

- a. Exhibit 1: SC Traffic Collision Report For TR-310 dated 06/05/11
 - b. Exhibit 2: Memorandum from Major Stewart to Lt. Col. Oliver dated 06/14/11
 - c. Exhibit 3: DPS Internal Report stating Major Stewart was on official business and signed by Lt. Col. Oliver dated 06/16/11
2. Deposition of Anna Stewart from 01/16/13 (no Exhibits)
3. Deposition of Lt. Colonel Michael Oliver from 01/16/13 w/Exhibits
- a. Exhibit 1: Memorandum from Lt. Col. Oliver to Oscar Gainous/Fleet Management dated 06/14/11
 - b. Exhibit 2: DPS Internal Report stating Major Stewart wasn't on official business and signed by Lt. Col. Oliver dated 06/16/11
 - c. Exhibit 3: DPS Internal Report stating Major Stewart was on official business and signed by Lt. Col. Oliver dated 06/16/11
 - d. Exhibit 4: Memorandum from Major Stewart to Lt. Col. Oliver dated 06/14/11
 - e. Exhibit 5: SC Traffic Collision Report For TR-310 dated 06/05/11
 - f. Exhibit 6: Memorandum from M. Elaine Johnson, Chairman of the Accident Review Board to Lt. Col. Oliver dated 10/20/11.
4. Deposition of Major Melvin Warren dated 02/11/13 (no Exhibits)

After considering all of the evidence, this court determines that Major Stewart was not acting in the course of his official duties at the time of the subject automobile wreck.

Findings of Fact

On June 5, 2011, John Fisher was in a vehicular wreck with Major Stewart in Orangeburg County. At the time of the wreck, Major Stewart was an employee of the Department of Public Safety and was driving a state issued vehicle.

Major Stewart was on call over Major Warren's territory as a result of Major Warren being out of state for training. Major Stewart had been in Dorchester County for the weekend for some business reasons as well as personal reasons and when the wreck occurred he and his wife were returning home to the Columbia area from Dorchester County.

On June 5, 2011, at the time of the wreck, Major Stewart was on the way home with his wife from Dorchester County after attending a church service at his regular church. Earlier in the day, he had patrolled Dorchester County in his cruiser, had gone back to his wife's family home for a substantial period of time, and at certain times throughout the day, visited with family. At all times including the time of the automobile wreck, Major Stewart was on call over Troop 6, which included Dorchester County. At the time, Troop 6 had officers and patrolmen on duty, a Captain who was a supervisor was on duty, and Major Stewart was on call over the Captain. At the time of the automobile wreck Major Stewart was not in official uniform but was driving his state owned patrol vehicle with all associated equipment and credentials. Major Stewart was accompanied by his wife who had traveled with him from his home in the Columbia area to Dorchester County. Travel to and from Dorchester County was the norm for the Stewarts, as Mrs. Stewart's family resided in Dorchester County. As Mrs. Stewart testified in her deposition, she and her husband made the trip for the purpose of visiting family and attending church service at Greater St. Paul AME Church as they do on Sundays. Colonel Oliver testified that he was aware that Major Stewart was a frequent visitor to Dorchester County and that Major Stewart's duties sometimes required him to be present in Troop 6. On the weekend of the automobile wreck, there were some times throughout the weekend where Major Stewart was certainly acting within the scope of his official duties, and there were other times throughout the weekend where he was not acting within the scope of his official duties, despite being on call the entire weekend and at the time of the automobile


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wreck. In undertaking the journey to Dorchester County the weekend of the automobile wreck, Major Stewart was acting for both personal and official purposes and neither purpose dominated over the other. If either the personal purpose or the official purpose were dropped the trip would have been made for the other purpose. In other words, neither the official purpose nor the personal purpose dominated over the other and the trip would have been made as it was if he were engaging in both purposes, and likewise would have been made had he only been engaging in one purpose or the other.

The business purpose for the weekend in question was that Major Stewart's responsibilities sometimes required him to have a physical presence in the area of Troop 6 and therefore, for at least some significant part of the weekend, Major Stewart can properly be said to have been acting within the scope of his official duties. The personal purpose of traveling to Dorchester County on the weekend in question was to visit with Mrs. Stewart's family and to attend church as the Stewart's do each weekend.

On the day of the accident, after finishing his patrolling for the day, and after attending church, Major Stewart returned to the family home to pick up his wife, where he spent hours visiting with his in-laws. The travel time to return home was delayed by the Stewart's personal routine of attending church and visiting with friends and family late into the day on the day of the accident. The accident took place at approximately 10:30 pm in Orangeburg County, less than halfway home and Major Stewart's official duties did not require him to stay in Orangeburg this long.

Discussion of Law

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When this suit was filed it was filed against Major Stewart individually for negligently causing the wreck and was filed against the South Carolina Department of Public Safety in the event that he was acting in the scope of his official duties at the time of the wreck. Therefore the Plaintiff has filed the case against Major Stewart personally under common law negligence and against the Department of Public Safety pursuant to South Carolina Tort Claims Act. Whether the case proceeds forward against Major Stewart personally or against the Department of Public Safety pursuant to the Tort Claims Act is governed by protections set forth in S.C. Code Ann. § 15-78-70, which provides that "An employee of a governmental entity who commits a tort while acting within the scope of his official duty is not liable therefor except as expressly provided for in subsection (b)". Subsection (b) indicates that there is no immunity from suit for an employee of a governmental entity if the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, malice, intent to harm, or a crime involving moral turpitude. The Plaintiff stipulates that Major Stewart's conduct did not constitute fraud, malice, intent to harm, or a crime involving moral turpitude. Therefore the analysis for the court turns on whether Major Stewart is afforded the protections of the exclusive remedy provided by S.C. Code Ann. § 70(a).

The Plaintiff argues that because it is the Defendant that asserts the affirmative defense of the protection provided by the statute, the Defendant has the burden of proof on that issue. The burden of establishing a limitation upon liability or an exception to the waiver of immunity is upon the governmental entity asserting it as an affirmative defense. Niver v. S.C. Dept. of Highways and Public Transp., 302 S.C. 461, 395 S.E.2d, 728 (1990). In this case, Major Stewart is asserting the affirmative defense that he was acting in the scope of his official duties and cannot be liable. Pursuant to South Carolina case law, he has the burden of proof, and in this case he has failed to meet that burden.

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The protections afforded by statute specifically turn on whether Major Stewart was "acting within the scope of his official duty". The phrase "scope of official duty" is defined in SC Code of Laws § 15-78-30(i), which states "scope of official duty" or "scope of state employment" means "(1) acting in and about the official business of a governmental entity and (2) performing official duties." Clearly the analysis of whether Defendant is afforded the protection of § 15-78-70 turns on whether the Defendant was acting in the scope of his official duty as that phrase is defined as set forth above. However, the Defendant contends that "scope of official duty" is tantamount to "scope of employment" as that phrase is used in worker's compensation. However, several cases in South Carolina have analyzed this issue and these phrases and concluded that "acting in the course of employment" is broader than the phrase "acting in the scope of official duty". South Carolina State Budget and Control Board v. Prince, 304 S.C. 241, 403 S.E.2d, 643 (S.C. 1991), Loadholt v. South Carolina State Budget and Control Board, 339 S.C. 165, 528 S.E. 2d, 670 (S.C. App. 2000). Because "the scope of official duties" is narrower than the phrase urged by the Defendant, the worker's compensation cases, which decisions turn on whether a particular employee was "acting within the course of his employment", are not on point. While the court does not believe these phrases to be synonymous, the court appreciates the analogy to the traveling employee doctrine raised by the Defendant and believes that it does inform the analysis in this case.

Under the traveling employee doctrine raised by the Defendant, the fact that Major Stewart was assigned to Troop 6 carries with it the fact that Major Stewart was required to travel to and from Dorchester County as a part of the assignment. Normally, this would strongly suggest that travel was a necessary aspect of the assignment and would normally suggest that any accident that took place to or from the destination would have occurred whether the Defendant was acting in the scope of his official duty, but the facts of this case indicate otherwise.

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Even if the traveling employee doctrine is perfectly applicable to this case, the facts of this case indicate that Major Stewart was not acting in the scope of his official duty at the time of the wreck. In particular, he and his wife normally travel to and from Dorchester on the weekends. In addition the travel time was delayed late into the night until approximately 10:30 pm by the Stewarts' personal routine of attending church and visiting friends and family which took place well after he had finished his work for the day. Major Stewart after patrolling for the day had returned to the family home to pick up his wife where he spent hours visiting with his in-laws. None of Major Stewart's official duties required him to stay in Dorchester that long. Therefore the court concludes that Major Stewart was not acting in the course and scope of his official duties.

Another issue that is raised by the Defendants and their assertion that Major Stewart is immune from suit is that he was on call at the time of the wreck. From a factual standpoint there is no dispute as to whether Major Stewart was on call at the time of the wreck, as the Plaintiff has stipulated that he was on call. However, the Plaintiff argues that merely being on call is not in it of itself acting within the scope of his official duty. Being on call, as that phrase applies to Major Stewart, is the equivalent of being prepared to act or respond if called upon. It carries with it the connotation that if certain things occur that Major Stewart would act in his official capacity. However, in the circumstances of this case, nothing occurred surrounding the trip from Dorchester to the Columbia area which required Major Stewart to act. It is too broad to say that any time Major Stewart was on call that he would be acting within the scope of his official duties, no matter what he was actually doing at the time.

As noted in the findings of fact above, despite testimony and evidence that indicates contra, the court finds that Major Stewart's responsibilities on the weekend in question required him to be present in the area of Troop 6. The court believes that, for at least some significant part of the weekend, Major Stewart could properly be said to have been acting within the scope of his official duties, such as when

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he was patrolling and actively interacting with the officers of Troop 6. However, the court does not believe that the requirement of physical presence in Troop 6 over the weekend means that Major Stewart was necessarily acting within the scope of his official duties the entire weekend, regardless of what activities he was actually engaged in. The court believes that Major Stewart could have been acting consistent with his assignment but not acting about his master's business at a particular time and therefore concludes that the requirement of physical presence in Dorchester County alone does not provide Major Stewart a blanket exemption from tort liability.

The court concludes that the proper analysis of this case with the specific facts that exist as set forth herein revolves around the activities being conducted by Major Stewart at the time that he was traveling from Dorchester to his home near Columbia. As the findings of fact indicate, this court concludes that he was not acting in the course and scope of his official duties.

Conclusions of Law

- 1) That the Defendant has raised the affirmative defense of protection of S.C. Code Ann. § 15-78-70 and therefore has the burden of proving that he was acting within the scope of his official duties at the time of the automobile wreck.
- 2) Major Stewart is not entitled to immunity from suit pursuant to S.C. Code Ann. § 15-78-70.
- 3) Major Stewart was not acting within the scope of his official duties as defined by S.C. Code Ann. § 15-78-30(i).
- 4) The requirement of physical presence in Troop 6 is not the equivalent of acting within the scope of official duties.
- 5) The fact of being on call under the circumstances in this case, is not equivalent to acting within the scope of official duties at the time of the automobile wreck.

6) The phrase scope of official duty as used in The South Carolina Tort Claims Act is not synonymous with the phrase "scope of employment" as used in workers compensation and law of agency and, "scope of official duty" is narrower. Because of this, the workers compensation cases, and the law of agency are not controlling, but are important in that they are merely informative.

AND IT IS SO ORDERED.



Edgar W. Dickson
Presiding Circuit Court Judge

June 23, 2015
Orangeburg, South Carolina

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