

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Jocelyn Newman, Fifth Judicial Circuit

RECEIVED

Case No: 2016-002503
Civil Action No: 2015-CP-40-2679

SEP 29 2017

SC Court of Appeals

Valeria Farr.....Appellant

v.

Leon Lott in his Capacity as Richland County Sheriff and the Richland
County Sheriff's Department.....Respondents

APPELLANT'S BRIEF

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STATEMENT OF THE CASE

A Summons and Complaint was filed April 29, 2015 alleging negligent on behalf of the Defendants. Defendants filed an Answer June 4, 2015 denying any negligence on their behalf. Defendants filed a Motion for Summary Judgment pursuant to SCRPC 56 on February 17, 2017. A hearing was held October 11, 2016 in which Plaintiff and Defendant provided memorandums and exhibits to the Circuit Court Judge. An Order was issued granting the Defendants Motion for Summary Judgment on November 9, 2016. Plaintiff filed a Notice of Appeal on December 14, 2016.

Facts

May 15, 2013, Valeria Farr was arrested by Richland County deputy Tracy Stephens for minor traffic violations and a simple possession charge.

(R. 81)

While transporting the Plaintiff to the detention center, deputy Stephens acting under color of law, wearing a uniform issued by the Richland County Sheriff, driving a Richland County Sheriff's Department vehicle and armed with a weapon provided by Richland County Sheriff acted violently and aggressively to Ms. Farr, by demanding that Ms. Farr perform various sex acts on herself while he watched. (R. 37; 43; 83; 124) When asked at his deposition whether or not he sexually harassed Ms. Farr so he could brag to his co-workers, he plead the 5th amendment to the U.S. Constitution. (R. 101-102) When asked in his deposition whether his co-workers at the Richland County Sheriff's Department joked about sexual dealings with suspects to create a hostile sexual environment, he testified that he did not remember (R. 101-102) Deputy Stephens had a history of Complaints and allegations of inappropriate, even

criminally violent behavior prior to the incident with Ms. Farr, yet was allowed to continue his employment without additional supervision. (R. 54-76; 92-98)

The Plaintiff has sued Richland County Sheriff Leon Lott and his department for the actions of his agent, deputy Stephens, as well as his retention of deputy Stephens, even though Sheriff Lott knew that deputy Stephens had anger management problems, and was criminally violent towards weaker individuals. (R. 12-17)

ARGUMENT

III. There is Evidence in the Record Supporting a Claim for Negligent Retention.

STANDARD OF REVIEW

Summary judgement is proper when there is no genuine issue of material fact and the moving party is entitled to judgement as a matter of law. *Young v. South Carolina Dep't of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct.App.1999); Rule 56(c), SCRPC. See also *Bruce v. Durney*, 341 S.C. 563, 534 S.E.2d 720 (Ct.App.2000) (motion for summary judgement shall be

granted if pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and moving party is entitled to judgement as matter of law). In determining whether any triable issues of fact exist, as will preclude summary judgement, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the nonmoving party. *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.*, 336 S.C. 53, 518 S.E.2d 301 (Ct.App.1999). If triable issues exist, those issues must be submitted to the jury. *Young, supra*.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000). All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the movant. *Vermeer, supra*. Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgement should be denied. *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 632, 634 S.E.2d 672 (2000). However, when plain, palpable, and indisputable facts exist on which

reasonable minds cannot differ, summary judgment should be granted. *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (Ct. App 1997).

An appellant court reviews the granting of summary judgement under the same standard applied by the trial court pursuant to Rule 56, SCRCP.

Brockbank supra; Wells v. City of Lynchburg, 331 S.C. 296, 501 S.E.2d 746 (Ct.App. 1998).

NEGLIGENT RETENTION

In *Degenhart v. Knights of Columbus*, 309 S.C. 114, 116-17, 420 S.E.2d 495, 496 (1992), the South Carolina Supreme Court quoted with approval section 317 of the *Restatement (Second) of Torts (1965)*. This section provides as follows:

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) The servant

(i) Is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) Is using a chattel of the master, and

(b) The master

(i) Knows or has reason to know that he has the ability to control his servant, and

(ii) Knows or should know of the necessity and opportunity for exercising such control.

Through discovery, the Plaintiff discovered that deputy Stephens had two prior complaints against him in the months prior to his activities towards Ms. Farr, as well as an incident happening the same night that Ms. Farr was assaulted. (R. 54-76; 78-79; 91-90) One of the prior incidents occurred March 5, 2013 and involved Mr. Stephens acting in an aggressive manner, using poor judgment, and poor anger management against a weaker individual (his stepson). The two incidents, prior to the incident with Ms. Farr, were known to Sheriff Lott, and he did nothing to protect the public from deputy Stephens, by either retraining, suspending or firing the deputy. In fact, the March 5, 2013 incident was investigated as a criminal matter. (R. 54-76)

On March 5, 2013 officer Stephens apparently struck his stepson causing him to get a black eye. (R. 54-76) However, unlike every other law enforcement agency in South Carolina, Sheriff Lott conducts his own internal criminal investigations, rather than farm it out to SLED or some other outside agency. (R. 92-98)

Sheriff Lott's employees investigating the crime, felt that there was enough to go forward with the criminal investigation. (R.54-76) In fact, the investigator told the victim that either a judge or the prosecutor would decide whether to prosecute. (R.58) Sheriff Lott apparently saw officer Stephen's defense attorney, Representative Todd Rutherford, and based on his brief conversation with Mr. Rutherford, he decided not to take any further action against deputy Stephens. (R.59)

The Plaintiff has retained an expert witness, James Flowers who has experience investigating against law enforcement officers when he was employed by SLED. (R. 92-98) Mr. Flowers has opined that Sheriff Lott was negligent in his investigation of the prior criminal actions of deputy Stephens, and that deputy Stephens should not have been working at the time of the incident with Valeria Farr as he should have been terminated due to his prior transgressions (R. 92-98)

The Circuit Court Judge incorrectly found that there was no evidence in which a jury could determine that Deputy Stephens was negligently allowed to remain on the job after being accused of violently assaulting another individual only weeks before the incident with Ms. Farr. (R.1-11; 54-76)

The Plaintiff's expert James Flowers states in his affidavit:

The Richland County Sheriff's Department was extremely derelict in their duties. They attempted to perform both a criminal and internal investigation on Stephens. Neither of those investigations resulted in the outcome that was necessary based upon the evidence. The Richland County Sheriff's Department and Sheriff Leon Lott are well known as an agency that investigates their own internal criminal affairs as opposed to calling for outside investigation. Most reasonable and respected law enforcement agencies and Sheriffs, call for outside criminal investigations to internal criminal matters. Tracy Stephens should have been terminated from employment and charged. Had he been terminated and charged, he would not have had the opportunity to commit criminal sexual conduct on Valeria Farr. As a result of this well-known and publicized self-investigation pattern, the Richland County Sheriff's Department and Sheriff Leon Lott were below the standard of care in retaining Stephens and therefore culpable in any actions taken by Deputy Tracy Stephens after this incident.

IV. Deputy Stephens was Operating Within the Scope of Employment and in a Manner Consistent with the Culture Created by Sheriff Lott.

South Carolina Code Ann. section 15-78-70 specifically provides that government employees may be liable in tort actions:

(a) This chapter constitutes the exclusive remedy for any tort committed by an employee of a governmental entity. An employee of a governmental entity who commits a tort while acting within the *scope of his official duty* is not liable therefor except as expressly provided for in subsection (b).

(b) Nothing in this chapter may construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the *scope of his official duties* or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.

Crittenden v. Thompson-Walker Co. Inc. 288 S.C. 112, 341 S.E.2d 385

(Ct.App. 1986) refers to *Jones v. Elbert*, 211 S.C. 553, 34 S.E.2d 796 (1945)

which states: Under the latter test, it is not necessary to find the particular act

creating liability was within the servant's authority. Nor is it necessary that the assault should have been made as a means or for the purpose of performing the work the servant was employed to do. *Carr v. William C. Crowell Co.*, 28 Cal.2d 652, 171 P.2d 5(1946); *Fields v. Sanders*, 29 Cal.2d 834, 180 P.2d 684 (1947). (Crittenden at S.E.2d 387)

“If the servant is doing some act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority.” *Jones v. Elbert*, supra, 211 S.C. at 558, 34 S.E.2d at 798-799, quoting *Cantrell v. Claussen's Bakery*, 172 S.C. 490, 494, 174 S.E. 438, 440 (1934); cf., *Jamison v. [288 S.C. 116] Howard*, supra, (master testified that servant had no authority to make credit sales or to collect business debts). On the other hand, if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, his conduct falls outside the scope of his employment. *Hancock v. Aiken Mills*, 180 S.C. 93, 185 S.E. 188 (1936); *Hyde v. Southern Grocery Stores*, 197 S.C. 263, 15 S.E.2d 353 (1941)(Crittenden at S.E.2d 387) If there is doubt as to whether the servant in injuring a third party was acting at the time within the scope of his employment, the doubt will be resolved against the master, at least to the

extent of requiring the question to be submitted to the jury for determination.

Hyde v. Southern Grocery Stores, supra.

Immunity under the statute is an affirmative defense that must be proved by the defendant at trial. *Tanner v. Florence City-County Bldg. Comm'n*, 333 S.C. 549, 552, 511 S.E.2d 369, 371 (Ct.App.1999).

There is also evidence that Sheriff Lott allowed an inappropriate culture to evolve at the Sheriff's department.

In South Carolina "it is permissible for the fact finder to draw an adverse inference in a civil case against a party involving the fifth amendment privilege against self-incrimination" *Griffen v. Griffen* 332 S.C.630, 506 S.E.2d 526, 532 (Ct. App. 1998).

When Tracy Stephens was asked if people at the sheriff's department joked around about sexual situations and dealings with suspects to create a hostile sexual environment, he answered he did not remember. (R. 101-102) When asked if he sexually harassed Ms. Farr so he could brag to his co-workers, Mr. Stephens plead the Fifth Amendment. (R. 101-102) If Sheriff Lott encouraged or allowed a hostile environment in his department, a jury

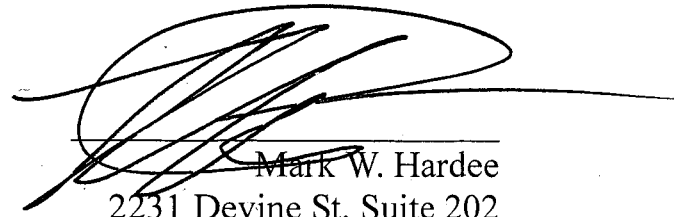
could determine that Deputy Stephens was acting within the scope of his emphasis by sexually harassing Ms. Farr, in order to fit into this environment.

There is more than enough evidence in this case for a jury to find that Sheriff Lott was responsible for deputy Stephens actions and was negligent in his retention of deputy Stephens and training, deputy Stephens, as well as his supervision of deputy Stephens, all of which were the approximate cause of the injuries to Ms. Farr.

CONCLUSION

Based on the above, the order dated November 9, 2016 granting Summary Judgment should be reversed, and this case remanded for trial.

Respectfully submitted,



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September 27, 2017

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CERTIFICATE OF COUNSEL

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The undersigned certified that this Appellant's Brief complies with Rule 211(b), SCACR.



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