

77054

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

AUG 27 2015
SC Court of Appeals

Clifton Newman, Circuit Court Judge

Appellate Case No.: 2013-001845
Case No. 2012-CP-43-1463

Brandon W. Hodge. Appellant,

v.

Sumter County. Respondent.

PETITION FOR REHEARING

Gary L. Cartee
Attorney at Law
3251 Landmark Drive, Suite 136
N. Charleston, SC 29418
(843) 767-1800

Attorney for Appellant

Other Counsel of Record:

Andrew F. Lindemann, Esq.
James M. Davis, Esq.
Davidson & Lindemann, P.A.
PO Box 8568
Columbia, SC 29202
(803) 806-8222
Attorneys for Respondent

PETITION FOR REHEARING

Pursuant to Rule 221(a), SCACR, the Appellant hereby requests that the Court grant a rehearing in this matter. It is respectfully submitted that the Court overlooked or misapprehended the following:

1. The Tort Claims Act alone establishes the definition of employment for the purpose of actions filed pursuant to it. It is respectfully submitted that for purposes of the Tort Claims Act, the deputy was a county official as well as a state official. It is indisputable that a deputy is a county official under other South Carolina statutes. This applies to both Issues 1 and 2.

2. There are no alleged facts in the Record to dispute that the deputy was an employee of the county as well as the state. The Complaint alleges that the deputy was an employee of the Respondent, and the Answer states that information was lacking to respond. This applies to both Issues 1 and 2.

3. The case should not have been dismissed under Rule 12 of the SCRCR. Rule 12(c) is the applicable rule for the Respondent's Motion to Dismiss, but under either Rule 12(c) or Rule 12(b)(6), the case should not have been dismissed. This applies to Issue 1.

STATEMENT OF THE CASE

The Appellant's Summons and Complaint alleged that the driving of a deputy sheriff and the negligence of other officials caused an accident and injury to the Appellant. The Defendant filed a Motion to Dismiss simultaneously with its Answer which stated that it was based upon the pleadings, as well as other allegations. The circuit court's Order dismissed the Appellant's action with the following finding: "I find that Defendant Sumter County is not a proper party to this action, and that the Defendant's Motion to Dismiss should be granted and this Defendant should be dismissed from the action." The Appellant then filed this appeal, and this Honorable Court affirmed the circuit court by an opinion dated August 12, 2015.

ARGUMENT

A. The Tort Claims Act alone establishes the definition of employment for the purpose of actions filed pursuant to it.

Section 15-78-30(c) sets forth the definition of employee for purposes of the Tort Claims Act. In pertinent part it provides as follows: "...employee" means any officer, employee, or agent of the State or its political subdivisions, including ..., law enforcement officers and persons acting on behalf or in service of a governmental entity in the scope of official duty...."

There is no doubt that a deputy is a county official under South Carolina law. Section 23-11-20 specifically provides that a deputy is required to take an oath as a "county deputy" upon taking office. Another statute which applies to deputies (but not to sheriffs) provides that deputies are required to patrol the entire county. S.C. Code Ann. Section 23-13-70.

Sheriffs are required by Article 3, Section 25 of the South Carolina Constitution to take an oath not only as a state official, but also as a county official. (Counsel believes that a deputy is required to take an oath only as a county official. However, Counsel is not entirely sure that a deputy does not also take a state oath of office).

So there can be no doubt that the deputy in the case at bar was a sworn county deputy, sworn as required by law, and he was acting in the course and scope of official duty at the time of the accident. At the time of the accident he was clearly a sworn county deputy patrolling the county pursuant to statute.

This clearly meets the definition of the Tort Claims Act of an "employee" of the county. The Tort Claims Act definition says nothing about a "control" test. But even if it did, that is a test which involves facts as well as law and it should not be decided on a 12(c) or 12(b)(6) motion. The Tort Claims act definition provides only that the "law

enforcement officer" or "person" is an "employee" if he is acting "on behalf or in service of a governmental entity in the scope of official duty." S.C. Code Ann. Section 15-78-30(c).

It is respectfully submitted that the Respondent could not truthfully allege or provide a truthful affidavit that the deputy was not a county official acting on behalf or in the service of the Respondent in the scope of official duty.

Throughout this case, in all arguments submitted in both the circuit court and before this Honorable Court, the Respondent has always argued simply that the deputy is solely a state official. However, the Respondent has never alleged that the Appellant's sole remedy was to file the lawsuit as "Brandon Hodge v. State of South Carolina," which is the logical conclusion under the Tort Claims Act if the deputy were solely a state employee.

A number of cases have been cited involving 42 U.S.C. Section 1983. These cases have weighed whether a deputy is more a state than a county official for purposes of liability of individuals, and the principal of law for purposes of Section 1983 is well settled that deputies are more state than county officials. But those cases have nothing to do with liability of governmental entities under the South Carolina Tort Claims Act. They recognize that officials can be both a county and a state official at the same time. For example, in Cone v. Nettles, 308 S.C. 109, 417 S.E. 2d 523 (1992), the Court stated that the deputy in that case was "more closely connected to the state than to the county." This wording clearly recognizes accurately that the deputy is both a county and state official.

The Tort Claims Act clearly provides that it is the exclusive remedy for actions against the State, its political subdivisions, and employees. Outside the Tort Claims

Act, there is immunity from liability. The Tort Claims Act is also explicit that it does not waive immunity from suit under Section 1983. See Section 15-58-20(b) and 15-78-20(e).

Footnote 1 in Edwards v. Lexington County Sheriff's Department, 386 S.C. 285, 287, 688 S.E.2d 125, 127, states that it was not deciding the issue of employment. It is respectfully submitted that the footnote was dicta directed to an issue not briefed, not before the court, and not necessary to the ruling. The footnote by its nature does not discuss the Tort Claims Act, other statutes pertaining to deputies, facts regarding the deputy in that case, or application of law to facts. It is classic dicta which is not binding precedent and is not intended to be so. The footnote itself states that it is not deciding the issue.

It is respectfully submitted that the requirements of the Tort Claims Act have been met, at least sufficiently to survive a 12(b)(6) or 12(c) motion. The Appellant respectfully requests this Court to rehear and consider this issue.

B. There are no alleged facts in the Record to dispute that the deputy was an employee of the county as well as the state.

The record before the Court regarding the facts of employment is unique, and it is brief. The Appellant alleged in Paragraph 5 of his Complaint that the deputy and other officials were employees of the Respondent "acting within the course and scope of their authority and duties as employees, officers, and or servants of the Defendant, at all times pertinent to this action...." R. .p. 5.

The Respondent filed an Answer simultaneously with a Motion to Dismiss. In response to Paragraph 5 of the Complaint, the Respondent stated in Paragraph 8 of the Answer, in part, that it "...lacks information upon which to form a belief as to the truth

and veracity of these allegations....” R. p. 10. The Respondent’s Motion to Dismiss stated that it is based upon the “pleadings filed in this case....” R. p. 14.

The allegation that the deputy was an employee of the Respondent was a factual allegation for which the Respondent stated that it lacked information to form a belief as to truth or veracity. The allegation is also supported by statutes that require the deputy to swear an oath as a “county deputy” and to patrol the entire county, as discussed above, among other authorities. See Final Brief of Appellant, pp. 11-12.

It is respectfully submitted that the issue of whether the deputy in this case was acting “on behalf or in service of” the Respondent, as required by the Tort Claims Act, should not be decided on a Rule 12 motion. S.C. Code Ann. Section 15-78-30(c). This is especially so since the Respondent itself admitted in its Answer that it lacked information to form a belief as to the truth or veracity of that allegation. The Appellant respectfully requests this Court to rehear and consider this issue.

C. This case should not have been dismissed under Rule 12 of the SCRPC.

It is well established that a court considering a motion to dismiss a complaint pursuant to Rule 12(b)(6) must base its ruling entirely on the allegations set forth in the complaint. It is equally well established that the court must consider all facts and all inferences drawn from the facts alleged in the complaint must be considered in the light most favorable to the plaintiff.

The standard for Rule 12(c) is identical to the standard for Rule 12(b)(6) with the addition that allegations of the Answer are to be considered as well as allegations of the Complaint.

The opinion of this Honorable Court in this case appears to rule that a deputy is, as a matter of law, always solely an employee of the state, and therefore the allegation

of the Complaint that the deputy was a county employee is not a "well pled" fact. But it may have been overlooked that a deputy is, by statute, a sworn "county deputy" who is required by statute to patrol the entire county.

The Appellant respectfully requests the Court to rehear and consider that under the Record of this case, there is a serious issue of fact, law, and the application of law to fact which make a dismissal pursuant to Rule 12 inappropriate.

Since the Respondent's Motion to Dismiss was filed simultaneously with its Answer, and since the Motion to Dismiss explicitly states that it is based upon the "pleadings," Rule 12(c) is the appropriate Rule.

The allegations in the Complaint concerning the deputy in this case clearly fall within the requirements of the Tort Claims Act that he was acting "on behalf or in service of a governmental entity." That is, the allegations are factually consistent with the deputy acting on behalf or in service of the Respondent.

The Respondent admitted in its Answer that it lacked information to form a belief as to whether the allegation of the Complaint was true. The Answer was filed January 18, 2013, and it was never amended although the hearing was on June 17, 2013, almost 5 months later. Taking the allegations of the Answer, with inferences, in the light most favorable to the Appellant- Plaintiff, the Respondent may not have been able to deny the allegations of Paragraph 5 of the Complaint because they are true, or they may be true.

Even if Rule 12(b)(6) were applied rather than Rule 12(c), the allegations of the Complaint, with inferences, taken in the light of most favorable to the Plaintiff may be true.

Since the deputy has taken an oath pursuant to statute as a "county deputy" and

since the accident occurred while he was patrolling the county pursuant to a statute that he patrol the entire county, there is support in the law for the allegation that the deputy was acting "on behalf or in the service of" the Respondent county as required by the Tort Claims Act.


The Appellant respectfully requests that this Court rehear and consider whether this case should have been dismissed pursuant to a Rule 12(b)(6) or Rule 12(c) motion.

CONCLUSION

The Appellant is requesting only that this Honorable Court rule that this case should not have been dismissed pursuant to Rule 12, and that the case be remanded to the circuit court for the development of more facts. This would in no way prejudice the Respondent. If the Respondent can produce a witness who can deny that the deputy was acting as a "county deputy" on behalf or in service to Respondent, that can be duly considered by the circuit court together with other pertinent facts, for an adequate record. Dismissal under Rule 12 has prohibited the development of a fair and adequate record to resolve this case.

The Appellant respectfully petitions that the Court rehear and consider the above stated requests.

Respectfully submitted,



Gary L. Cartee

Attorney at Law

3251 Landmark Drive, Suite 136

N. Charleston, SC 29418

(843) 767-1800

August 26, 2015

Attorney for Appellant

GARY L. CARTEE
ATTORNEY AT LAW
3251 Landmark Dr., Suite 136
N. Charleston, S.C. 29418
(843) 767-1800
FAX 767-3451

August 26, 2015

VIA: FEDERAL EXPRESS

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

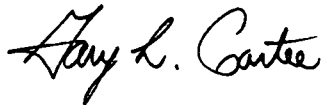
RE: Brandon W. Hodge v. Sumter County
Appellate Case No.: 2013-001845

Dear Ms. Kitchings:

Enclosed please find an original and six copies of the Appellant's Petition for Rehearing together with proof of service in the above referenced appeal.

My firm check in the amount of \$25.00 is enclosed for the required filing fee.

Respectfully submitted,



Gary L. Cartee

cc: Andrew F. Lindemann, Esq.
James M. Davis, Esq.

RECEIVED

AUG 27 2015
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No.: 2013-001845
Case No. 2012-CP-43-1463

RECEIVED

AUG 27 2015

SC Court of Appeals

Brandon W. Hodge. Appellant,

v.

Sumter County. Respondent.

PROOF OF SERVICE

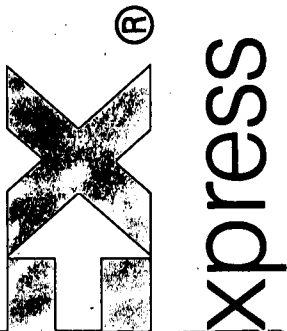
I Certify that I have served the Appellant's Petition for Rehearing in this matter by depositing a copy in the United States Mail, postage prepaid, on August 26, 2015, addressed to Respondent's attorney of record as follows: Andrew F. Lindemann, Esq., James M. Davis, Esq., Davidson & Lindemann, P.A., PO Box 8568, Columbia, SC 29202.

August 26, 2015



Gary L. Cartee
Attorney at Law
3251 Landmark Drive, Suite 136
N. Charleston, SC 29418
(843) 767-1800

Attorney for Appellant



FedEx Express NEW Package, US Airbill

FedEx Tracking Number

8064

08 27 09 19

10:30 A

RT 104 106

Form ID No.

0200

1 From

Date 8/26/2015

Sender's Name

Gary L. Cartee, Atty.

Phone

843 767-1800

Company

Address 3251 Landmark Dr., Ste. 136

Dept./Floor/Suite/Room

City N. Charleston RECEIVED 29418

2 Your Internal Billing Reference

3 To

Recipient's Name

Hon. Jenny Abbott Kitchings
SG Court of Appeals
Clerk, South Carolina Court of Appeals

Phone

803 734-1890

Company

Address 1015 Sumter St.

Dept./Floor/Suite/Room

Address

Use this line for the HOLD location address or for continuation of your shipping address.

City Columbia

State SC

ZIP

29211

HOLD Weekday
FedEx location address
REQUIRED. NOT available for
FedEx First Overnight.

HOLD Saturday
FedEx location address
REQUIRED. Available ONLY for
FedEx Priority Overnight and
FedEx 2Day to select locations.



8064 4022 6169

Extrem

ORIGIN ID:CHSA (843) 767-1800
GARY L CARTEE ATTORNEY AT LAW
3251 LANDMARK DR STE 136
NORTH CHARLESTON, SC 294188466
UNITED STATES US

SHIP DATE: 26AUG15
ACTWGT: 0.70 LB
CAD: /POS1621
DIMS: 0x0x0 IN

BILL SENDER

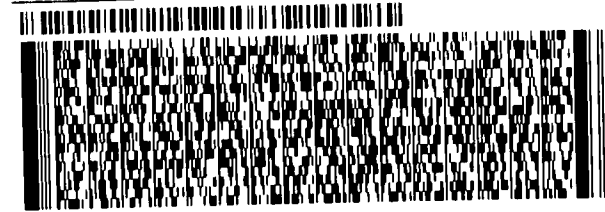
TO HON. JENNY ABBTT KITCHINGS
CLEARK, SOUTH CAROLINA COURT
1015 SUMTER ST

COLUMBIA SC 29211

(803) 734-1890
THU:
PO:

REF:

DEPT:



FedEx Express



4 Express Package Service *To
NOTE: Service order has changed. Please select

Next Business Day

- FedEx First Overnight
Earliest next business morning delivery to select locations. Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- FedEx Priority Overnight
Next business morning*. Friday shipments will be delivered on Monday unless SATURDAY Delivery is selected.
- FedEx Standard Overnight
Next business afternoon*. Saturday Delivery NOT available.

5 Packaging *Declared value limit \$500.

- FedEx Envelope* FedEx Pa

6 Special Handling and Delivery.

- SATURDAY Delivery
NOT available for FedEx Standard Overnight, FedEx 2D
- No Signature Required
Package may be left without obtaining a signature for delivery. Dir Som may

Does this shipment contain dangerous go.

- One box must be checked.
- No Yes As per attached Shipper's Declaration. Yes Shipper's Declaration not required. Dry Ice Dry ice, 9 UN 1845 _____ x _____ kg
 - Cargo Aircraft Only
- Dangerous goods (including dry ice) cannot be shipped in FedEx packaging or placed in a FedEx Express Drop Box.

7 Payment Bill to:

- Sender Acct. No. in Section 1 will be billed. Recipient Third Party Credit Card Cash/Check

Total Packages Total Weight Credit Card Auth.

*Our liability is limited to US\$100 unless you declare a higher value. See the current FedEx Service Guide for details.

644

fedex.com 1.800.GoFedEx 1.800.463.3339

Part # 156297-435 R112 0715
#5044734 08/26 3:59:11/FEDX/3100
J1520150628031uv