets the floor for individual rights, a state constitution establishes the ceiling. See Segura v. Texas, 826 S.W.2d 178, 182 [343 S.C. 644] (Tex.App.1992). Thus, South Carolina courts can interpret the state protections to provide greater protection than the federal Constitution. State v. Forrester, 541 S.E.2d 837, 343 S.C. 637 (S.C. 2001). In this case greater protection should be afforded the Appellant since South Carolina recognizes a constitutional right to privacy. S.C. Const. art. 1 § 10 provides an express protection of the right

to privacy which the State took without just compensation through the Appellant's wrongful incarceration:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures and unreasonable invasions of privacy shall not be violated.

S.C. Const. art. 1 § 10.

In State v. Weaver, 374 S.C. 313, 649 S.E.2d 479 (2007) it was held that by articulating a specific prohibition against unreasonable invasions of privacy, the people of South Carolina have indicated a higher level of privacy protection than the federal Constitution. This illuminates the ability of our State to further protect our citizens and highlights the novel particularities of Appellant's case.

Even in the absence of a specific right to privacy provision, the South Carolina Courts could interpret our state constitution as providing more protection than the federal counterpart. As such, by articulating a specific prohibition against "unreasonable invasions of privacy," the people of South Carolina have indicated that invasions of privacy that do not offend the federal Constitution may still offend the South Carolina Constitution. Id. Ten states have express right to privacy provisions in their constitutions. South Carolina and the other states with a right to privacy provision imbedded in their constitutions have held such a provision creates a distinct privacy right that applies both within and outside the

search and seizure context. *See, e.g., Singleton v. State*, 313 S.C. 75, 437 S.E.2d 53 (1993)(finding the state constitutional right to privacy prevented the forced medication of a death row inmate in preparation of execution). Furthermore, many of the states that have adopted explicit state constitutional right to privacy provisions have read their constitutions as applying protection above and beyond the protection provided by the federal Constitution. *See, e.g., State v. Church*, 538 So.2d 993 (La.1989)(disallowing a police roadblock under the state constitution's right to privacy even though it did not violate the Fourth Amendment).

The South Carolina Constitution, with an express right to privacy provision favors an interpretation offering a higher level of protection than provided by the federal constitution. *Forrester, supra*. Accordingly, the definition of property under the South Carolina takings clause should include the right to privacy, taken from the Appellant without just compensation through his incarceration.

The Appellant further contends that a deprivation of his familial relations is similarly entitled to compensation as South Carolina likewise recognizes a liberty interest which parents have in the care, custody, and management of their children. *Hooper v. Rockwell*, 513 S.E.2d 358, 334 S.C. 281 (S.C. 1999). Because the Appellant was wrongfully incarcerated he was not only unable to care for his children, but that his children were eventually separated and placed into the

custody of Florida child welfare officials. Again, the State took from the Appellant constitutionally protected rights without just compensation. Through incarceration the State committed a taking of Appellant's liberty, property, employment, family and privacy, all of which South Carolina recognizes on par or above the protections provided by the United States Constitution. *See* State v. Dykes, 728 S.E.2d 455, 398 S.C. 351 (S.C. 2012).

Of the 7 reported double jeopardy cases in South Carolina involving alleged prosecutorial misconduct, only the Appellant's case involves a second trial and conviction that was ultimately found to be in violation of the Double Jeopardy Clause. *See*, State v. Inman, 720 S.E.2d 31, 395 S.C. 539 (S.C. 2011); State v. Mathis, 597 S.E.2d 872, 359 S.C. 450 (S.C.App. 2004); State v. Parker, 707 S.E.2d 799, 391 S.C. 606 (S.C. 2011); State v. Thrift, 440 S.E.2d 341, 312 S.C. 282 (S.C. 1994); State v. Coleman, 616 S.E.2d 444, 365 S.C. 258 (S.C.App. 2005); State v. Barroso, 462 S.E.2d 862, 320 S.C. 1 (S.C.App. 1995); State v. Plath, 313 S.E.2d 619, 281 S.C. 1 (S.C. 1984). Unlike foregoing cases, only the Appellant's case involved an incarceration for 6 years after a trial that never should have occurred and a sentence that never should have been served. Under the unique circumstances of this case, summary dismissal by the trial court was erroneous.

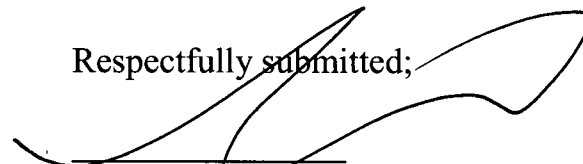
The Appellant's action does not offend the State's protection under the South Carolina Torts Claim Act and or doctrine of prosecutorial immunity. Of course, the Tort Claims Act governs all tort claims against governmental entities. Flateau v. Harrelson, 355 S.C. 197, 203, 584 S.E.2d 413, 416 (Ct.App.2003). It is the exclusive civil remedy available for any tort committed by a governmental entity or its employees or agents. S.C.Code Ann § 15-78-70(b) (Supp.2003); Olson v. Faculty House of Carolina, Inc., 344 S.C. 194, 215, 544 S.E.2d 38, 49 (Ct.App.2001); Wells v. City of Lynchburg, 331 S.C. 296, 302, 501 S.E.2d 746, 749 (Ct.App.1998). The term 'inverse condemnation' however, describes an action grounded on the constitution as opposed to statutory law. See Vick v. South Carolina Dep't of Transp., 347 S.C. 470, 480, 556 S.E.2d 693, 698 (Ct.App.2001). Accordingly, the Appellant's claim did not allege a "tort" grounded on statute and thus limited by the Torts Claims Act, but rather it raised a constitutional claim which should fall outside of the Torts Claims Act. To the extent that there is any conflict in the application of the Torts Claims Act or Doctrine of Prosecutorial Immunity to the Appellant's action for inverse condemnation, the Appellant contends simply that the South Carolina Constitution "trumps" a the lesser legislative act or doctrine. The facts of this case sufficiently support an action for inverse condemnation. Accordingly, it was error for the trial court to grant the

Respondent's motion and dismiss the Appellant's action.

CONCLUSION

Based on the foregoing the decision of the lower court should be reversed and the case remanded for further proceedings below.

Respectfully submitted;



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CERTIFICATE

I certify that on September 2nd, 2014, I served the Appellant's Final Brief and Certificate on the Respondent by placing a copies of same in the United States Mail, first class postage prepaid, addressed to counsel of record and others as indicated below:

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CERTIFICATE

I certify that the Appellant's Final Brief is in compliance with Rule 211(b).



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