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THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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SC Court of Appeals

Appeal From CHARLESTON COUNTY  
COURT OF COMMON PLEAS

Diane S. Goodstein, Circuit Court Judge

Case No.: 2016-000650

Terrell L. McCoy, 256070 ..... Appellant

v.

North Charleston Police Department and Sgt. Thomas  
Deckard, of which, North Charleston Police Department.

is, ..... Respondent

APPELLANT'S FINAL BRIEF

Terrell McCoy  
LEC Edisto 12  
P.O. Box 205  
Ridgeville, SC 29472

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APPEAL FROM CHARLESTON  
COURT OF Common Pleas

Diane Goodstein, Circuit Court Judge

CASE No. ~~200~~ 2016-000-650

Terrell McCoy, ○○○○○○○○○○ Appellant

v.

North Charleston Police Department, Sergeant Thomas  
Deckard, ○○○○○○○○○○ Respondent

FINAL BRIEF

Terrell McCoy, 256070  
Leiber Correctional Inst  
P.O. Box 205  
Bridgville, SC 29472

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LEGAL MAIL

## STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERRED BY RULING THAT APPELLANT'S CIVIL ACTION WAS UNTIMELY AND BARRED BY THE 3 THREE-YEAR STATUTE OF LIMITATION PROVIDED UNDER THE SOUTH CAROLINA TORT ACT?

2. DOES S.C. CODE ANN. § 15-78-70 (b) RENDER INAPPLICABLE THE STATUTE OF LIMITATION FOUND IN § 15-78-110

~~3. DOES THE LANGUAGE OF § 15-78-70 (b) RENDER INAPPLICABLE THE STATUTE OF LIMITATION FOUND IN § 15-78-110 DETERMINING IT WOULD BE APPLICABLE TO A TORT ACTION?~~

## STATEMENT OF THE CASE

Appellant was indicted by the Charleston County grand jury for murder. Appellant's first trial ended in a hung jury. Lorelle Proctor represented appellant during that trial.

A pre-trial hearing was held on January 27, 2009 before the Honorable R. Markley Dennis, Jr. where appellant expressed desire to represent himself.

Appellant's case was then called to trial on February 2, 2009, before the Honorable Roger M. Young, Sr., and a jury. Appellant represented himself. Lorelle Proctor was stand by Counsel.

At the conclusion of the trial on February 6, 2009, the jury found the appellant guilty of murder. Judge Young sentenced the appellant to fifty years imprisonment.

An Appeal was filed.

The South Carolina Court of Appeals denied Appellant's appeal in November of 2011. Robert Dudek represented Appellant. Appellate Counsel filed a petition for rehearing, which was denied on December 19, 2011.

Appellate Counsel filed a petition for writ of certiorari in the South Carolina Supreme Court which was denied on March 6, 2013.

In June 20, 2014, while Appellant learned through Interrogatories received by attorney Beth Woodall and Francis Austin, attorneys for North Charleston Police Department, that evidence (all tape recording was destroyed and never produce to Appellant pursuant to South Carolina Rules of Criminal Procedure Rule (5).

Appellant filed a civil action against North Charleston Police Department and Detective Sergeant Thomas Dechard in 2014.

On May 7, 2015, a motion to dismiss the civil action was held. The Honorable J. C. Nicholson presided. [See May 7, 2015 hearing transcript mark as Exhibit 1

Robin Jackson and Kevin DeAntonio represented respondents. At the conclusion of the hearing, Judge Nicholson dismiss the

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1. While Appellant was waiting for an decision on Appeal, he moved in good faith seeking discovery from North Charleston Police Department pursuant to the Freedom of Information Act.

the Civil action.

Appellant filed an timely SCRPC Rule 59(e), and a hearing was held on December 2, 2015. The Honorable Diane S. Goodstein presided. Appellant appeared pro se, and Kevin DeAntonio and Robin Jackson represented the respondents. [see December 2, 2015 hearing transcript mark as Exhibit]

This Appeal followed.

## Relevant Facts

## ARGUMENT

### I

DID THE COURT ERRED BY RULING THAT APPELLANT'S CIVIL ACTION WAS UNTIMELY AND BARRED BY THE THREE YEAR STATUE OF LIMITATION PROVIDED UNDER THE SOUTH CAROLINA TORT ACT?

DOES S.C. CODE ANN. § 15-78-70 (b) RENDER INAPPLICABLE THE STATUE OF LIMITATION FOUND IN § 15-78-110?

At the May 7, 2015 hearing held before Judge Nicholson, the respondents told Judge Young that Appellant's claim was barred by the three year statute provided under the S.C. code Ann § 15-78-110. "See May 7, 2015 hearing transcript page 2 Line 10-11; page 3 line 7-20."

Kevin DeAntonio represented Respondents.

During the hearing, Mr. De Antonio stated "The solicitor failed to produce a 911 tape, but I guess the suit is against the North Charleston Police Department and the detective." May 7, 2015 hearing transcript page 3 Line 7-9."

Mr. De Antonio then told the judge that the statute of limitation began

to run February 2009 when Appellant was convicted. "May 7, 2015 hearing transcript page 18-20."

Appellant then told Judge Nicholson that he was convicted February 6, 2009, and his standby attorney filed a timely appeal. "May 7, 2015 hearing transcript page 6 line 21-24."

Appellant then explained to the judge "The remittitur was issued to the lower court on March 8, 2013, affirming his loss of liberty." "May 7, 2015 hearing transcript page 7 line 11-18."

Appellant told the judge that during his second trial he was never told that the 911 tape recording was destroyed. "May 7, 2015 hearing transcript page (7) Line 24-25; (8) line 1-25"

Appellant then stated "I didn't actually find out that the 911 tape recording was destroyed until I filed a lawsuit against respondents, and received my Interrogatories on June 20, 2014." "May 7, 2015 hearing transcript page 10 Line 3-5; **See Also Appellant's 2<sup>nd</sup> Interrogatories page 2 question 2 + 3**

Judge Nicholson then asked Appellant "When did you find out it was destroyed." "May 7, 2015 hearing transcript page 10 line 2-15."

Judge Nicholson also wanted to know **HOW** the 911 tape recording could have helped Appellant. "May 7, 2015 hearing transcript ~~page 11 line 7-15~~; page 12 Line 7-9."

Appellant then explained that the 911 tape recording contradicts the State Witness, Carinda Williams Snowden, trial testimony and could have been used to impeach the witness. "May 7, 2015 hearing transcript page ~~11~~ 11 Line 7-22; page 12 Line 10-17."

Judge Nicholson asked Appellant did he mention the 911 tape recording destruction in his PCB application. "May 7, 2015 hearing transcript page (9) Line 7-25."

Appellant then told Judge Nicholson the 911 tape recording was not mentioned because he had known know at his second trial that the tape had been destroyed, and he had not discover the spoliation until he filed a civil action against Respondent for failing to respond to FOIA request pursuant to the Freedom of Information Act. May 7, 2015 hearing transcript page (10) Line 3-5; page (13) Line 20-25; page (14) Line 1-25; page (15) Line 1-4<sup>99</sup>

Appellant tried twice to give Judge Nicholson copies of Interrogatories, received from Respondents, to be admitted into the record and the Judge refuse. " May 7, 2015 hearing transcript page (15) Line 24-25; page (16) Line 1-4; page (15) Line 1-25<sup>99</sup>

Judge Nicholson then asked Mr. DeAntonio, " when do you think you first found out about the tape? " May 7, 2015 hearing transcript page (16) Line 6-7.

Mr. DeAntonio explained the public defender requested and received the SCR Crimp Rule 5 Motion sometime between April of 2006 - There was a Summary of what the 911 tape said, so that's when they became aware that there was a tape and they requested a copy of the actual recording. May 7, hearing transcript page (16) Line 13-16; page (16) Line 17-18.

Mr. DeAntonio continued and allege Appellant knew in 2008 that he did not have the tape, that it existed. ( May 7, 2015 hearing transcript page (17) Line 5-25 )

Mr. DeAntonio mis informed Judge Nicholson that there was a motion hearing held specifically for the State to produce the 911 tape recording. " May 7, 2015 hearing transcript page (17) Line 5-25.

Judge Nicholson then asked, " what was the judges ruling? " May 7, 2015 hearing transcript page (18) Line 4

Mr. De Antonio did not have a copy of Appellant's second trial transcript, and could not tell the judge what the trial judge's ruling was. May 7, 2015 hearing transcript page (18) (5-25)

Judge Nicholson then told Mr. De Antonio, "I'm trying to determine when he actually knew it was destroyed. So I need to know what happened in that camera hearing. May 7, 2015 hearing transcript page (19) Line (1-5)

Appellant then gave a copy of his transcript pages to the judge for review. Appellant explained that the motion hearing was not for the 911 tape recording. May 7, 2015 hearing transcript page (19) Line 14-24

Judge Nicholson then read the transcript from the second trial and stated, "Having read the transcript from the second trial during the camera hearing; I think it's pretty clear on page 635 line 25: May 7, 2015 hearing transcript page (20) Line 15-25

The Court: From what I understand, it doesn't exist. Mr. Proctor said back when she used to represent you her office tried to obtain it and were informed it didn't exist, so again, it one of those deals where if you had it, I would let you play it; however, it doesn't exist. I can't create it. Okay?

Judge Nicholson then granted Respondent's motion and dismissed the case.

During the Motion to Alter or Amend Judgment, held on December 2, 2015, Appellant introduced exhibits, into the record, which was never marked by the Court-reporter. "December 2, 2015 hearing page (4) Line 21-25; page (5) Line 6-7; page (5) Line 24-25; page (6) Line 24.

Appellant then explained his case to Judge Goodstein. "December 2, 2015 hearing transcript page (4) Line 9-25; page (5) Line 1-25; page (6) Line 1-25; and page (7) 1-25.

Appellant explained when he was put on notice that a right of his had been violated, and a cause of action existed. Appellant told Judge Goodstein, that

Appellant's claim was dismissed b/c Judge Nicholson was misinformed when Appellant learned the 911 tape recording was destroyed at his retrial. See "December 2, 2015 hearing transcript page (7) Line 18-19."

Appellant then read portions of his second trial transcript into the record where Judge Nicholson based his ruling on. "December 2, 2015 hearing transcript page (6) Line ~~2-4~~ 1-4"

Appellant then told Judge Goodstein. "If Plaintiff was made aware of the spoliation during the retrial, he could have requested a jury charge on spoliation of evidence. The respondents did not rebut the fact that the Jury did not receive instruction on Spoliation." December 2, 2015 hearing transcript page (6) Line 4-8."

Appellant then explained to the Court the meaning of the words "Exist" and "Destroyed." "The word exist in the American Heritage College Dictionary 3<sup>d</sup> edition means to be present under certain circumstances or in a specified place occur. Latin term E-X-I-S-T-E-R-E, E-X-I-S-T-E-R-E. to come forth be manifest, or to stand." December 2, 2015 hearing transcript page (7) Line 8-12."

Appellant explained that destruction means the act of destroying or demolishing, the ruining of something. Appellant also explained that the solicitor, during the second trial, stated that the evidence did not exist. "December 2, 2015 hearing transcript page (7) Line 19-25; page (8) Line 1-3"

Judge Goodstein then stated, "In other words just to be sure in following you, in other words, what you're talking about is there is a difference between evidence not existing and evidence being destroyed." December 2, 2015 hearing transcript page (8) Line 1-25; page (9) 1-5"

Appellant explained to the Court, that while his appeal was pending in

~~the appellate Court, he in good faith search by due diligence through different law enforcement agencies seeking the whereabouts of the 911 tape recording.~~  
December 2, 2015 hearing transcript page: (9) Line 17-21; page: 10 Line 3-18

Judge Goodstein then asked, "when you're talking about having served -- you did a couple of things, you made some Freedom of Information request." December 2, 2015 hearing transcript page: (10) Line 22-25; page (11) Line 1-25

Appellant then explained when he learned the evidence was destroyed. Judge Goodstein then asked, "It doesn't exist what does that mean? Does it mean it was destroyed? Does it mean it never existed that there was a malfunction of the 911 system etcetera." December 2, 2015 hearing transcript page: 16 Line 1-10.

Mr. DeAntonio then stated that the Appellant had in his possession of the dispatcher's report, which gave a brief description of the 911 call made, so they knew the call existed during February of 2009. "December 2, 2015 hearing transcript page: (17) Line 14-23"

Mr. DeAntonio then explained to the Court, "Mr. Wetmore told the judge he never heard the 911 tape and that the tape recording was kept for a certain period and then they are destroyed." "December 2, 2015 hearing transcript page (18) Line 7-14."

Judge Goodstein then inquired about when the 911 tape recording was mentioned. "December 2, 2015 hearing transcript page: (19) Line 26

At the conclusion of the hearing Judge Goodstein did not make a ruling. December 2, 2015 hearing transcript pages 19-26. Appellant received a order notice, by mail, that the Judge denied the Rule 59(e) motion.

## Discussion

The statute of limitation of the tort act runs from the date the

Injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. Bayle v. S.C. Dept of Transportation, SC. app. 2001, 344 S.C. 115, 542 S.E.2d 736 S.C. Ct app. 2001 . . . . . True v. Monteith, 327 S.C. 116 (1997) 489 S.E.2d 615; ~~Joubert v. South Carolina Dept of Social Services, 348 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000)~~

The date on which discovery of the cause of action should have been made is an objective, rather than subjective question. See Joubert v. South Carolina Dept of Social Services, 341 S.C. 176, 534 S.E.2d 1 (Ct. App. 2000)

In Dean v. Buscon Corp., 321 S.C. 360, 468 S.E.2d 645 (1996), the Supreme Court explicated:

According to the discovery rule, the statute of limitation begins to run when a cause of action reasonably ought to have been discovered. The statute runs from the date the injured party either knows or should have known by the exercise of reasonable diligence that a cause of action arises from the wrongful conduct. We have interpreted the "exercise of reasonable diligence" to mean that the injured party must act with some promptness where the facts and circumstances of an injury place a reasonable person of common knowledge and experience on notice that a claim against another party might exist. Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial.

First, the evidence in the record shows that during Appellant's second trial, there was an in camera hearing held concerning the "lost" witness: North Charleston Police Department dispatcher Jene Fowler. See Exhibit (4): Mark as Portion of Appellant's Second trial transcript page: 631 Line

During the in camera hearing, Appellant made arguments concerning a witness that was subpoenaed and had not appeared to court. Judge Roger Young, the presiding judge, asked that since the dispatcher was not present, did the state or defense have the 911 tape recording. Appellant stated he had subpoenaed the 911 tape recording. "Portions of Appellant's Second trial transcript page: <sup>633</sup> ~~633~~ Line 1."

There was discussions made by Appellant's attorney that she had requested a 911 tape recording from previous solicitor and never received the 911 tape recording. "Portions of Appellant Second trial transcript page: 633 Line 10-14; page: (634) Line 12-17."

The Solicitor, Burns Wetmore, stated he never heard a 911 tape recording, He just knew from experience as being a officer of Court, that recordings are kept for certain periods, and then destroyed "Portion of Appellant Second trial transcript page: (634) Line 1-9."

He further stated he never ~~checked~~ asked for it, nor subpoenaed the 911 tape, so he had no factual evidence that the 911 tape recording was actually destroyed or stored in evidence at the Police Department during Appellant's second trial.

During Appellant's Second trial, at the in camera hearing, Judge Young stated the following: "I understand, but from what I understand, it doesn't exist. Miss Proctor said back when she used to represent you, her office tried to obtain it, and they were informed it didn't exist. So again, its one of those deals where if you had it, I would let you play it probably, but if it doesn't exist, I can't create it. Okay." Second trial transcript page: (635) Line 25 page: 636 Line 1-6.

The languages did not exist, and can't create it, used by Judge Young is evidence the court may have been under the assumption the 911 tape -

recording didn't exist. Also the Respondent did not produce any evidence to show that the trial Judge instructed the Jury on Spoilation, ~~Appellant~~ during Appellant's second trial. ~~When~~ If there was evidence of spoilation, the jury would have been given spoilation charges.

In this case, the circumstances of the case did not put Appellant, on notice that some right of his was invaded, or that some claim against another party might exist. The Solicitor admitted he had never requested or subpoenaed the 911 tape recording, so he had never seek the evidence although Appellant's attorney requested for the 911 tape recording.

~~In a criminal matter, where as~~

The Solicitor had no factual knowledge that the 911 tape recording had been destroyed. Nor did the record show that Appellant was told the 911 tape recording was destroyed and given a date the evidence was destroyed.

In Bayle v. SC Dept of Transportation Supra. The Court explained that the litigant has to be put on notice that some right of his was invaded, or that some claim against another party might exist. In Bayle, this court stated the date on which discovery of the cause of action should have been made is an objective, rather than subjective, question. Jourbert, Supra; Young, Supra

In this case, the state failed to admit evidence was destroyed at trial. Appellant was under assumption that the 911 tape recording did not exist, and did not include it into his PCR application. Judge Nicholson reviewed, Appellant's PCR application, and verified it had not been raised in Appellant's PCR application. Appellant also explained he was not informed that the 911 tape recording was destroyed, the indictment, was never dismissed. " See MAY 7, 2015 hearing transcript page: (8) Line 24-25; page 9 Line 1-25; page: 10 Line 1-25

This record was insufficient to show that Appellant was placed on notice that a right had been invaded during his second trial held on February 2, 2009 in order to establish that the civil action was barred by the statute of limitation provided by the S.C. Code Ann §

Does S.C. Code Ann § 15-78-70(b) Render Inapplicable the statute of limitation found in § 15-78-110

~~S.C. Code Ann § 15-78-70(b) states:~~

During the May 7, 2015 hearing held in front of Judge Nicholson, Mr. DeAntonio stated the Solicitor failed to produce a 911 tape recording, but I guess this suit is against the North Charleston Police Department and the detective. "May 7, 2015 hearing transcript page: (3) Line 7-20

The Respondents, throughout the hearings, never rebutted the fact that the evidence was destroyed in violation of Appellant's constitutional rights.

Judge Nicholson asked was the 911 tape recording available at the first trial, and the Respondents stated it was never produced at all. "May 7, 2015 hearing transcript page: (6) Line 8-11; page: (18) Line 7-11.

## DISCUSSION

Chewing v. Ford Motor Company, 354 S.C. 72, 579 S.E. 2d 605 Id. at 78, 579 S.E. 2d at 608 (citing Rozier v. Ford Motor Co., 573 F.2d 1332, 1338 5th Cir. 1978) Extrinsic fraud induces a person not to present a case or deprives a person of the opportunity to be heard. Id at 81, 579 S.E. 2d at 610 (citing Hilton Head Ctr. of South Carolina v. Public Serv. Comm'n, 294 S.C. 9, 11 362 S.E. 2d 176, 177 (1987). On the other hand, intrinsic fraud "is fraud which was presented and considered in the trial" and which misleads a court in determining issues and induces the court to find for the party perpetrated by officers the fraud." Id. (citing Hagy v. Pruitt, 339 S.C. 425, 529

S.E.2d 714 (2000); Hilton Head CTR. 294 S.C. at 49, 262 S.E.2d at 176

The essential distinction between intrinsic and extrinsic fraud is the ability to discover the fraud. Equitable relief from judgment "is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the Court on the ~~summary~~ subject matter of the action." <sup>89</sup> Id. See also Bryan v. Bryan, 220 S.C. 164, 167-68, 66 S.E.2d 609, 610 (1951)

In this case, Appellant argued that the Respondents committed the act of Extrinsic fraud, and therefore the statute of limitation does not apply, and Appellant has named an individual defendant in the civil action.

During the May 7, 2015 and December 2, 2015 hearing held, Appellant argued that the destruction of the 911 tape recording by the Respondent constituted negligence. In more words, Appellant stressed the point that the destruction of 911 tape recording prevented him from fully exhibiting and trying his case.

The record supports this argument as Judge Nicholson asked Appellant, "How would that 911 tape have made any difference whether you were involved in the shooting or not?" <sup>93</sup> <sup>46</sup> May 7, 2015 hearing transcript page: (12) (7-20); page: (11) (1-25)"

It is evident, the destruction of the 911 tape recording prevented Appellant from presented a full defense in his criminal case. The Respondents did not rebut the facts presented at the hearing that Respondents destroyed

the 911 tape recording preventing Appellant from fully exhibiting and trying his case.

The South Carolina Supreme Court stated in Chewning V. Ford Motor Company, Supra. "Where an attorney - an officer of the court - suborns perjury or intentionally conceals documents, he or she effectively precludes the opposing party from having his day in court.

If this court would review portions of Appellant's second trial transcript pages: (634) Line (20-25), and the Verified Complaint, Appellant allege fraud against NEPD. Appellant's standby Counsel stated she requested the tape from the Solicitor's office. The Solicitor ~~intentionally~~ <sup>intentionally</sup> concealed material from the Appellant, as evidence shows that the Solicitor stated, "He did not request nor subpoena the 911 tape recording." See Portions of Appellant's second trial transcript page: (634) Line (8-9)

In a criminal proceeding the United States Supreme Court stated the following: The prosecution has the duty to disclose regardless of whether the defendant makes a specific request. This rule extends to evidence that is not in the actual possession of the prosecution but known by others acting on the government's behalf in the particular case, including the Police. United States V. Bagley, 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed. 2d 481 (1985); State V. Kennerly, 357 S.C. 442 (S.C. App. 1998)

If Appellant made the specific request, and the Solicitor

failed to disclose the evidence, then his actions as well as the Respondents constituted extrinsic fraud.

Extrinsic fraud deprives a person the opportunity to be heard. Relief is granted for extrinsic fraud on the theory that because the fraud prevented a party from fully exhibiting his case. Hilton Head Ctr. of South Carolina v. Public Serv. Comm'n, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987).

Although this is a civil action, the facts of the case stem from a criminal proceeding. Sergeant Thomas Deckard was present throughout the entire trial. The Respondents never indicated that the 911 tape recording was destroyed nor did the Solicitor request the evidence from the Respondents after receiving a SCRCrimP Rule (5) motion (Exhibit #10).

Appellant stated the Respondents committed fraud during in Verified Complaint. "SEE Appellant's Complaint filed AS EXHIBIT (5). The Respondents did not file an answer and defaulted.

For these reasons stated above, Appellant should be granted a new hearing.

October  
~~September 5~~, 2016

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