

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SUMTER COUNTY
Court of Common Pleas

SEP 23 2015

Clifton Newman, Circuit Court Judge

SC Court of Appeals

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

Brandon W. Hodge. Appellant,

v.

Sumter County. Respondent.

REPLY IN SUPPORT OF PETITION FOR REHEARING

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Attorney for Appellant

Other Counsel of Record:

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Attorneys for Respondent

The Appellant respectfully submits this Reply in support of his Petition for Rehearing:

ARGUMENT

1. Authorities cited by the Respondent do not address the definition of “employee” under the S.C. Tort Claims Act.

In its Return to Petition for Rehearing, the Respondent again does not address the definition of employee under the Tort Claims Act. The Respondent again mainly refers to precedents regarding civil rights liability of individuals under Section 1983. The Respondent does not quote or refer to the applicable wording in the Tort Claims Act. The Respondent does not analyze the wording of the Tort Claims Act’s definition of “employee.” Whether the deputy is an “employee” of the state or the county for purposes of Section 1983 is immaterial to the issue in this case.

The issue before this Honorable Court is the definition of employee under the S.C. Tort Claims Act. The definition is found in Section 15-78-30(c) which 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....”

The Respondent cites Cone v. Nettles, 308 S.C. 109, 417 S.E.2d 523 (1992), which deals entirely with liability of individuals under 42 U.S.C. Section 1983. It does not deal at all with liability of governmental entities under the state Tort Claims Act. Also, it does not mention the definition of “employee” under the Tort Claims Act. The Cone case quotes from Gulledge v. Smart, 691 F. Supp. 947 (D.C.S.C. 1988) that deputies are “more closely connected to the state than to the county.” This case merely finds that he is “more closely connected’ to the state than the county,” which is all that is

required to preclude liability under Section 1983.

The case of Heath v. County of Aiken, 295 S.C. 415, 368 S.E.2d 904 (1988), deals with personnel policies and grievance procedures. That case holds that all employees of sheriff's departments other than deputies are county employees subject to personnel and grievance procedures established by county council. The case makes it clear that all sheriffs are partly county officials since their entire department except for deputies is subject to county council's rules. The Heath case does not mention the definition of "employee" in the Tort Claims Act, and it does not purport to apply that definition in any respect. It does not deal with tort liability at all.

The Respondent also again cites Edwards v. Lexington County Sheriff's Department, 386 S.C. 285, 688 S.E. 125 (2010), although that case explicitly declined to address the issue in the case at bar. The Supreme Court explicitly stated that the Respondents had filed a joint answer accepting that the County and the Sheriff's Department were one and the same entity, and therefore one and the same entity for purposes of that case. See Edwards, supra, notes 1 and 5. In note 1, the Court stated, "We therefore do not address (emphasis supplied) the legally settled distinction between a county government and a sheriff's office for liability purposes." 514 S.E. at 123. The term "legally settled" is clearly dicta.

It is hard to see how the Edwards case can be authority for a proposition which it explicitly stated that the court was not addressing.

The Respondent also mentions the case of Henry v. Horry County, 334 S.C. 461, 514 S.E. 122 (1999), which has nothing to do with liability claims or with the definition of "employee" under the Tort Claims Act. (That case dealt solely with the issue of the sheriff's control of the county detention center).

There is no appellate court case which Counsel for the Appellant has found which deals directly with the issue of the definition of "employee" under the Tort Claims Act.

The Respondent has cited no authority concerning the definition of "employee" which is set forth in the S.C. Tort Claims Act. The Respondent has not even attempted to apply the Tort Claims Act definition of "employee" to this case.

The cases of Cone, Heath, Henry, and Edwards do not even mention the definition of "employee" in the Tort Claims Act, and they certainly do not decide the issue. The Appellant does not seek to overturn those cases (as alleged by Respondent), but merely to distinguish them since they do not deal with the issue which is before this Honorable Court.

2. This case should not be decided on a 12(b)(6) or 12(c) motion.

As stated in the preceding section, no case has been cited by the Respondent which addressed the issue of whether a deputy can ever fit the definition of "employee" set forth in the S.C. Tort Claims Act.

All that is before the Court are the allegations of Paragraph 5 of the Complaint that Deputy Horton and other employees of the Sumter County Sheriff's Department "were acting within the course and scope of their authority and duties as employees, officers, and or servants of the Defendant, and at all times pertinent to this action, the Sumter County Sheriff's vehicle was being operated pursuant to the purposes and business of the Defendant;" and, the allegations of Paragraph 8 of the Answer that the Respondent lacked information as to the truth and veracity of the allegations of Paragraph 5 of the Complaint. R. pp. 5-6, 10.

The question before the court is whether the Tort Claims definition of employee has been met. That is whether there was a "law enforcement officer (or) person acting on behalf or in service to a governmental entity (Sumter County) in the course of official duty."

This question is a novel question since no case has been cited by Respondent or found by Counsel for the Appellant which directly addresses this issue. Novel issues should not be decided on 12(b)(6) motions. The S.C. Supreme Court has recently ruled that a novel question regarding an element of damages should not be decided on a motion to dismiss. Chestnut v. AVX Corp., 776 S.C. 2d 82 (2015). See also Keiger v. Citgo Coastal Petroleum, Inc., 326 S.C. 369, 482 S.E.2d 792 (Ct. App. 1997). The applicable legal principal is that novel issues should usually not be decided merely on the pleadings.

In this case it is not reasonable to state that as matter of law the deputy and other employees could not have been acting "on behalf or in service to" the Respondent; particularly since the Respondent itself stated that it lacked sufficient information to respond.

A fuller development of the record is necessary for a fair determination of this case. Under the definition of "employee" provided by the Tort Claims Act, it must be determined whether the "law enforcement officer (or) persons were acting in service to or on behalf of the governmental entity" in question.

In this case no facts have been developed. For example, the accident report indicates that the Respondent Sumter County was the owner of the Sheriff's vehicle which was involved in the accident, but this fact is not in the record before this Honorable Court because the case was prematurely decided on the pleadings before

any affidavits or evidence was developed through discovery.

For another example, the Complaint alleged acts of negligence by Sumter County Sheriff Department employees other than Deputy Horton. Complaint, Paragraph 5, R. pp. 5-6; and Paragraph 23 (f), (j), (k), (m), (n), (o) and (p).

One of the cases relied upon by the Respondent, Heath v. County of Aiken, 295 S.C. 416, 368 S.E. 2d 904 (1988), directly holds that all sheriff department employees other than deputies are county employees for purposes of personnel policies and grievance procedures. None of the evidence regarding the other employees is in the record before this Honorable Court because the case was dismissed prematurely with no affidavits and no discovery evidence.

There has been no development of the facts regarding the actions of Deputy Horton in service to or on behalf of Sumter County. It makes no sense to take the position (as Respondent appears to) that taking an oath as county deputy does not mean that he is acting "on behalf or in service to" Sumter County. Likewise, it makes no sense to argue as does Respondent, that a statute placing an affirmative duty on the deputy to patrol the entire county is actually only intended as a limitation to his jurisdiction.

It is respectfully submitted that the issue of "employee" pursuant to the definition provided in the S.C. Tort Claims Act is novel for the appellate courts of this State. A fuller development of the record is necessary in order for the Appellant to have a fair opportunity to prove his case. The Respondent has not established as a matter of law that the deputy and other employees did not meet the test of the Tort Claims Act definition of "employee" as to the Respondent. It is likely that they were "acting in service to or on behalf" of the Respondent, which is all that the applicable statute

requires.

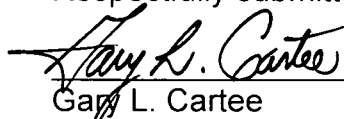
CONCLUSION

The Appellant respectfully requests that this case be remanded to the Circuit Court for a fuller development of the record. This in no way prejudices the Respondent since it will have the opportunity to present its arguments pursuant to a summary judgment motion should it so choose.

Respectfully, it is submitted that a fair determination of this case requires the development of a fuller record.

The S.C. Tort Claims Act provides its own definition of "employee." It is not correct to state as a matter of law that this definition has been applied to a county deputy sheriff in a previous appellate court case.

Respectfully submitted,



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September 21, 2015.

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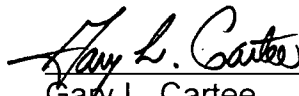
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PROOF OF SERVICE

I Certify that I have served the Appellant's Reply in Support of Petition for Rehearing in this matter by depositing a copy in the United States Mail, postage prepaid, on September 21, 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.



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VIA: FAX AND MAIL

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.

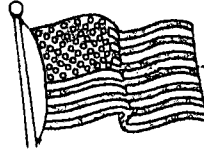
The above referenced petition and proof of service are also being forwarded by fax.

Respectfully submitted,



Gary L. Cartee

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



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TO:

The Honorable Jenny Abbott Kitchings
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