

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM SUMTER COUNTY
Court of Common Pleas

NOV 20 2015

Clifton Newman, Circuit Court Judge

S.C. SUPREME COURT

Case No. 2012-CP-43-1463

Brandon W. Hodge Petitioner,

v.

Sumter County Respondent.

PETITION FOR WRIT OF CERTIORARI

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PETITION FOR WRIT OF CERTIORARI

Pursuant to Rule 242, SCACR, the Petitioner hereby requests that the Court grant a writ of certiorari and review the decision of the South Carolina Court of Appeals in this matter. It is respectfully submitted that the Court of Appeals erred in its Opinion (No. 2015-UP-395, filed August 12, 2015) and that this Court should review the following issues:

I. Did the Court of Appeals err in failing to reverse the circuit court for holding that South Carolina has "clearly established that deputies are state and not county officials" exclusively and under all circumstances for purposes of liability under the S.C. Tort Claims Act?

II. Did the Court of Appeals err in failing to reverse the circuit court for dismissing the case pursuant to Rule 12(b)(6) on the record before the Court, without additional development of facts?

STATEMENT OF THE CASE

The Petitioner'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 Respondent 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 Petitioner'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 Petitioner then filed an appeal and the Court of Appeals affirmed the circuit court by an opinion dated August 12, 2015. Petitioner filed a Petition for Rehearing which the Court of Appeals denied by Order dated October 23, 2015.

ARGUMENT

I. Did the Court of Appeals err in failing to reverse the circuit court for holding that South Carolina has “clearly established that deputies are state and not county officials” exclusively and under all circumstances for purposes of liability under the Tort Claims Act?

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

For the reasons set forth below, it is respectfully submitted that the issue of the definition of employment of a deputy sheriff for purposes of liability pursuant to the Tort Claims Act is a novel issue as contemplated in Rule 242(b)(1). It is respectfully submitted that no South Carolina state appellate case has dealt with the definition of employment of deputies for purposes of the Tort Claims Act. The issue was mentioned in a footnote of an opinion by this Honorable Court. The issue has been dealt with in cases involving personal liability pursuant to Section 1983. But no case has been found which directly decides the issue for purposes of entity liability under the Tort Claims Act.

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 Petitioner'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 Petitioner respectfully requests this Honorable Court grant a writ of certiorari to decide this issue.

II. Did the Court of Appeals err in failing to reverse the circuit court for dismissing the case pursuant to Rule 12(b)(6) on the record before the Court, without additional development of facts?

A. 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 Petitioner 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 Petitioner respectfully requests this Court to grant a writ of certiorari to review this issue.

B. 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 the Court of Appeals and the circuit court in this case appears to be 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 Petitioner respectfully requests this Court to grant a writ of certiorari to

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 Petitioner, 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 Petitioner 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.

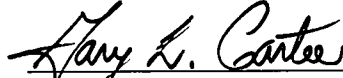
The Petitioner respectfully requests that this Court grant a writ of certiorari to consider this issue because, it is respectfully submitted, the standards for dismissal pursuant to Rule 12(b) or 12(c) have not been met.

CONCLUSION

It is respectfully submitted that the issue of entity employment for a sheriff's deputy pursuant to the Tort Claims Act is a novel issue not yet directly decided by the appellate courts of South Carolina. Respectfully, it is submitted that the record before the Court is inadequate to decide the case under the Tort Claims Act and under Rule 12(b)(6) or 12(c). The Petitioner respectfully requests that this Honorable Court grant a writ of certiorari to consider the issue of the definition of employment under the Tort Claims Act. The Petitioner further requests a writ of certiorari to consider the issue of the application of Rule 12(b) or 12(c) in this case. It is respectfully submitted that the Court of Appeals should have reversed the circuit court's Rule 12(b)(6) dismissal of the case. Remanding the case to the circuit court for the development of additional facts 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(b)(6) has prohibited the development of a fair and adequate record to resolve this case.

The Petitioner respectfully petitions that the Court grant a writ of certiorari and consider the above stated issues.

Respectfully submitted,



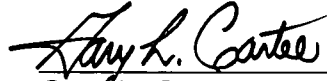
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October 19, 2015.

Attorney for Appellant

CERTIFICATION

Pursuant to Rule 242(d)(1), SCACR, the undersigned counsel for the Petitioner certifies that the Petitioner filed a timely Petition for Rehearing in the South Carolina Court of Appeals, which was finally denied in an Order dated October 23, 2015,



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Proof of Service

I Certify that I have served the Petition for Writ of Certiorari in this matter by depositing a copy in the United States Mail, Postage prepaid, on November 19, 2015, addressed to Respondent's attorneys of record as follows: Andrew F. Lindemann, Esq., James M. Davis, Jr., Esq., Davidson & Lindemann, P.A., PO Box 8568, Columbia, SC 29202.



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