

THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

**RECEIVED**

FEB 18 2016

**SC Court of Appeals**

\_\_\_\_\_  
APPEAL FROM THE RICHLAND COUNTY  
COURT OF COMMON PLEAS

TANYA GEE, CIRCUIT COURT JUDGE

\_\_\_\_\_  
Appellate Case No. 2015-002367  
\_\_\_\_\_

ORLANDO I. BROWN, PRO SE,.....Appellant.

v.

THE STATE OF SOUTH CAROLINA.....Respondent.

\_\_\_\_\_  
**INITIAL BRIEF OF RESPONDENT**  
\_\_\_\_\_

Temus C. Miles, Jr., Esquire  
P.O. Box 7217  
Columbia, S.C. 29202  
803-265-4645  
Attorney for Respondent

Table of Contents

Table of Authorities	ii
Statement of Issues on Appeal	1
Statement of the Case	2
Argument	3
1.    WAS THE TRIAL COURT CORRECT IN DISMISSING THE PLAINTIFF'S COMPLAINT PURSUANT TO SOUTH CAROLINA RULES OF CIVIL PROCEDURE GIVEN THE IMMUNITIES PROVIDED BY THE SOUTH CAROLINA TORT CLAIMS ACT.	3
2.    WAS THE COURT CORRECT IN ITS RULING ON PARTY IDENTIFICATION.	5
3.    ARE THE STATE'S IMMUNITIES GRANTED UNDER TORT CLAIMS ACT AFFECTED BY 42 U.S.C. § 2000 d-7.	7
Conclusion	8

## Table of Authorities

### Cases

<i>Williams v. Condon</i> , 347 S.C. 227, 553 S.E.2d 496 (Ct.App.2001).	4 & 4
<i>Spence v. Spence</i> , 368 S.C. 106, 628 S.E.2d 869, (2006).	3
<i>Baird v. Charleston County</i> , 333 S.C. 519, 511 S.E.2d 69 (1999);	4
<i>Stiles v. Onorato</i> , 318 S.C. 297, 457 S.E.2d 601 (1995).	4
<i>Gentry v. Yonce</i> , 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999).	4
<i>Toussaint v. Ham</i> , 292 S.C. 415, 357 S.E.2d 8 (1987).	4
<i>Flateau v. Harrelson</i> , 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003)	4
<i>Staubes v. City of Folly Beach</i> , 331 S.C. 192, 500 S.E.2d 160 (Ct. App. 1998)	4 & 7
<i>Creech v. South Carolina W.M.R.D.</i> , 328 S.C. 24, 491 S.E.2d 571 (1997).	7
<i>Floyd v. Floyd</i> , 365 S.C. 56, 615 S.E.2d 465 (Ct.App.2005)	7
<i>Bd. of Trs. of the Univ. of Ala. v. Garrett</i> , 531 U.S. 356, 121 S. Ct. 955 (2001)	8

### Statutes

S.C. CODE ANN. § 15-78-10 <i>et seq.</i> ,	4 & 5
S.C. CODE ANN. § 15-78-60	4 & 5
S.C. CODE ANN. § 15-78-20	4 & 6
S.C. CODE ANN. § 17-1-10	5
S.C. CODE ANN. § 15-78-70	5 & 6
S.C. CODE ANN. § 15-78-30	6 & 7

42 U.S.C. 2000 d-7	7
29 U.S.C. 794	8
20 U.S.C. 1681	8
42 U.S.C. 6101	8
42 U.S.C. 2000d	8
<u>Constitution</u>	
Eleventh Amendment of the Constitution of the United States	8

**STATEMENT OF ISSUES ON APPEAL**

- I. THE TRIAL COURT WAS CORRECT IN DISMISSING THE PLAINTIFF'S COMPLAINT PURSUANT TO SOUTH CAROLINA RULES OF CIVIL PROCEDURE GIVEN THE IMMUNITIES PROVIDED BY THE SOUTH CAROLINA TORT CLAIMS ACT.**
  
- II. THE TRIAL COURT WAS CORRECT IN ITS RULING ON PARTY IDENTIFICATION.**
  
- III. THE STATE'S IMMUNITIES GRANTED UNDER THE TORT CLAIMS ACT ARE NOT AFFECTED BY 42 U.S.C. § 2000 d-7.**

## STATEMENT OF THE CASE

Appellant, appearing *pro se*, filed the Summons and Complaint in the matter that gave rise to this Appeal with the Richland County Clerk of Court on July 2, 2015. Appellant initially named only the Richland County Probate Court as a Defendant. Appellant filed an Amended Complaint on July 10, 2015. The Amended Summons and Complaint removed the S.C. County Probate Court as a Defendant and added the State of South Carolina as the sole defendant in this action.

Plaintiff's Amended Complaint alleged he faced discrimination because of a mental disability in violation of Title II of the Americans with Disabilities Act ("ADA"). Specifically, Appellant claimed that the Richland County Probate Court ordered him to abstain from alcohol "on six occasions." Appellant contended that alcohol consumption alleviates the symptoms of his disability, and that without alcohol consumption he suffered mentally, emotionally, socially and physically. Appellant acknowledged in his Amended Complaint that the Richland County Probate Court was informed that Appellant "was avoiding treatment and abusing drugs and alcohol" but argued that "abstaining from alcohol has caused undo stress and anxiety." Appellant's only reference to the Respondent was as a geographic reference, stating the "Probate Court, in the name of care, has made it illegal for me to consume alcohol in South Carolina." There is no other mention of Respondent in Appellant's Amended Complaint. Simply put, there appear to be absolutely no cognizable claims or allegations against Respondent.

This matter came before the Trial Court on September 30, 2015 for a hearing on Appellant's Amended Motion for Summary Judgment and Respondent Motion to Dismiss. Present at the hearings were *pro se* Appellant, Orlando Ira Brown, and counsel for Respondent, Richard E. Marsh, III, Esquire. Respondent moved to dismiss this action against it pursuant to

Rule 12(b)(6), SCRPC, on the grounds that the Appellant's claims fail to state a cause of action upon which relief can be granted and there is no genuine issue as to any material fact. At the conclusion of the hearing the Trial Court found that Appellant's Motion to Dismiss should be granted and that Appellant's Amended Motion for Summary Judgment was moot.

The Appellant then attempted to make additional arguments against the dismissal, including the issues he is attempting to argue in Section 3 of his Appeal. In response, the Trial Court twice advised the Appellant of the opportunity to file post order motions to raise the issues. (Transcript of Motion Hearing P. 7, L. 3-5; & P. 8, L. 1-3). The Trial Court issued its order granting the Respondent's Motion and dismissing the action on October 13, 2015. Thereafter, the Appellant failed to file any post Order motions (such as a Rule 59(e) motion to reconsider) and failed to receive a ruling on any of the issues he attempted raise after the hearing concluded. This Appeal followed.

### ARGUMENT

#### **I. THE TRIAL COURT WAS CORRECT IN DISMISSING THE PLAINTIFF'S COMPLAINT PURSUANT TO SOUTH CAROLINA RULES OF CIVIL PROCEDURE GIVEN THE IMMUNITIES PROVIDED BY THE SOUTH CAROLINA TORT CLAIMS ACT.**

In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRPC, the appellate court applies the same standard of review as the trial court. *Williams v. Condon*, 347 S.C. 227, 553 S.E.2d 496 (Ct.App.2001). In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint. *Spence v. Spence*, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal

under Rule 12(b)(6) is improper. *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999); *Stiles v. Onorato*, 318 S.C. 297, 457 S.E.2d 601 (1995). "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

"A trial judge in the civil setting may dismiss a claim when the defendant demonstrates the plaintiff has failed 'to state facts sufficient to constitute a cause of action' in the pleadings filed with the court." *Williams v. Condon*, 347 S.C. 227, 232-33, 553 S.E.2d 496, 499 (Ct. App. 2001) (citing Rule 12(b)(6), SCRCP); *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003) (citing *Baird v. Charleston County*, 333 S.C. 519, 511 S.E.2d 69 (1999)). "The trial court's ruling on a Rule 12(b)(6) motions must be bottomed and premised solely upon the allegations set forth by the plaintiff." *Williams*, 347 S.C. at 233, 553 S.E.2d at 499. "The question to be considered is whether, in the light most favorable to the plaintiff, the pleadings articulate any valid claim for relief." *Id.*

The South Carolina Tort Claims Act, codified at S.C. CODE ANN. § 15-78-10 *et seq.*, is a limited waiver of governmental immunity. *Staubes v. City of Folly Beach*, 331 S.C. 192, 204, 500 S.E.2d 160, 167 (Ct. App. 1998) (internal citation omitted). S.C. CODE ANN. § 15-78-60 sets forth forty (40) exceptions to the waiver of sovereign immunity. "The exceptions under the Act must be construed liberally in favor of limiting the liability of the State and its political subdivisions." *Staubes*, 331 S.C. at 205, 500 S.E.2d at 167 (citing S.C. CODE ANN. § 15-78-20(f)).

The Appellant's sole allegation of wrongful conduct are Orders of the Probate Court that the Appellant believes are a violation of federal law. S.C. CODE ANN. § 15-78-60(23) provides

immunity for the “institution or prosecution of any judicial or administrative proceeding.” In this case, the Respondent is immune from liability for any damages that may have been incurred by the Appellant from the institution or prosecution of any proceeding related to Appellant by the Probate Court. Furthermore, S.C. CODE ANN. § 15-78-60(4) provides immunity for “. . . enforcement, or compliance with any law or failure to adopt or enforce any law, whether valid or invalid, including, but not limited to, any charter, provision, ordinance, resolution, rule, regulation or written policies.” In this case, assuming Respondent had any involvement in the events giving rise to this action, Respondent was enforcing or complying with the laws and policies of the State of South Carolina relating to the judicial proceedings of Plaintiff. *See* S.C. CODE ANN. § 17-1-10 *et seq.* Accordingly, the Action was properly dismissed.

## **II. THE TRIAL COURT WAS CORRECT IN ITS RULING ON PARTY IDENTIFICATION**

Respondent should be dismissed from this action due to the fact that the State of South Carolina is immune from suit for damages by virtue of its sovereign immunity. Appellant’s exclusive remedy in tort, if any actually lies, is pursuant to the South Carolina Tort Claims Act (hereinafter “the Act”), S.C. CODE ANN. § 15-78-10, *et seq.* The Act provides, in pertinent part,

The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved. The remedy provided by this chapter is the exclusive civil remedy available for any tort committed by a governmental entity, its employees, or its agents except as provided in Section 15-78-70(b).

S.C. CODE ANN. § 15-78-20(b). The Act specifically governs all tort claims against governmental entities and is the exclusive remedy available to a Plaintiff against any governmental entity or its employees, assuming the Plaintiff has any available remedy. *See Flateau*, 355 S.C. at 204, 584 S.E.2d at 416.

In this case, the Appellant was required to name the appropriate state agency or political subdivision as the defendant in place of the State of South Carolina pursuant to S.C. CODE ANN. § 15-78-70, which states,

On or after January 1, 1989, a person, when bringing an action against a governmental entity under the provision of this chapter, ***shall name as a party defendant only the agency or political subdivision for which the employee was acting*** and is not required to name the employee individually, unless the agency or political subdivision for which the employee was acting cannot be determined at the time the action is instituted. In the event that the employee is individually named, the agency or political subdivision for which the employee was action must be substituted as the party defendant.

S.C. CODE ANN. § 15-78-70(c) (emphasis added). The Act defines “agency” as the following:

. . . the individual office, agency, authority, department, commission, board, division, instrumentality, or institution, including a state-supported governmental health care facility, school, college, university, or technical college, which employs the employee whose act or omission gives rise to a claim under this chapter.

S.C. CODE ANN. § 15-78-30(a). The Act further defines “political subdivision” as the following:

. . . the counties, municipalities, school districts, a regional transportation authority established pursuant to Chapter 25 of Title 58, and an operator as defined in item (8) of Section 58-25-20 which provides public transportation on behalf of a regional transportation authority, and special purpose districts of the State and any agency, governmental health care facility, department, or subdivision thereof.

S.C. CODE ANN. § 15-78-30(h).

Consequently, because the State of South Carolina is neither an “agency” nor a “political subdivision” as defined by the Act, Defendant State is improperly named as a party in this action. Accordingly, the action was properly dismissed.

### **III. THE STATE’S IMMUNITIES GRANTED UNDER THE TORT CLAIMS ACT ARE NOT AFFECTED BY 42 U.S.C. § 2000 d-7.**

The Appellant attempted to raise this issue after the Trial Judge had issued a ruling from the bench on the Respondent’s Motion to Dismiss. (Transcript of Motion Hearing P. 7, L. 19-25). In response, the Trial Court advised the Appellant of the opportunity to file post order motions to raise the issues. (Transcript of Motion Hearing P. 8, L. 1-3). The Trial Court issued its order granting the Respondent’s Motion and dismissing the action on October 13, 2015. Thereafter, the Appellant failed to file any post Order motions (such as a Rule 59(e) motion to reconsider) and has not received a ruling on this issue.

It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Creech v. South Carolina Wildlife and Marine Resources Dep't*, 328 S.C. 24, 491 S.E.2d 571 (1997). To preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court. *Floyd v. Floyd*, 365 S.C. 56, 73, 615 S.E.2d 465, 474 (Ct.App.2005). "Error preservation requirements are intended to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000) (quoting *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000)). Without an initial ruling by the trial court, a reviewing court simply is not able to evaluate whether the trial

court committed error. *Id.* As the Appellant failed to raise these issues in a post order motion (such as a SCRCP, Rule 59(e) Motion for Reconsideration) and the Court has not ruled on these issues, the issues are preserved for appellate review.

Assuming for the sake of argument that this issue is properly preserved for appellate review, there is no merit to the Appellant's claim. In relevant portions, 42 U.S.C. § 2000 d-7, provides as follows. (a) General provision

A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

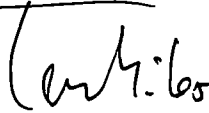
42 U.S.C. § 2000 d-7(a)(1) (underlining added for emphasis).

By its own express terms this Federal statute applies only in Federal court to actions dealing with alleged violation of a set of enumerated Federal statutes. The Appellant claims relating to the ADA were not made in Federal court and did not involve the statutes included in the protections of 42 U.S.C. § 2000 d-7. The Supreme Court of the United States has ruled that States are shielded by sovereign immunity pursuant to Eleventh Amendment of the Constitution of The United States from ADA claims, such as the Plaintiff's, in the case of *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 121 S. Ct. 955 (2001). Accordingly, 42 U.S.C. § 2000 d-7 is does not change the fact that the Respondent is immune from the Appellants claims in this case.

### CONCLUSION

For the reasons set forth above, the Order of the trial Court should be affirmed.

Respectfully submitted,



---

Temus C. Miles, Jr.  
McKay, Cauthen, Settana & Stublely, P.A.  
Post Office Box 7217  
Columbia, SC 29202  
803-256-4645  
Attorney for the Respondent

Columbia, South Carolina  
February 18, 2016.

**RECEIVED**

FEB 18 2016

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM THE RICHLAND COUNTY  
COURT OF COMMON PLEAS

TANYA GEE, CIRCUIT COURT JUDGE

Appellate Case No. 2015-002367

**RECEIVED**  
FEB 18 2016  
SC Court of Appeals

ORLANDO I. BROWN, PRO SE,.....Appellant.

v.

THE STATE OF SOUTH CAROLINA.....Respondent.

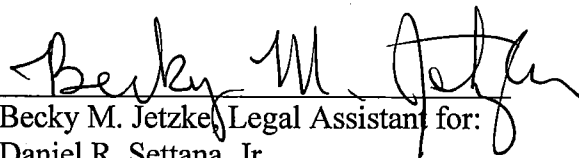
**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on February 18, 2016, a copy of the foregoing *Initial Brief of Respondent* is served on the Appellant by first class mail at the address as follows:

Orlando Brown  
440 Rimer Pond Road  
Blythewood, SC 29016

*(Signature Page Follows)*

**RECEIVED**  
FEB 18 2016  
SC Court of Appeals



Becky M. Jetzke, Legal Assistant for:

Daniel R. Settana, Jr.

Temus C. Miles

McKay, Cauthen, Settana & Stubley, P.A.

P. O. Drawer 7217

Columbia, SC 29202

(803) 256-4645

Attorneys for Respondent

Julius W. McKay, II  
Mark D. Cauthen  
Daniel R. Settana, Jr.  
M. Stephen Stubley  
Janet Brooks Holmes  
Peter P. Leventis, IV\*  
Kelli L. Sullivan\*  
George D. Gallagher\*  
Temus C. Miles, Jr.  
David M. Bornemann  
Brandon P. Jones  
James E. L. Fickling+  
Charles A. Kinney, Jr.+  
Erica E. Loudin

Law Offices  
**McKAY, CAUTHEN, SETTANA & STUBLEY, P.A.**

Post Office Box 7217  
Columbia, South Carolina 29202-7217

1303 Blanding Street  
Columbia, South Carolina 29201

Douglas McKay, Jr.  
(1917-2008)

Telephone  
(803) 256-4645

Fax

(803) 765-1839

E-Mail

mms@mckayfirm.com

Web

www.mckayfirm.com

\*S.C. Certified Mediator  
+ Also licensed in N.C.

Of Counsel:  
C. E. Hardin, Jr.

February 18, 2016

**Via Hand Delivery:**

The Honorable Jenny Abbott Kitchings  
The South Carolina Court of Appeals  
PO BOX 11629  
Columbia, South Carolina 29211

**RECEIVED**  
FEB 18 2016  
SC Court of Appeals

RE: Orlando I. Brown v. State of South Carolina  
Civil Action No.: 2015-CP-40-04012  
Our File No.: 9-463  
Claim No.: 10917

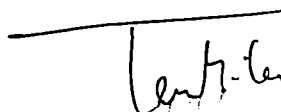
Dear Ms. Kitchings:

Please find enclosed for filing the original and one copy of the Initial Brief of Respondent, Respondent's Designation of Matter to be included in the Record on Appeal, Certificate of Compliance, and Proof of Service, in the above-referenced matter.

Please return the additional clocked in copies to my courier.

By copy of this letter and evidenced by the attached Proof of Service, I am serving a copy of Respondent's Initial Brief and Designation of Matter to be included in the Record on Appeal, and Certificate of Compliance on Appellant.

Sincerely,



Temus C. Miles, Jr.

TCM/bmj  
Enclosures

cc: Orlando Brown (w/encl.)