

State Of South Carolina
Court Of Appeals

Michael J. Ferola # 291941
Appellant

VS.

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OCT 15 2014

South Carolina Department Of Corrections
et-al Respondents. **SC Court of Appeals**

Appeal From Clarendon County
Court Of Common Pleas

Honorable Ralph F. Cottrill Jr
Circuit Court Judge

Circuit Court Case 2014-CP-14-00019
Appellate Case Number 2014-001877

Initial Brief Of Appellant

Michael J. Ferola
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Statement Of Issue On Appeal

(a) Did the circuit Court error in granting Defendants Motion To Dismiss Kenneth Sharp, Officer Fulton, Michael Bowers, under rule 12 (b) (1), 12 (b) (2), and (12) (b) (6), South Carolina Rules of Civil Procedure, when plaintiff witness affidavits and complaint establish liability on behalf of these Defendants. 2

(b) Did the circuit Court used the proper standard under South Carolina Rules of Civil Procedure 12 (b) (1), 12 (b) (2), 12 (b) (6) when it dismissed said Respondent(s) as Defendants 2

Statutes

S.C. Code ANN 14-3-330 (2)	4
S.C. Code ANN 15-78-60 (5)	3
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S.C. Rules Civil Procedure Rule 12 (b) (1), 12 (b) (2), 12 (b) (6).	3
SC Code ANN 15-78-10	3

Table Of Authorities:

Lebovitz v Mudd (1986) 289 SC 476, 347 SE2d 94 later Proceeding (SC) 358 SE2d 698	5
Dawkins v Fields (SC 2003) 354 SC 58, 580 SE2d 433 rehearing denied.	5
Tyler v Burns 373 SC 637, 647 SE2d 188	5
Doe v Marion (SC 2007) 373 SC 390, 645 SE2d 245	5
Dye v Gainey (SC App 1995) 320 SC 65, 463 SE2d 97	5
Brazell v Windsor (SC App 2007) 376 SC 83, 655 SE2d 736 rehearing denied	5
Certiorari Granted	
Bergstrom v Palmetto Health Alliance (SC 2004) 358 SC 388, 596 SE2d 42 rehearing denied	5
Solan Const Co Inc v Southco Grassing Inc (2008) 377 SC 108, 659 SE2d 158	5
Jensen v SC Dept Social Services (1987 App) 297 SC 323, 377 SE2d 102	5

Statement Of Issues

- (a) Did the Circuit Court Error in Granting Respondents motion To Dismiss when plaintiff Verified Complaint and Declarations presented in open Court showed a claim for relief?
- (b) Does the plaintiff Complaint and Declarations submitted state A claim UNDER S.C. Rules Of Civil Procedure when all facts are assumed to be true for the purpose of a motion To Dismiss.
- (c) Did the Circuit Court error in refusing to have respondents produce officer Fulton prior Disciplinary File.

Statement Of Case

This is an action brought by a State Prisoner, Appellant Michael J. Ferola, against Respondents South Carolina Department of Corrections (hereinafter SCDC) and several employees under the South Carolina Tort claim Act, SC Code ANN 15-78-10, 15-78-60 (5), (25) to recover damages from SCDC officials for personal injuries (assault) suffered as a result of an altercation between appellant Ferola and a fellow inmate Joseph Cannon.

In a order dated August 6, 2014 the individual defendants [Michael Bowers, Officer Fulton, and Kenneth Sharp] were dismissed as named defendants and SCDC was left as the only remaining defendant. [Lower Court order dated 8-6-14]

On March 3, 2014 the South Carolina Department Of Corrections filed a motion To Dismiss Defendants Michael Bower, officer Fulton, Kenneth Sharp, as named defendants pursuant to rule 12 (b), (1), 12 (b)(2), 12 (b)(6) of South Carolina rules of Civil Procedure. On or about July 30, 2014 the court after hearing arguments from both parties granted defendants motion To Dismiss pursuant to rule 12 (b)(1) 12 (b)(2), 12 (b)(6) stating plaintiff complaint does not rise to level of conduct outside the scope of defendants duties; or conduct that would constitute actual fraud, malice, intent to harm, or crime of moral turpitude. [Lower Court order dated 8-6-14]

In a order dated August 6, 2014 the Honorable Ralph F Cothran Jr dismissed Defendants Bowers, Sharp, and Fulton as named defendants AND allowed the case to move forward on SCDC and Joseph Cannon. On August 26, 2014 Appellant Filed this Notice Of Appeal.

Statement Of Facts

Appellant claims that on July 12, 2012 while an inmate at Turbeville Correctional Institution he was assaulted by another inmate after being threaten by this inmate ten minutes earlier in the present of Respondent Fulton. Appellant further alleges in his complaint that respondent Fulton failure to take Any corrective action after she heard Defendant Cannon threaten appellant was a contributing factor to Appellant being assaulted [Appellant Complaint page 2-4].

Appellant during the assault called out for assistance however, despite this fact respondent Fulton was only [25] feet from where the assault took place offered no assistance to plaintiff. The fact appellant was threaten in the present of officer Fulton, placed said respondent [Fulton] on notice that a altercation could occur between appellant and respondent Cannon.

The record clearly demonstrates that respondent Fulton was present and heard said physical threats and failed to take any corrective action. On July 30, 2014 during the hearing before the Honorable Ralph F Cothran Jr Appellant introduced (2) Declarations / Affidavits of inmates Chris Jones and Gary Writz Proving respondent Fulton was present during said threats prior to appellant being assaulted.

On August 6, 2014 the court granted respondents motion to dismiss and dismissed respondents Fulton, Bowers, Sharp, as named defendants. Respondents Bowers and Sharp were placed on notice prior to the July 12, 2012 assault of the Appellant that respondent Fulton was not doing her job and the fact (3) previous assaults showed respondent Sharp and Bowers were placed on notice.

This Honorable Court should hear this case under S.C Code Ann 14-3-330 (2) As it dismiss a substantial portion of appellant case.

STANDARD OF REVIEW

Argument

When deciding a motion to Dismiss for failure to state a Claim the question is "in light most favorable to plaintiff, and Every Doubt resolved in his behalf, the complaint states ANY claim for relief. Plyer v Burns (sc 2007) 373 SC 637, 647 SE2d 198, Doe v marion (sc 2007) 373 SC 390, 645 SE2d 245, Dye v Grainey (sc App 1995) 330 SC 65, 463 SE2d 97.

Further in deciding a motion to Dismiss courts should only consider Allegations contained in the complaint. Stiles v Onorato 318 SC 297, 300, 457 SE2d 601, 602 (1995) rule 12 (b) (6) S.C.R.C.P.

If facts alleged and inferences reasonably deducible therefrom would entitled Plaintiff to any relief on any theory of the case then "Dismissal" for failure to state a claim is inappropriate. Solan Const Co Inc v Southco Grassing Inc (sc 2008) 377 SC 108, 659 SE2d 158, Brazell v Windsor (sc 2007) 376 SC 83, 655 SE2d 736 rehearing denied, certiorari granted, Bergstrom v Palmetto Health Alliance (2004 sc) 358 SC 388, 596 SE2d 42 rehearing denied, Pre-Trial Procedure Key 622, 624,

The South Carolina Court of Appeals has stated dismissal under rule 12 (b) (6), is seldom appropriate when the defense of immunity is plead to establish this requires more than an assertion in the pleadings, that the action complained of falls within Scope of Duty Jensen v S.C. Dept Social Services (1987 App) 297 SC 323, 377 SE2d 102. A order granting 12 (b) (1), 12 (b) (2), 12 (b) (6) as to one of multiple claims is directly appealable under 14-3-330 (2) because it effects a substantial right and strikes out a part of the case. Lebovitz v mudd (1986) 289 SC 476, 347 SE2d 94 later proceeding (sc) 358 SE2d 698, Enriquez v SCDC (sc 2007) 648 SE 2d 582 Pre-Trial Procedure Key 434.

Conclusion

Appellant moves this Honorable Court for a order reversing the lower courts order Dismissing Michael Bowers, Kenneth Sharp, Officer Fulton as Named Defendants and allow the case to proceed to trial.

Respectfully Submitted

Michael J. Ferola

Michael J. Ferola #291941

Ridgeland Correctional Inst

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Ridgeland, SC 29936-2039

Certificate Of Service

I do hereby certify I've mailed a true and correct Copy of the within "Brief Of Appellant" on this 9th day of October 2014 To:

Murrell G. Smith Jr

126 North Main St

Po Box 580

Sumter, SC 29151-0580

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SC Court of Appeals

To: Clerk Of Court
S.C. Court Of Appeals
1015 Sumter St
Columbia, S.C. 29211-1629

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SC Court of Appeals

RE: Enclosed Brief/Designation

October 9, 2014

Dear Clerk,

Attached here to you'll find two copies of Appellants initial Brief and Designation of matter in Ferola v SCDC 2014-001877.

Please check/stamp the second copy highlighted in yellow and return to me in the enclosed envelope. As always your time is greatly appreciated

Sincerely

Michael J. Ferola

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