

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2017-000639

Eighty-five thousand six hundred eighty seven and 45/100 dollars (\$85, 687.45); 2010 Chevrolet Impala vin# 2GIW15EKOA1166142; 2008 Mercedes vin#JH2PC400X9K201006; various weapons, miscellaneous gold men's jewelry, electronics and real property located at 732 Dragonfly Drive, Myrtle Beach, SC, TMS#: 1642201065, Defendant Property,

Michael A. Hatten, Stephanie N. Hatten a/k/a Stephanie N. Mackie, Joseph L. White, Eleanor J. Carter, Bryon A. Gidney, Kristin J. Milby, Ivan K. Chatman and Steven N. Mackie, Defendants,

Of whom Stephanie N. Hatten a/k/a Stephanie N. Mackie is the Appellant.

Appellant,

v.

Jimmy A. Richardson, II,
Solicitor Fifteenth Judicial
Circuit, On Behalf of The 15th
Circuit Drug Enforcement Unit,

Respondent.

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MAY 01 2017

SC Court of Appeals

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUE ON APPEAL

1. DID THE CIRCUIT COURT ERR IN FINDING THAT A SOLICITOR IS IMMUNE FROM SUIT WHEN ACTING WITHIN HIS "OFFICIAL DUTIES?"
2. DID THE CIRCUIT COURT ERR IN GRANTING A 12(b)(b) MOTION TO DISMISS WHERE THE AGENCY AND GOVERNANCE RELATIONSHIP BETWEEN THE PARTIES WAS UNCLEAR AND DISCOVERY HAD NOT BEEN COMPLETED?

STATEMENT OF THE CASE

On April 11, 2016, Jimmy Richardson, Solicitor (hereinafter Solicitor) for the Fifteenth Judicial Circuit filed a forfeiture action against Stephanie Hatten a.k.a Stephanie Mackie (hereinafter Mrs. Hatten) and several property items owned by Mrs. Hatten under S.C. Code §44-53-530.

On July 19, 2016, Solicitor filed an amended complaint in the forfeiture action.

On August 17, 2016, Mrs. Hatten answered the forfeiture action and counterclaimed against Solicitor for Conversion, Claim and Delivery, and Punitive Damages.

On August 19, 2016, Solicitor filed a Rule 12(b)(6), SCRPC motion to dismiss the counterclaims of Mrs. Mrs. Hatten based on the "South Carolina Tort Claims Act, S.C. Code §§15-78-10 to 220 and upon the fact that there are no allegations in the counterclaims against the Solicitor or any employees of the Solicitor's Office."

On September 19, 2016, Mrs. Hatten filed a response to Solicitor's motion to dismiss the counterclaim.

On October 4, 2016, Solicitor filed a memorandum in support of Plaintiff's motion to dismiss the counterclaims.

On November 9, 2016, Mrs. Hatten filed a second response and memorandum in response to Solicitor's memorandum in support of his motion to dismiss the counterclaims.

On January 5, 2017, Judge Culbertson heard oral arguments on Solicitor's motion to dismiss Mrs. Hatten's counterclaim. Shortly after the hearing on January 5, 2016, Mrs. Hatten filed a letter brief clarifying the applicable law governing this matter.

On February 17, 2017, Judge Culbertson filed an order dismissing Defendant Mrs. Hatten's counterclaims with prejudice.

This appeal followed.

STATEMENT OF FACTS

On March 29, 2016, armed agents of the 15th Circuit Solicitor's Drug Enforcement Unit executed a search warrant at 732 Dragonfly Drive in Myrtle Beach, South Carolina, the home of Mrs. Hatten. During the search, agents seized a 2008 Mercedes Benz CLS550 belonging to Mrs. Hatten. Agents also seized a Mossberg pump shotgun serial number R293914, one thousand and twenty dollars, and a 2009 Honda CBR600RR9, all of which Mrs. Hatten had a marital interest in. Amended Complaint 3, 8-9, Counterclaim 5-8. Agents did not find any illegal drugs, drug paraphernalia, drug packaging, scales commonly used to weigh drugs, or any other evidence of criminal involvement of Mrs. Hatten during the execution of the search warrant. Despite not finding anything of evidentiary value against Mrs. Hatten in this search, agents seized Mrs. Hatten's personal property and the Solicitor filed this action for forfeiture to confirm the seizure. Amended Complaint 3,8-9, Counterclaim 5-8. To this day, the above listed property remains in the possession and control of the 15th Circuit Solicitor's Drug Enforcement Unit. Counterclaim 5-8.

The Solicitor also filed a lis pendens against Mrs. Hatten's home at 732 Drangonfly Drive in Myrtle Beach and is attempting to seize the real property in this forfeiture action. Amended Complaint 3-4.

Despite no illegal substances or evidence of illegal activity being found during the search, and despite the fact that there is no other evidence of Mrs. Hatten's involvement in any kind of criminal enterprise, Mrs. Hatten was arrested on one count of Criminal Conspiracy on June 6, 2016. The criminal case is still pending.

STANDARD OF REVIEW

Under Rule 12(b)(6), SCRCPP, a party may move to dismiss a complaint against him based on a failure to state facts sufficient to constitute a cause of action. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006). In considering a motion to dismiss under Rule 12(b)(6), the circuit court must base its ruling solely on the allegations set forth in the complaint. Doe v. Marion, 373 S.C. 390, 645 S.E.2d 245 (2007). Such a motion may not be sustained if the facts alleged and the inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. Id. 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. Id. In reviewing the dismissal of an action pursuant to Rule 12(b)(6), the appellate court applies the same standard as the circuit court. Id. Cole Vision Corp. v. Hobbs, 394 S.C. 144, 148-149, 714 S.E.2d 537, 539 (2011).

ARGUMENT

Judge Culbertson's order dismissing Mrs. Hatten's counterclaims reasons that "Because it is part of his official duties to bring forfeiture actions, the Plaintiff has prosecutorial immunity from civil liability in this case." Judge Culbertson's order seems to rely solely on The South Carolina Tort Claims Act without ever citing it directly. However, during briefing and argument,

Solicitor relied on the argument that Solicitor was not the seizing agency, therefore the claims were brought against the wrong party. Both arguments will be addressed below. Order 2-3.

I. THE CIRCUIT COURT ERRED IN FINDING IMMUNITY UNDER THE SOUTH CAROLINA TORT CLAIMS ACT FOR ADMINISTRATIVE ACTIONS, INCLUDING FORFEITURE OF PROPERTY.

The office of the Solicitor was created in Article V, Section 24 of the South Carolina Constitution:

Law enforcement officials, prosecutors and administrative officers; Attorney General. There shall be elected in each county by the electors thereof a clerk of the circuit court, a sheriff, and a coroner; and in each judicial circuit a solicitor shall be elected by the electors thereof....

The General Assembly shall provide by law for their duties and compensation. The General Assembly also may provide by law for ...and the selection, duties, and compensation of other appropriate officials to enforce the criminal laws of the State, to prosecute persons under these laws, and to carry on the administrative functions of the courts of the State.

The South Carolina Generally assembly vested Solicitors with the primary duty of prosecution of cases in General Sessions court in S.C. Code Ann §§1-7-320-330:

Solicitors shall perform duties of Attorney General and assist in prosecutions. Solicitors shall perform the duty of the Attorney General and give their counsel and advice to the Governor and other State officers, in matters of public concern, whenever they shall be, by them, required to do so; and they shall assist the Attorney General, or each other, in all suits of prosecution in behalf of this State when directed so to do by the Governor or called upon by the Attorney General.

Attendance at circuit courts; preparation and publication of docket...

The solicitors shall attend the courts of general sessions for their respective circuits. Preparation of the dockets for general sessions courts shall be exclusively vested in the circuit solicitor and the solicitor shall determine the order in which cases on the docket are called for trial. Provided, however, that no later than seven days prior to the beginning of each term of general sessions court, the solicitor in each circuit shall prepare and publish a docket setting forth the cases to be called for trial during the term.

Over time, each Circuit Solicitor has been vested with a wide variety of duties in addition to the prosecution of crimes in the court of General Sessions. Circuit Solicitors run Pre-Trial Intervention programs, Drug Court programs, the Worthless Check Unit, file civil actions to estreat bonds, handle expungement requests and procedures, facilitate extradition, and confirm the seizure of personal property through forfeiture actions.

The South Carolina Tort Claims Act provides immunity from suit for prosecutors performing “judicial, or quasi-judicial action or inaction.” S.C Code §15-78-60(1). This Court considered the extent of a Solicitor’s immunity under this section of the Tort Claims Act in Williams v. Condon, 347 S.C. 227, 553 S.E.2d 496 (Ct. App. 2001). In that case the Williams court expressly adopted the reasoning in Imbler v. Pachtman, 424 U.S. 409, 96 S. Ct. 984 (1976). The Imbler Court drew a distinction between the actual prosecution of a criminal case (finding absolute immunity for prosecutors acting in that role), and the administrative duties that a Solicitor undertakes, including providing legal advice to police (not finding absolute immunity). Imbler, 424 U.S. at 430, 96 S. Ct. at 995. See also, Buckley v. Fitzsimmons, 509 U.S. 259, 113 S. Ct. 2606 (1993) (holding that prosecutors lose absolute immunity when they analyze evidence during the period before they convened a special grand jury to investigate a crime). Further, the United States Supreme Court found only qualified immunity for a prosecutor while making statements to the press. Burns v. Reed, 500 U.S. 478, 111 S. Ct. 1934 (1991) (holding that the prosecutor at a press conference did not act “in his role as an advocate for the State” and finding qualified immunity for that prosecutor acting in that role).

The South Carolina Supreme Court detailed the exceptions to judicial immunity in Faille v. S.C. Dep’t of Juvenile Justice, 350 S.C. 315, 324, 566 S.E.2d 536, 540-541 (2002) (citing, O’Laughlin v. Windham, 330 S.C. 379, 498 S.E.2d 689 (Ct. App. 1998), (cert denied

1999))(holding that a DJJ probation officer was not entitled to judicial immunity for acts performed during the supervision of a probationer)(emphasis added):

South Carolina recognizes three exceptions to judicial or quasi-judicial immunity. Judges and other officials are not entitled to judicial immunity if: (1) they did not have jurisdiction to act; (2) the act did not serve a judicial function; or (3) the suit is for prospective, injunctive relief only. *Id.* at 385, 498 S.E.2d at 692. The second exception, which emphasizes **the importance of the act, as opposed to the actor**, is relevant here. Under the second exception, **even judges are not insulated by judicial immunity when they act in an administrative capacity.** *Id.* (citing *Forrester v. White*, 484 U.S. 219, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988)). In determining whether an act is judicial, the Court looks to the nature and function of the act. *Id.*; *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991); *Stump v. Sparkman*, 435 U.S. 349, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).

Solicitor asserts that he, as the Solicitor of the Fifteenth Circuit, is entitled to “prosecutorial immunity” from Mrs. Hatten’s Counterclaims. Motion to Dismiss 2, Memo in support of Motion to dismiss 3-4. In fact, Solicitor has repeatedly asserted that the Solicitor is immune from prosecution from all acts within his official duties, a plain misstatement of the law of South Carolina. Transcript 5, 13-14. *Williams*, *Imbler* and its progeny contemplate that the analysis is on the act, not the actor in determining whether the Solicitor is entitled to immunity. Importantly, this Court held in *Williams* that:

a prosecutor in the employ of this state is immune from personal liability under § 1983 or the South Carolina Tort Claims Act **for actions relating to the prosecution of an individual as a criminal defendant** -- regardless of the prosecutor's motivation -- provided the actions complained of were committed while the prosecutor was acting as an “advocate,” as defined by *Imbler v. Pachtman* and its progeny. Additionally, the law is clear that a prosecutor cannot be sued in his official capacity under either § 1983 for money damages or the Tort Claims Act when the acts complained of were “judicial” or “quasi-judicial” in nature.

347 S.C. at 250, 553 S.E.2d at 509 (emphasis added).

While the Solicitor does have immunity from suit for acts relating to the criminal prosecution of defendants in General Sessions Court, he does not have immunity from suit for administrative acts, including advising law enforcement, or making statements to the media. The question of whether a forfeiture suit to confirm a seizure of property made by law enforcement falls within a prosecutorial act or an administrative act is a novel question in the appellate courts of this state. Given the broad range of administrative duties our modern Solicitor's offices undertake, it would create a slippery slope for the courts to find that Solicitors have immunity from all acts undertaken in their official duties.

In the instant case, armed employees of the Solicitor seized the property of a citizen and that citizen sought recourse through the courts to obtain possession of her wrongfully seized property. In response, Solicitor, advances the extraordinary position that he can never be sued for any actions, including the forcible taking of real property and chattel, that his armed employees, who are members of the executive branch of government, engage in against the citizens of this State because he is a "quasi-judicial" officer. Transcript 8-9, 13-14.

Simply stated, that is not the law of the State of South Carolina or the United States of America; that is tyranny. See JAMES MADISON, FEDERALIST PAPER #47 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.")

II. THE CIRCUIT COURT ERRED BY RELYING ON INFORMATION OUTSIDE OF THE PLEADINGS WHEN DISMISSING HATTEN'S COUNTERCLAIMS UNDER RULE 12(b)(6).

“A motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the allegations set forth in the complaint and [the court] must presume all well-pled facts to be true.” Gressette v. South Carolina Electric & Gas Co., 370 S.C. 377, 378-79, 635 S.E.2d 538 (2006). “[A] judgment on the pleadings is considered to be a drastic remedy by our courts. Therefore, pleadings in a case should be construed liberally and the trial court . . . must presume all well pled facts to be true so that substantial justice is done between the parties.” Overcash v. South Carolina Electric & Gas Co., 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005).

Solicitor did not convert this motion to one for summary judgment which would be premature because discovery¹ had not been completed.

As a result, the Court must look to only the pleading itself and the detail and content of the pleading must be viewed according to general pleading rules. State Bd. of Medical Examiners v. Fenwick Hall, Inc., 300 S.C. 274, 276, 387 S.E.2d 458 (1990) (“A ruling on a 12(b)(6) motion to dismiss [for failure to state a claim] must be based solely upon allegations set forth on the face of a complaint.”). Rule 8(e), SCRPC, provides for simple, concise and direct averments and states that “no technical forms of pleading are required.” In addition, a trial court must review a challenged complaint in the light most favorable to the nonmoving party and must consider the

¹ “[S]ummary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) citing 10A Wright & Miller, Federal Practice and Procedure § 2741, p. 543 (1983); 6 Moore's Federal Practice ¶ 56.02[6], p. 56-39 (2d ed. 1990). In Baughman, our Supreme Court ruled that summary judgment is premature when (1) plaintiffs demonstrate a likelihood that further discovery will uncover additional relevant evidence and (2) plaintiffs are not dilatory in seeking discovery. Accord, Doe ex rel. Doe v. Batson, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001) (holding that summary judgment was premature three years after the date of the commencement of a lawsuit because plaintiff had not taken depositions and was not dilatory in seeking discovery).

facts alleged in the complaint as true. Woodell v. Marion Sch. Dist. One, 307 S.C. 297, 298, 414 S.E.2d 794 (Ct. App. 1992).

Paragraph #39 of Defendant's Counterclaim specifically alleges that the 15th Circuit Solicitor's Drug Enforcement Unit executed the search warrant which resulted in the Defendant's property being wrongfully withheld from her. Counterclaim 6.

Under the applicable Rule 12(b)(6) standard, this allegation was sufficiently well pled² to survive a Motion to Dismiss and any effort to go outside the four corners of the Counterclaim must be disregarded.

The trial court hearing contained much debate about the agency and governance relationship between the 15th Circuit Solicitor's Drug Enforcement Unit and the Solicitor. Transcript 3-15. The extent to which the 15th Circuit Solicitor's Drug Enforcement Unit is controlled by or an agent of the Solicitor is one that is ripe for exploration during the discovery phase of litigation. The fact that Solicitor enclosed an exhibit³ along with the memorandum in support of his motion to dismiss demonstrates that this question is not one that can be settled by the pleadings alone. Memorandum in support of motion to dismiss (attached exhibit).

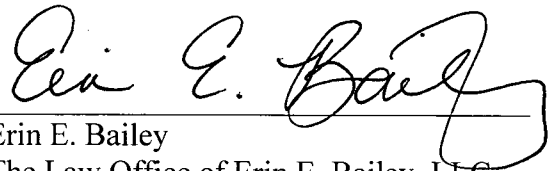
² Appellant further notes that, logically, if the Solicitor has the legal authority to bring this action on behalf of his own employees of the DEU, the Solicitor has the legal authority to return the property to its rightful owner and be counterclaimed against for tortious actions arising from the same occurrence. See generally Rule 17, SCRCP; Reporter's Note to Rule 13, SCRCP ("**counterclaims** arising out of the same transaction or occurrence that is the subject of the action are 'compulsory' under Rule 13(a) and are barred by *res judicata* or estoppel by judgment if not asserted."); and Hembree v. One Thousand Eight Hundred Forty-Seven Dollars, 404 S.C. 241, 249, 743 S.E.2d 864, 868 (Ct. App. 2013) (affirming the dismissal of a counterclaim against the 15th Circuit Solicitor who brought an action on behalf of the Horry County Police Department not SLED against whom the counterclaim was made). In this case, Appellant asserts counterclaims against the same law enforcement officers employed by the Solicitor whose shoes the Solicitor fills in bringing this action.

³ The exhibit was an unexecuted copy of an agreement purporting to be the interagency agreement that created the 15th Circuit Solicitor's Drug Enforcement Unit.

CONCLUSION

For the reasons set forth above, Appellant respectfully requests this Honorable Court reverse the Judgment of the Circuit Court.

Respectfully submitted, this 27th day of April, 2017.

A handwritten signature in cursive script that reads "Erin E. Bailey". The signature is written in black ink and is positioned above a horizontal line.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
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Benjamin H. Culbertson, Circuit Court Judge

Case No. 2017-000639

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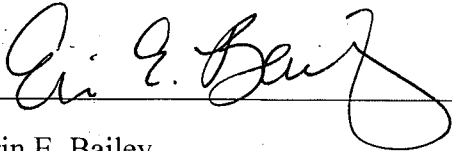
Respondent.

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PROOF OF SERVICE

I certify that I have served the Initial Brief and Designation of Matter on Jimmy A. Richardson, II, Solicitor, Fifteenth Judicial Circuit, by depositing a copy of it in the United States Mail, postage prepaid, on April 27, 2017, addressed to his attorney of record, James R. Battle of BATTLE LAW FIRM, LLC located at P.O. Box 530 Conway, S.C. 29528.

April 27, 2017

By: 

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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, S.C. 29211

Re: Jimmy A. Richardson, II, Solicitor, Fifteenth Judicial Circuit on behalf of the 15th Circuit
Drug Enforcement Unit, Respondent,

v.

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Eleanor J. Carter, Bryon A. Gidney, Kristin J. Milby, Ivan K. Chatman and Steven N.
Mackie, Defendants,

Of whom Stephanie N. Hatten A/k/a Stephanie N. Mackie is the Appellant

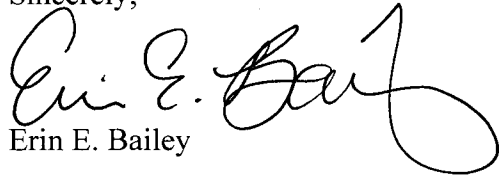
Case Number: 2017-000639

Dear Ms. Kitchings:

Enclosed for filing is Appellant's Initial Brief and Appellant's Initial Designation of Matter to
the Included in the Record on Appeal in the above case along with a Proof of Service.

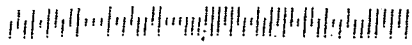
If you have any questions, please do not hesitate to contact me.

Sincerely,

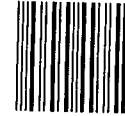

Erin E. Bailey

Enclosures

cc: James Richard Battle, II, Esquire



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