THE STATE OF SOUTH CAROLINA
South Carolina Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
Case No.: 2011-CP-07-04548

Appellate Case No.: 2014-001862

Theophilus Hamilton.....Appellant,

vs.

Beaufort County Sheriff's Office.....Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant filed suit in this matter against Respondent on October 31, 2011, asserting claims for abuse of process, defamation, false arrest, malicious prosecution, and negligent supervision and retention. Following a motion to dismiss, the claims were dismissed and/or amended leaving only the malicious prosecution and negligent supervision/retention claim. On July 29, 2014, Judge Carmen Mullen granted Respondent's motion for summary judgment on the negligent supervision/retention cause of action finding that the claim was barred by the relevant statute of limitations. Specifically, she found that the statute of limitations had expired on August 1, 2011, one year after Appellant had turned age 18. A jury trial on the remaining cause of action for malicious prosecution was held August 4, 2014, resulting in a Defense verdict for Respondent on August 6, 2014. The court entered only a form order granting the motion for summary judgment. This order was entered on the same day the trial began on the remaining cause of action, August 4, 2014. This appeal follows.

ARGUMENTS

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON APPELLANT'S CAUSE OF ACTION FOR NEGLIGENT SUPERVISION/RETENTION AS THE CLAIM WAS BARRED BY THE TIME OF FILING BY THE STATUTE OF LIMITATIONS.

Under the Tort Claims Act, any action is forever barred unless an action is commenced within two years after the date of loss was or should have been discovered. An exception to that rule, found in section 15-3-40 of the South Carolina Code, provides that the applicable statute of limitations is tolled until a

minor reaches the age of majority. However, the statute of limitations cannot be extended in any case longer than one year after the disability ceases. The statute of limitations on a negligence claim accrues at the time of the negligence, or when facts and circumstances would put a person of common knowledge on notice that he might have a claim against another party. Doe v. Bishop of Charleston, 407 S.C. 128, 754 S.E.2d 494 (2014).

Appellant was indicted on December 18, 2008, on charges of assault with intent to kill, conspiracy and burglary. At the time of his indictment Appellant was aware of Deputy Novak's involvement and was on notice that he may have a claim against the Sheriff's Office for negligent supervision and retention. Furthermore all the information needed for this cause of action was readily available, specifically Deputy Novak's personnel file, which was subject to the Freedom of Information Act.

Appellant claims that the statute of limitations is tolled because somehow an alleged Brady[1] violation occurred in the trial of the case that would somehow toll the statute of limitations. Appellant alleges that evidence of an alleged CDV committed by Deputy Novak, who was an investigator in Appellant's criminal case, was withheld from him and this should somehow toll the statute of limitations until it was discovered by his original counsel in this case through a FOIA request in March of 2011.

First, the incident giving rise to the "evidence of a CDV" that was allegedly withheld in violation of Brady occurred in July 2009, more than six months after

[1] Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963).

the Rule 5 request was made and answered in December 2008. Second, there is no information requested in Hamilton's Rule 5 request in December 2008, **[Rule 5 Motion date 12/11/2008]**, that would have required Respondent to turn over a portion of a personnel file relating to a disciplinary action for an uncharged domestic incident as nothing contained in the alleged "withheld materials" had to do with the accusations in the criminal case or the officer's professional conduct or job performance, but rather involved an alleged domestic disturbance between the officer and his girlfriend.

The Brady disclosure rule requires the prosecution to provide the Respondent with any evidence in the prosecution's possession that may be favorable to the accused and material to guilt or punishment. Hyman v. State, 397 S.C. 35, 45, 723 S.E.2d 375, 380 (2012). Favorable evidence is either favorable exculpatory evidence or favorable impeachment evidence. United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375 (1985). Materiality of evidence is based on the reasonable probability that the result of the proceeding would have been different had the evidence been disclosed to the defense. Hyman, 397 S.C. at 45, 723 S.E.2d at 380. A reasonable probability is shown when the government's evidentiary suppression undermines confidence in the outcome of the trial. Id. at 45–46, 723 S.E.2d at 380. Furthermore, the prosecution has the duty to disclose such evidence even in the absence of a request by the accused. United States v. Agurs, 427 U.S. 97, 107, 96 S.Ct. 2392 (1976). Thus, an individual asserting a *Brady* violation must demonstrate the evidence was (1) favorable to the accused; (2) in the possession of or known by

the prosecution; (3) suppressed by the State; and (4) material to the accused's guilt or innocence, or was impeaching. Kyles v. Whitley, 514 U.S. 419, 419, 115 S.Ct. 1555 (1995). Nothing contained in his personnel file relative to this incident would have required disclosure under Brady.

Moreover, Appellant's Brady violation tolling argument is in fact a red herring. First, Appellant's negligent supervision claim was not only based on the disciplinary actions in his personnel file. Appellant's retained expert witness, Chuck Drago, testified in his deposition that the conduct of the officer during the course of the investigation, including his interrogation tactics and coercion of witnesses was a basis for the negligent supervision/retention claim. **[Deposition of Drago p.16 line 16- p. 17 line18, p. 20 line 17- p. 22 line 1]** Appellant was in possession of the information referenced by Drago in December 2008. At that point, he would have been placed on notice of the claim based on the discovery rule. See McMaster v. Dewitt, 411 S.C. 138, 145, 767 S.E.2d 451, 454 (Ct. App. 2014) ("Under the discovery rule, the statute begins to run when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist." (internal quotation marks omitted)).

Thus, the statute of limitations began to run no later than December 2008; however, Appellant was a minor in December 2008, and thus the statute of limitations was tolled. Appellant turned eighteen on August 1, 2010, and pursuant to section 15-3-40, Appellant had one year from that date to assert this cause of action. Appellant's complaint was not filed until October 31, 2011.

Accordingly, Appellant's cause of action for negligent supervision and retention is barred by the statute of limitations and Respondent is entitled to summary judgment.

II. BY MOVING FORWARD WITH THE TRIAL OF THIS MATTER ON THE REMAINING GROUNDS, THE APPELLANT WAIVED HIS RIGHT TO THIS APPEAL OR IS ESTOPPED FROM APPEALING THIS ORDER.

Appellant is attempting a "second bite at the proverbial apple" by appealing this issue after the trial on the malicious prosecution cause of action. Appellant is appealing the summary judgment motion heard the week prior to the trial. The court made the parties aware of its ruling on the negligent supervision cause of action while at the hearing. Appellant then moved forward with the trial of the remaining cause of action for malicious prosecution the next week. The trial judge at the summary judgment motion was also the administrative judge for the county and was responsible for placement of cases on the roster for trial. When the court expressed its intention that the trial move forward the week after the summary judgment hearing, counsel for Respondent raised concerns with moving forward with trial while the time for Appellant to appeal the summary judgment motion was still pending. Specifically, counsel for Respondent advised the trial court that she was concerned with moving on with trial while the time to appeal the grant of summary judgment had not expired. **[Motion for Summary Judgment Transcript p. 34 line16-25]** Additionally, she expressed that if Appellant was willing to waive his right to appeal, she would agree to proceeding with trial. Appellant never suggested that he did in fact intend to appeal and by implication waived the appeal and/or is estopped to appeal of the grant of

summary judgment because he moved forward with trial in light of the express concerns raised by the Respondent's counsel. See In re Estate of Boynton, 355 S.C. 299, 305, 584 S.E.2d 154, 157 (Ct.App.2003) (citing 4 C.J.S. *Appeal & Error* § 185 (1993)) ("A party who voluntarily acquiesces in or takes a position inconsistent with the right to appeal impliedly waives or is estopped to assert his right to appellate review."). Furthermore, if Appellant wished to preserve his right to appeal the grant of summary judgment, he was required to raise his objection to moving forward with the trial and receive a ruling from the trial court. See Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial [court] to be preserved for appellate review.").

Clearly in light of the express concerns raised by the Respondent's counsel in moving forward with the trial of the remaining cause of action while Appellant had the right to appeal, Appellant by failing to assert the right to appeal before the trial impliedly waived or is estopped to assert that right to appeal.

III. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON APPELLANT'S CAUSE OF ACTION FOR NEGLIGENT SUPERVISION/RETENTION BECAUSE THE JURY DETERMINED DEPUTY NOVAK HAD PROBABLE CAUSE TO ARREST APPELLANT, AND THEREFORE, RESPONDENT DID NOT INTENTIONALLY HARM APPELLANT AND APPELLANT SUFFERED NO DAMAGES.

The trial court properly granted summary judgment on Appellant's cause of action for negligent supervision/retention because the jury determined Respondent had probable cause to arrest Appellant, and therefore, Respondent

did not intentionally harm Appellant. "An employer can be liable for negligent supervision of an employee when an employee intentionally harms another on the employer's premises and the employer (i) knows or has reason to know that he has the ability to control his employee, and (ii) knows or should know of the necessity and opportunity for exercising such control." Hamilton v. Charleston Cnty. Sheriff's Dep't, 399 S.C. 252, 255, 731 S.E.2d 727, 728 (Ct. App. 2012).

In this case, Appellant claimed he was harmed because Deputy Novak's propensity for dishonesty caused Appellant to be charged with a crime. **(Amended Complaint Dated October 15, 2012, 23-24).** During the trial on the malicious prosecution cause of action, the jury determined Respondent had probable cause to arrest Appellant.[2] Because Respondent had probable cause to arrest Appellant there is no basis for finding Deputy Novak intentionally harmed Appellant based on Appellant's arrest, which is required to succeed on a claim of negligent supervision. See id. (explaining an employer "can be liable for negligent supervision of an employee when an employee *intentionally harms* another" (emphasis added)); Simmons v. Smith, 2012 WL 3467191, 8, (D.S.C. 2012) (finding a Appellant failed to show malice or an intent to harm when an officer arrested the Appellant based on probable cause). Additionally, because Respondent had probable cause to arrest Appellant and Appellant claimed his damages resulted from his arrest, Appellant suffered no recoverable damages. Allowing Appellant to maintain this cause of action would be futile as he cannot

[2] This finding by the jury has not been appealed, and therefore, it is the law of the case. See Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance.").

prove an element of negligent supervision given the previous determination of the jury on the malicious prosecution cause of action, which is the law of the case. Thus, Respondent would be entitled to summary judgment if this court reversed and remanded on the statute of limitations issue).[3]

CONCLUSION

Based on the foregoing, it is respectfully submitted that the lower court properly granted summary judgment as the statute of limitations had expired prior to filing the claim for negligent supervision/retention. Alternatively, the Appellant waived or is estopped from asserting this appeal as he moved forward with trial on the remaining cause of action despite the obvious right to appeal prior to moving forward with trial as raised by Respondent's counsel. Lastly, based on the determination by the jury in the trial of the malicious prosecution cause of action which is now the law of the case that there was probable cause for the Appellant's arrest , the Appellant's cause of action for negligent supervision/retention is futile, as the Appellant cannot prove an element of the claim.

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[3] See Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) ("[A] respondent—the 'winner' in the lower court—may raise on appeal any additional reasons the appellate court should affirm the [trial] court's ruling, regardless of whether those reasons have been presented to or ruled on by the [trial] court.").

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March 20, 2015

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that he has served the foregoing Initial Brief of Respondent and Designation of Matter upon all counsel of record by affixing same with proper postage and placing same with the United States Postal Service on 20th day of March, 2015 addressed to the following:

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