

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM SUMTER COUNTY
Court of Common Pleas

S.C. SUPREME COURT

Clifton Newman, Circuit Court Judge

Appellate Case No.: 2015-002370

Brandon W. Hodge..... Appellant,

v.

Sumter County..... Respondent.

AMENDED REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Appellant respectfully submits this Reply in Support of Petition for Writ of Certiorari:

ARGUMENT

A. Novel issues.

The Respondent is wrong in denying that the Petition for Writ of Certiorari referred to Rule 242(b). The Petitioner referred to Rule 242(b)(1), novel questions of law. Petition for Writ of Certiorari, p.2, paragraph 1. The Respondent is also wrong in asserting that the case at bar presents no novel questions of law.

There are definitely novel questions of law in this case, and, it is respectfully requested that certiorari be granted.

The Respondent's assertion that there are no novel questions of law is based largely upon footnote 1 of this Honorable Court's opinion in Edwards v. Lexington County Sheriff's Department, 386 S.C. 285, 688 S.E. 2d 125 (2010) at p. 127, n.1.

The footnote is clearly classic dicta, unnecessary to the ruling of the Court. It even states, "We therefore do not address the legally settled distinction between a county government and a sheriff's office for liability purposes." But it has been treated as authoritative binding precedent not only by the Respondent but by the circuit court and by the Court of Appeals in this case. See Order Granting Defendant Sumter County's Motion to Dismiss, R. p.3; Unpublished Opinion no. 2015-UP-395.

Footnote 1 states that the sheriff and the sheriff's deputies are State, not **county** employees. The footnote states that the law of the case was that Lexington County Sheriff's Department and Lexington County are one entity because that was admitted in their joint answer. The footnote relies upon the case of Cone v. Nettles, 308 S.C. 109, 112, 417 S.E.2d 523, 524 (1992); and Heath v. Aiken County,

295 S.C. 416, 368 S.E.2d 904, 905 (1988). Neither of those cases deals with the application of the S.C. Tort Claims Act to deputies. The Cone case is a Section 1983 case brought in state court. The analysis is whether a deputy is a “person” subject to liability under section 1983. The Cone case stated that the deputy was “more closely connected to the state than to the county.” Cone, supra, p. 112. The case does not rule out that the deputy is also a county official. The case has nothing to do with the Tort Claims Act. Under Section 1983 there is no jurisdiction because of the Eleventh Amendment to the United States Constitution over someone who is more a state official than a county official. By contrast, the S.C. Tort Claims act is the **exclusive remedy** against public employees, state, county, and otherwise.

The Heath case decides only that deputies are not “employees” under S.C. Code Ann. Section 4-9-30(7) which gives counties the right to set personnel policies for county employees, but which explicitly exempts elected officials or those under the direct control of elected officials. By contrast, the S.C. Tort Claims Act **explicitly** includes all public employees, including **elected** officials.

There is no case addressing the appropriate application of the S.C. Tort Claims Act to deputies other than the footnote in the Edwards case.

The S.C. Tort Claims Act has its own definition of “employee” which vastly differs from Section 4-9-30(7), and which has nothing whatever to do with a U. S. Eleventh Amendment analysis.

B. The county is the appropriate entity to name as defendant.

The Respondent has now explicitly argued in its Return to Petition for Writ of Certiorari that the Sumter County Sheriff’s Office is the appropriate party defendant.

That is not what Respondent argued to the circuit court. There the Respondent argued repeatedly that the sheriff was the appropriate party defendant. See for example, R. p. 37, lines 12-18 and R. p. 38, lines 8-12. The sheriff was the appropriate party defendant before the Tort Claims Act under S.C. Code Ann. Section 23-13-10. Now the Tort Claims Act is the exclusive remedy. The enactment of the Tort Claims Act impliedly overruled Section 23-13-10. Robinson v. Metts, 86 F. Supp. 557 at 564 (1997).

The Tort Claims Act requires that an entity be named as defendant. A sheriff's office or department is definitely a part of county government. The department is funded by county government. Authority to counties to fund law enforcement is explicitly granted in U.S. Code Ann. Section 4-9-30(5). All of the employees of a sheriff's department or office are subject to county personnel policies, except for sheriffs and deputies. Heath, supra, 368 S.E.2d at 906. The car which was involved in this case was owned by Sumter County. R. p. 43, line 11.

So the party which must be named as defendant under the Tort Claims Act is county government.

The attorneys for Lexington County and the Lexington County Sheriff's Department in the Edwards case probably filed a joint answer because they were aware that the Sheriff's Department was fundamentally a part of county government. They were undoubtedly aware of many more facts joining the two such as deputies receiving county paychecks.

In the case at bar, all of the facts connecting the deputy to the County have not yet been ascertained because the case was dismissed before discovery.

C. Application of the Tort Claims Act in the case at bar.

The Petitioner was injured as a child in an accident involving a Sumter County Sheriff's Department car, owned by Sumter County. The Sumter County car was driven by a Sumter County Deputy.

The Tort Claims Act requires that an action for the tort of a government employee "shall name as a party defendant only the agency or **political subdivision** for which the employee was acting..." If an employee is named individually, "the agency or political subdivision for which the employee was acting must be substituted as the party defendant." S.C. Code Ann. Section 15-78-30(c).

The Tort Claims Act defines "employee" as "any officer, employee, or agent of the State or its **political subdivisions**, including elected or appointed officials, **law enforcement officers**, and persons 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).

The Tort Claims Act defines "**governmental entity**" as "the State and its **political subdivisions**." S.C. Code Ann. Section 15-78-30(d).

The Tort Claims Act defines **political subdivisions** as "the **counties**, municipalities, school districts..., and special purpose districts of the State and any agency, governmental health care facility, department, or subdivision thereof. S.C. Code Ann. Section 15-78-30(h).

The Petitioner followed the Tort Claims Act, and filed suit involving a **law enforcement officer** (a Sumter County Deputy) against the **political subdivision** (the **county**), that is Sumter County, on whose behalf or in service of whom the law enforcement officer was acting in the scope of his official duty.

The Respondent moved to dismiss the Petitioner's Complaint on the grounds that it failed to state a cause of action against the Respondent Sumter County and that the Respondent Sumter County is not a proper party (among other allegations which are not germane). Respondent's Motion to Dismiss, R. p. 13.

At the hearing before the circuit judge, Respondent argued that deputies (and sheriffs) are purely state officials, and therefore the county defendant must be dismissed. Petitioner responded that the Respondent was a proper defendant under the Tort Claims Act..

The Respondent then repeatedly made the incorrect argument that the proper party defendant was the Sheriff. (See for example, R. p. 37, lines 12-18 and R. p. 38, lines 8-12. The Respondent's argument that the Sheriff was the proper party had been correct under S.C. Code Ann. Section 23-13-10. But the Tort Claims Act impliedly repealed Section 23-13-10, since it made entity liability rather than individual liability the exclusive remedy. S.C. Code Ann. Section 15-78-20(b).

Now, in its most recent filing, the Respondent has taken the position that the proper party is not the State or a subdivision thereof as it has implied previously, and not the Sheriff, as a constitutional officer, as it has previously argued explicitly, but **the Sumter County Sheriff's Office**.

The Sumter County Sheriff's Office is a department of the Respondent Sumter County. It is a county department which is funded by the county. It cannot be denied that the Sumter County deputies are members of the Sumter County Sheriff's office or department.

An imperfect, but perhaps useful analogy to the argument of the Respondent

would be a case against a school district for the negligence of a teacher. The defendant could argue that the teacher or administrator is a state employee and therefore not an employee of a local school district because the state pays the teacher and licenses the teacher, so the proper defendant should be the State and not the local school district. At the same time the defendant could argue that the local school district is too remote and the only proper defendant is the particular school or even the office of the principal.

Respectfully, the Tort Claims Act is not a model of clarity in its definitions. Sometimes the language from one subsection does not track exactly in another subsection. Sometimes it is vague. Sometimes it is circular. "Law enforcement officers" are employees when acting "on behalf or in service to a governmental entity."

A "governmental entity" is the State or its political subdivisions. A "political subdivision" is a county or enumerable other possibilities including (but not limited to) "any agency," "department," or "subdivision." In other words, in part, a "political subdivision" is defined as a "subdivision."

Under these circumstances, it was improper for the case at bar to be dismissed on a Rule 12 motion without ascertaining all of the facts. Once all of the facts have been discovered the circuit court will be in a better position to determine the appropriate disposition of the case.

The Petitioner substantially complied with the Tort Claims Act.

The Tort Claims Act provides no catalogue matching employees to particular entities. It provides no guidance for determining how specific a subdivision constitutes a proper defendant. Literally, any "office" or "subdivision," not matter how small, could conceivably be named as a defendant and declared a "governmental entity"

under the Tort Claims act.

It is an extremely harsh penalty to deprive the Petitioner in this case of a remedy. Even if the circuit court determined that a smaller subdivision of the county government should be named as a defendant, the case should not be dismissed. Rather a substitution of the lesser included entity should be allowed.

Guidance from the Supreme Court would be useful for the public and the Government. It would be useful for both litigants and counsel. This is another public policy reason in favor of granting a writ of certiorari.

D. The Respondent's Return to Petition for Writ of Certiorari, as well as the rulings of the lower courts, did not address clearly the Tort Claims Act's definition of employee.

The Respondent and the lower courts have not specifically addressed the Tort Claims Act's definition of employee.

The definition of employee 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 Tort Claims Act's definition of employee is unique and very different from other employee tests such as those seen in ordinary agency or employment law. Those tests tend to focus on control. The Tort Claims Act definition says nothing about control.

Heath, supra, 368 S.E.2d 904, deals exclusively with the definition of employee under Section 4-9-30(7). Cone, supra, deals with the jurisdictional issues of a 42 U.S.C. Section 1983 cause of action. Neither case even mentions the Tort Claims Act.

The Respondent also cites the case of Henry v. Horry County, 334 S.C. 461,

514 S.E.2d 122 (1999), which has nothing to do with the definition of “employee” under the Tort Claims Act or with liability cases at all. (That case dealt solely with the Sheriff’s control of the county detention center).

Edwards v. Lexington County Sheriff’s Department, 386 S.C. 285, 688 S.E.2d 125 (2010), as discussed above only deals with the employment issue in a footnote and does not address the Tort Claims Act definition of employee. It is clear that the issue was not briefed or formally ruled upon in that case. It is at first impression hard to see how dicta in a footnote can be authority for a proposition which explicitly states is not being addressed.

The obvious answer is that the respect for and authority of this Honorable Court carries great weight where there is a reference to settled law. Thus the Respondent and the lower courts in this case have taken the footnote as binding precedent even though the issue was not briefed and there was no ruling.

The Respondent has cited no authority concerning the definition of “employee” under the Tort Claims Act, and 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 do not decide the issue. The Petitioner does not seek to overturn those cases (as contended by Respondent), but merely to distinguish them since they do not address the application of the Tort Claims Act.

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

All the record that is before the Court are the pleadings in which the Petitioner

has asserted that the deputy and other employees of the Respondent were acting in the course and scope of their authority and duties for the Respondent; and, the Respondent's assertion of a lack of information as to the truth and veracity of the allegations. R. pp. 5-7, 10. (It should not be overlooked that the Complaint alleged negligence for employees who may not have been deputies, such as those involved in development of procedures and policies).

There is no development of the record to ascertain all of the relevant facts pertaining to the relationship between Petitioner and the Respondent. There should not be dismissal where a fuller development of the facts would assist the court.

The Respondent's assertion that it is not a proper party as a matter of law is incorrect. There is no appellate court case which has been found or cited which decides the issue of the proper defendant under the Tort Claims Act for the situation in the case at bar.

Novel issues should not be decided on 12(b)(6) motions. This Honorable 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). The applicable legal principal is that novel issues should usually not be decided merely on the pleadings.

The Respondent has stated in its Return to Petition for Writ of Certiorari that it makes no difference whether cases relied upon were decided under Section 1983 or under the Tort Claims Act. Return to petition for Writ of Certiorari, p. 8, line 1. But it makes a great deal of difference whether cases are analyzed under the correct statute.

It is respectfully requested that certiorari be granted.

CONCLUSION

The Petitioner respectfully requests that this Honorable Court grant a writ of certiorari to deal with the novel issues presented, to prevent a miscarriage of justice in this case, and to provide guidance for the proper application of the Tort Claims Act in cases such as the one at bar.

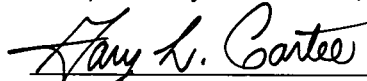
The application of the Tort Claims case requires that the named defendant be the county government. Even the Respondent has now admitted that the proper party is not the state and it is not the sheriff. The Respondent now argues that the proper defendant is the Sumter County Sheriff's Office. That office is a department of the Respondent Sumter County. It is a part of county government. The Petitioner has named the right defendant under the definitions provided in the Tort Claims Act. But even if this Honorable Court or a lower court on remand ruled that the Respondent is correct that the Defendant should be the Sumter County Sheriff's Department, it is respectfully submitted that dismissal should not be the result. Rather substitution of the lesser included entity should be allowed in this case. The Petitioner has substantially complied with the requirements of the Tort Claims Act.

It is clear that the Edwards footnote is being used as binding authority even though the issue has not been briefed to this Honorable Court and ruled upon; and even though this Court stated that the issue was not being addressed since it was moot in that case.. The Edwards footnote was used as authority in this case by the circuit court and the Court of Appeals. Respectfully, it is likely influencing important decisions, and will in the future likely influence many important decisions by government, litigants, counsel, and the public. Only the Supreme Court of South

Carolina has the authority to definitively deal with the issue of the proper application of the Tort Claims Act in cases such as the one at bar. Only the Supreme Court of South Carolina can provide guidance and depth to the issues referenced in the Edwards footnote.

Counsel for the Petitioner recognizes that he is taking a position contrary to the Edwards footnote. But regardless of the ultimate outcome, Petitioner requests that certiorari be granted so that these important issues may be fully briefed to this Honorable Court.

Respectfully submitted,



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January 4, 2016.

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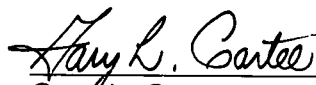
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Proof of Service

I Certify that I have served the Amended Reply in Support of Petition for Writ of Certiorari in this matter by depositing a copy in the United States Mail, Postage prepaid, on January 4, 2016, 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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