THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Clifton Newman, Circuit Court Judge

Case No. 2012-CP-43-1463

Brandon W. Hodge, ... Appellant,

v.

Sumter County, ... Respondent.

INITIAL BRIEF OF RESPONDENT

Andrew F. Lindemann
James M. Davis
DAVIDSON & LINDEMANN, P.A.
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent
Sumter County

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STATEMENT OF THE CASE

This action rises out of a police pursuit that occurred on February 27, 1999. According to the allegations of the Complaint, the Appellant Brandon Hodge was a "small child" on that date and was a passenger in a vehicle driven by his father. Hodge alleges that Deputy Sheriff Anthony L. Horton engaged in a "high speed chase" of the vehicle driven by his father. During that pursuit, Deputy Horton allegedly lost control of his vehicle and struck the vehicle in which Hodge was a passenger, and that collision allegedly resulted in injuries to Hodge. Hodge alleges that Deputy Horton was negligent in his operation of the vehicle during the pursuit. He further alleges that "Headquarters" failed to exercise proper control over Deputy Horton during the pursuit. Lastly, he alleges the negligent failure to properly train Deputy Horton.

In his Complaint, the Appellant Hodge brought suit only against the Respondent Sumter County. Hodge erroneously pled that all employees of the Sumter County Sheriff's Office, including Deputy Horton, were employed by Sumter County.

The Respondent Sumter County filed a Motion to Dismiss contemporaneously with the filing of its Answer. Sumter County asserted that the County is not a proper party under the South Carolina Tort Claims Act because

under South Carolina law it is well settled that a sheriff and his deputies are not county employees. The County's motion to dismiss was heard by Circuit Court Judge Clifton Newman on June 17, 2013. By Order filed July 16, 2013, Judge Newman granted Sumter County's motion and dismissed the County as a party-defendant.

The Appellant Hodge did not file a Rule 59(e) motion but rather filed an appeal to this Court.

ARGUMENTS

In his Complaint, the Appellant Brandon Hodge alleged that Sumter County was negligent for a motor vehicle collision that occurred during a police pursuit on February 27, 1999. Hodge alleges that the County is liable based upon the conduct of Deputy Sheriff Anthony Horton and other unidentified employees with the Sumter Court Sheriff's Office. Circuit Judge Clifton Newman ruled that the employees of the Sheriff's Office are not county employees as a matter of state law and thus the County cannot be liable for Hodge's injuries. That ruling was correct and should be affirmed.

The dispositive question before the Circuit Court and this Court is an issue of law. That issue of law has previously been decided by the South Carolina Supreme Court and has been reaffirmed on numerous occasions. Contrary to Hodge's assertions, there is no novel issue of law raised in this litigation.

Specifically, the issue before Judge Newman was whether Sumter County is a proper party which may be held liable for the alleged negligence committed by Deputy Horton and other unidentified employees of the Sumter Court Sheriff's Department. That issue is well settled as a matter of law. In *Cone v. Nettles*, 308 S.C. 109, 417 S.E.2d 523 (1992), the South Carolina Supreme Court held that a sheriff and his deputies in South Carolina are state, rather than county, employees.

The Court in *Cone* examined and found persuasive prior federal court case law which had concluded that "in South Carolina sheriffs and deputies are state, not county, officials." 417 S.E.2d at 525, *citing Gulledge v. Smart,* 691 F. Supp. 947 (D.S.C. 1988), *aff'd* 878 F.2d 379 (4th Cir. 1989). As the *Cone* Court recognized, the federal district court in *Gulledge* had specifically found that "(1) the South Carolina constitution establishes the office of sheriff and the term of office, S.C. Const. art. V, § 24; (2) the duties and compensation of sheriffs and deputies are set forth by the General Assembly; (3) their arrest powers are related to state offenses; and (4) the Governor of South Carolina has the authority to remove a sheriff for misconduct and fill the vacancy." 417 S.E.2d at 525. Based upon those factors, the Supreme Court agreed with the conclusion reached by the court in *Gulledge* that a sheriff and his deputies are state, not county, officials.

The Supreme Court in *Cone* also looked at prior state court precedent including *Heath v. County of Aiken*, 295 S.C. 416, 368 S.E.2d 904 (1988), where the Supreme Court held that deputy sheriffs are not county employees and thus are not covered by county personnel policies.

Since *Cone* was decided in 1992, it has been cited favorably in several state appellate cases. Most recently, in *Edwards v. Lexington County Sheriff's Department*, 386 S.C. 285, 688 S.E.2d 125 (2010), the Supreme Court, citing *Cone*, reaffirmed that "under South Carolina law, the sheriff and sheriff's deputies

are State, not county, employees." 688 S.E.2d at 127, n.1. The Supreme Court described this principle as "settled law" and declined to address what the Court described as "the legally settled distinction between a county government and a sheriff's office for liability purposes." *Id.*

Nonetheless, the Appellant Hodge appears to suggest that the existing case law, including *Cone*, is distinguishable from the present case because *Cone* was a Section 1983 action rather than an action brought under the South Carolina Tort Claims Act. However, that is a distinction without a difference. Hodge does not offer any plausible explanation as to why a sheriff or deputy sheriff should be considered a state employee for purposes of a federal cause of action but a county employee for purposes of a state tort claim. Moreover, in *Edwards*, which is the most recent case reaffirming *Cone*, is a Tort Claims Act case. In short, there is no valid basis for treating a sheriff and his deputies as county employees under the Tort Claims Act and treating them as state employees for Section 1983 actions.

Furthermore, Section 15-78-70(c) of the Tort Claims Act, which governs the Appellants' negligence action against Sumter County, specifically provides that "a person, when bringing an action against a governmental entity under the provisions of this chapter shall name as a party defendant only the agency or political subdivision *for which the employee was acting*." S.C. Code Ann. § 15-78-70(c). (Emphasis added). Similarly, in *Faile v. South Carolina Department of Juvenile*

Justice, 350 S.C. 315, 566 S.E.2d 536 (2002), the Supreme Court held that "only the entity employing the employee whose act gives rise to the claim may be sued." 566 S.E.2d at 543. Clearly, any employees of the Sheriff's Office, including Deputy Horton who was involved in the pursuit, would be acting for the Sumter County Sheriff and not for Sumter County. Thus, Sumter County cannot be held liable under the Tort Claims Act for the acts or omissions of the Sheriff or his deputies in conducting the pursuit at issue. Sumter County's motion to dismiss was thus properly granted.

Because the legal issue dispositive of Sumter County's motion to dismiss is clearly established by existing Supreme Court precedent, the Appellant Hodge instead attempts to argue that Judge Newman's order was contrary to the standard of review applicable to a Rule 12(b)(6) motion. Hodge maintains that he has pled that "all employees of the Sumter County Sheriffs Department, including but not limited to Deputy Anthony L. Horton" were employees of Sumter County. He insists that the standard of review required Judge Newman to accept those allegations as true for purposes of adjudicating Sumter County's Rule 12(b)(6) motion.

When reviewing a motion to dismiss for failure to state facts sufficient to constitute a cause of action, the pleadings must be construed liberally, and all *well pled facts* must be presumed true." *Doe v. Bishop of Charleston*, 407 S.C. 128,

754 S.E.2d 494, 497-498 (2014). (Emphasis added). However, only "well pled facts" are to be presumed true. In contrast, issues of law -- which are not "well pled facts" -- are for the Court and are not determined by the pleadings. Importantly, this Court has previously explained that, on a Rule 12(b)(6) motion, "the court is required to presume all well pled *facts,* not propositions of law, to be true." *HHHunt Corp. v. Town of Lexington*, 389 S.C. 623, 699 S.E.2d 699, 705 (Ct. App. 2010). (Emphasis in original). Moreover, a plaintiff "cannot transform an unsupported proposition of law into a statement of fact merely by stating that they are informed and believe it to be so." *Id.* In short, issues of law are not "well pled facts," and the court is not required to accept those as true.[1]

Therefore, as the South Carolina Supreme Court has recently reaffirmed, the status of a sheriff and his deputies as state, not county, employees is already "settled law." *Edwards v. Lexington County Sheriff's Department*, 386 S.C. 285, 688 S.E.2d 125, 127, n.1 (2010). It is not a question of fact, nor can it be transformed into a question of fact by creative pleading or even by any admissions

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[1] By way of analogy, the same is also true where parties enter into stipulations regarding matters of law. Courts are never bound by parties' representations or stipulations as to issues of law. *See*, *Walterboro Community Hospital v. Meacher*, 392 S.C. 479, 709 S.E.2d 71 (Ct. App. 2011), (stipulations as to the law are not binding on the court); *McDuffie v. McDuffie*, 308 S.C. 401, 418 S.E.2d 331, 336 (Ct. App. 1992) (holding a stipulation concerning a question of law is not binding on the court); *Alltel Communications, Inc. v. South Carolina Department of Revenue*, 399 S.C. 313, 731 S.E.2d 869, 872 (2012) (holding that an "issue of law [is] to be decided by the court, rather than the parties" and "courts are not bound by parties' stipulations of law").

by the parties. In other words, Hodge's allegation that Deputy Horton is an employee of Sumter County is not a "well pled fact" that must be presumed as true. Instead, Judge Newman was correct to apply the settled law as established by Supreme Court precedent rather than be bound by Hodge's pleading which was contrary to that precedent.

Hodge also argues beyond what was pled that it is possible that employees of Sumter County may have been at fault. He argues that the County owned the vehicle driven by Deputy Horton. However, even if that is true, it is well settled that mere ownership of a vehicle does not give rise to liability. *See*, *Holder v. Haynes*, 193 S.C. 176, 7 S.E.2d 833 (1940). Furthermore, Hodges has not alleged any claim against the County for negligent entrustment or for negligent maintenance of the vehicle. Instead, Hodge focuses on the alleged acts and omissions of Deputy Horton, who he has pled was a deputy sheriff and thus not a county employee per the holding from *Cone* and its progeny. Hodges also makes allegations regarding negligent supervision of the pursuit and negligent training of Deputy Horton, but it is clear that the chain of command in the Sheriff's Office responsible for supervision of deputies, training, and policy would consist of the Sumter County Sheriff and other deputies, none of whom are county employees as a matter of law. Thus, there is no basis for concluding that Hodge has pled a claim of negligence committed by an actual employee of Sumter County.

Finally, the Appellant Hodge argues that Judge Newman erred in not adjudicating his motion to substitute party, which was filed subsequent to the June 17, 2013 motion hearing. The motion to substitute party was actually filed on July 5, 2013, which was *after* Judge Newman issued the order on appeal. Judge Newman dated his execution of the order as July 2, 2013. (R. ___).

At any rate, this argument fails for several reasons. First, as mentioned, there is no indication that Judge Newman was aware of the motion to substitute party when he issued the order on appeal. Second, there is no indication that the motion to substitute party was properly before Judge Newman. Third, the filing of a motion to substitute party does not prevent or bar the dismissal of Sumter County as a party-defendant. Judge Newman's order simply dismisses Sumter County as an improper party, which was a correct ruling. Fourth, after Judge Newman issued his order, Hodge never filed a Rule 59(e) motion requesting that the motion to substitute party be adjudicated. This issue, in fact, was never raised to nor decided by the Circuit Court and thus is not preserved for appeal.[2] In sum, Hodge's filing

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[2] The Supreme Court and this Court have repeatedly explained that an appellant cannot raise an issue on appeal that was not first raised to *and* decided by the lower court. In *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004), the Supreme Court explained that "[i]ssues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." 602 S.E.2d at 779-780. "Error preservation requirements are intended 'to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments.'" *Ellie, Inc. v. Miccichi*, 358 S.C. 78, 594 S.E.2d 485, 498 (Ct. App. 2004), *citing I'On v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716, 724 (2000). "It is well settled that an appellate court cannot address an issue unless it was raised to, *and ruled upon by,* the trial court." *Id.* (Emphasis in original).

of a motion to substitute party does not require a different result nor support the conclusion that Judge Newman erred in dismissing Sumter County as a party-defendant.

CONCLUSION

Based on the foregoing discussion and analysis, the Respondent Sumter County respectfully requests that this Court affirm the order of Circuit Court Judge Clifton Newman dismissing the County as an improper party to this action.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
JAMES M. DAVIS
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

Counsel for Respondent Sumter County

Columbia, South Carolina

September 12, 2014

DAVIDSON & LINDEMANN, P.A.

ATTORNEYS AND COUNSELLORS AT LAW

1611 Devonshire Drive, Second Floor
Post Office Box 8568
Columbia, South Carolina 29202-8568
Telephone: (803) 806-8222
Facsimile: (803) 806-8855
www.dml-law.com

William H. Davidson, II
Andrew F. Lindemann*
James M. Davis, Jr.†
Robert D. Garfield
Michael B. Wren

*Also Admitted In North Carolina
†Certified Mediator

Daniel C. Plyler
Joel S. Hughes
Justin T. Bagwell
David A. DeMasters
Steven R. Spreeuwers
Todd R. Flippin

Of Counsel
Kenneth P. Woodington

Writer's Email: alindemann@dml-law.com

September 12, 2014

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Brandon W. Hodge v. Sumter County
Appellate Case Tracking Number: 2013-01845
Civil Action Number: 2012-CP-43-1463
Claim Number: 5187
Our File Number: 290.9100

Dear Ms. Kitchings:

Please find enclosed for filing the originals and one copy each of the **Initial Brief of Respondent** and **Respondent's Designation of Matter to be Included in the Record on Appeal** with regard to the above referenced matter. Please file the originals and return a clocked-in copy of each document to me in the enclosed envelope.

By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

DAVIDSON & LINDEMANN, P.A.

Andrew F. Lindemann

AFL/
Enclosures

cc: Gary L. Cartee, Esquire *(w/ Enclosures)*