THE STATE OF SOUTH CAROLINA
In the 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

RESPONDENT'S FINAL BRIEF

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STATEMENT OF THE CASE

On February 18, 2015, Plaintiff-Appellant filed this action alleging negligence and gross negligence against the North Charleston Police Department and Sgt. Thomas Deckard. On March 30, 2015, all named defendants filed a motion to dismiss asserting that the appellant failed to file his action within the applicable statute of limitations. (Supp. R. 92-94).[1]

On May 7, 2015, the Honorable J.C. Nicholson, Jr., heard arguments on the Motion to Dismiss. (R. 17-40). By Order dated May 14, 2015 Judge Nicholson granted Defendants' Motion to Dismiss. (R. 3-5). Appellant filed a Motion to Reconsider on May 26, 2015. The Motion to Reconsider was heard by the Honorable Diane S. Goodstein on December 2, 2015. (R. 41-67). By Order dated March 2, 2016, the motion to reconsider was denied. (R. 6). Appellant filed his Notice of Appeal on March 28, 2016 as to North Charleston only.

STATEMENT OF THE FACTS

On March 27, 2006, the appellant was arrested and charged with the murder of Antwan Bryant. On April 10, 2006, appellant's attorney requested Rule 5 discovery from the solicitor. As part of the production, the Computer Assisted Dispatch (CAD) Report was produced, documenting that a 911 call was taken and providing some information about the content of the call. The recording of the call was not produced by the solicitor's office.

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[1] Pro se appellant submitted this document as part of the Supplemental Record on Appeal on February 15, 2017, but the same was not paginated. In order to file this final brief, counsel for respondent numbered the two new documents (Complaint and Motion to Dismiss) consecutively with the documents in the original Record on appeal, starting with 88).

On July 14, 2008, appellant's first trial started. It resulted in a hung jury. On January 17, 2009, appellant decided to proceed pro se at trial. The second trial began on February 2, 2009, with the appellant representing himself and attorney Lorelle Proctor sitting with him. During that trial, there was a motion hearing relating to the 911 recording. During the hearing, the solicitor told the court that he had never requested the 911 recording. The solicitor also advised the court that 911 recordings are kept for a certain period of time and then destroyed and that as three years had passed, it was destroyed. On February 6, 2009, appellant was convicted of murder and sentenced to forty (40) years in prison.

Over four (4) years after his conviction, appellant sent a Freedom of Information Act (FOIA) request to the City of North Charleston requesting further information about the 911 recording. In June 2014, appellant received the exact date the recording was destroyed. The tape was destroyed on June 25, 2006, ninety (90) days after it was recorded, which occurs in the normal course for dispatch audio. In February, 2015, appellant filed this civil action, more than six (6) years after learning about the destruction of the 911 recording. Appellant alleges that he did not have complete information about the exact date of destruction of the recording until June 2014. Defendants assert that he was on sufficient notice about the destruction of the recording in February 2009, during his second criminal trial.

STANDARD OF REVIEW

Pursuant to Rule 12 of the Federal Rules of Civil Procedure, failure to state a claim upon which relief can be granted is reason to dismiss a complaint in its entirety. Fed. R. Civ. P. 12(b)(6). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need

detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007). In order to survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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." *Toussaint v. Ham,* 292 S.C. 415, 416, 357 S.E.2d 8, 9 (1987).

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED DEFENDANTS' MOTION TO DISMISS BECAUSE THE APPELLANT MISSED THE APPLICABLE STATUTE OF LIMITATIONS.

"Statutes of limitations are not simply technicalities." *Stokes Craven Holding Corp. v. Robinson*, 787 S.E.2d 485, 490 (S.C. 2016) *citing Kelly v. Logan, Jolley & Smith, L.L.P.*, 383 S.C. 626, 632, 682 S.E.2d 1, 4 (Ct.App.2009). "One purpose of a statute of limitations is to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his or her rights." *Id.* (citations omitted). "Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation." *Id.* "Statutes of limitations are, indeed, fundamental to our judicial system." *Id.* (citation omitted).

"The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Kerr v. Richland Memorial Hosp.*, 678 S.E.2d 809, 811, 383 S.C. 146,

149 (S.C. 2009); *citing Mid-State Auto Auction of Lexington, Inc. v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996) (*citation omitted*). The General Assembly has stated its intent in the Tort Claims Act through §15-78-200, which provides:

> Notwithstanding any provision of law, this chapter, the "South Carolina Tort Claims Act", is the exclusive and sole remedy for any tort committed by an employee of a governmental entity while acting within the scope of the employee's official duty. The provisions of this chapter establish limitations on and exemptions to the liability of the governmental entity and must be liberally construed in favor of limiting the liability of the governmental entity.

S.C. CODE ANN§15-78-200.

The statute of limitations for a claim related to the tort of a governmental employee is also established by the Tort Claims Act – "any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered." S.C. CODE ANN. § 15-78-110. In this case, the appellant was on notice of the existence of a 911 recording as early as 2006 when his attorney received the Computer Automated Dispatch (CSD) Report, and most certainly in February, 2009, when he and his attorney addressed the court in his second criminal trial, regarding the recording.

> MS. PROCTOR: We had tried three years ago to find the dispatch tape. We never were able to get the 911 tape, and I don't believe the solicitor's office ever had the 911 tape either. All we have are the writings of what was on – . . . . what was said during the dispatch, saying a female said the door was kicked in.
>
> R. 83, lines 10-17

The appellant's criminal attorney admitted to the court that she had known there was a

recording since 2006. Apparently, there was no mention of the recording during the first trial. During the February 2009 trial, it came to light that although it had been made, as evidenced by the CAD, the recording was no longer in existence.

> MR. WETMORE: I have never heard a 911 tape. I know they're kept for a certain period of time and then they're destroyed. It's all digital, to my understanding, and certainly three years have passed. I don't know if it's there or not, but I don't have it.
>
> THE COURT: Have you checked with North Charleston to see if they have it?
>
> MR. WETMORE: I have not asked for it, nor have I subpoenad, no, sir.
>
> (R. 84, lines 1-9)

The facts and circumstances were sufficient to place a reasonable person on notice that a claim might exist, whether or not he comprehended the full extent of the damage. *Dean v. Ruscon Corp.*, 321 S.C. 360 (1996). Therefore, the statute of limitations for any civil action begins to run, at the latest, from February, 2009 and expired in February 2011. This action was filed in February 2015, four years after the statute of limitations expired. (R. 7).

II. S.C. CODE ANN. §15-78-70(B) IS NOT APPLICABLE TO THE APPELLANT'S CLAIMS AGAINST NORTH CHARLESTON.

Appellant asserts that SC Code Ann. §15-78-70(b) renders the statute of limitations contained in the South Carolina Tort Claims Act, inapplicable. This is not correct. Although appellant makes vague allegations of intrinsic and extrinsic fraud in his brief, there is no evidence that anyone at either the North Charleston Police Department or the North

Charleston Dispatch ever received any request for the recording of the 911 call, and no evidence that the recording was destroyed for any reason other than being recorded over in the normal course. The on the record discussion between counsel and the court shows that the recording was never requested from North Charleston by the Solicitor's Office. (R. 84, lines 8-9). The appellant, in his complaint, has not alleged any facts that would support a claim for any type of fraud by the defendants. Therefore the applicable statute of limitations is two (2) years, though the appellant has missed the three (3) year statute of limitations for tort claims against non-governmental entities as well.

III. WHETHER THE KNOWLEDGE THAT THE 911 TAPE NO LONGER EXISTED IN 2009 PROVIDED THE APPELLANT WITH THE OPPORTUNITY TO EXERCISE REASONABLE DILIGENCE TO DISCOVER WHETHER HE HAD A CAUSE OF ACTION.

Inmate McCoy takes the position that there is some distinction between the words "exist" and "destroyed" such that he was not on notice about the status of the 911 tape. This is disingenuous at best. McCoy admits that he and his criminal attorney, Ms. Proctor received a summary of the 911 call before his first trial. That is when they had actual knowledge that there was a recording. This occurred in April, 2006. (R. 32, lines 8-22). The recording was recorded over in the normal course on or about June 25, 2006. The appellant asserts that his attorney sent a Brady Motion to the solicitor in April, 2006, but there is no evidence that the requests in the Brady Motion were ever sent from the solicitor's office to the North Charleston Police Department or the Dispatch Center. There is no evidence that North Charleston had any notice of the request before the recording was recorded over. Assistant

Solicitor Wetmore acknowledge in February, 2009 "I have not asked for it, nor have I subpoenad, no, sir. (R. 84, lines 8-9). The appellant acknowledged during his argument on the motion to reconsider that Burns Wetmore told the court in 2009 that "He never checked for a tape." (R. 60, lines 15-16). If assistant solicitor Wetmore never checked for a tape, North Charleston would not have been on notice that the recording needed to be maintained.

The appellant's argument during the motion to reconsider was that he could not bring a claim about something that never existed, and he did not find out it was destroyed until much later. However, during the hearing in 2009, the appellant knew the tape had existed at one point, because (1) he had the Computer Automated Dispatch (CAD) report, which details the technical aspects of the 911 call, received in 2006; (2) Lorelle Proctor told the court that she had requested it, been told it was coming, and then there was a delay and by the time she realized she did not have it, it had been recorded over in the normal course; (3) the appellant and his attorney intended to call the dispatcher who had handled the call to testify about it; and (4) the solicitor told the court that the normal process is to only keep the recordings for a short period of time before they are destroyed by being recorded over in the normal course. This is all information that put the appellant and his attorney on notice, in 2009, to do further investigation to see what had happened to the recording. A reasonable person would have been on notice to do further investigation to find out when and how the recording stopped existing. (R. 55, lines 7-8).

To the extent that the appellant asserts that he did investigate to find out what happened with the recording, it was also untimely. Appellant did not send his initial Freedom of Information Act request until four (4) years after the re-trial had concluded (September

2013). (Supp. R. 89, ¶6).[2] According to the discovery rule, the statute of limitations 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. *Johnston v. Bowen,* 313 S.C. 61, 437 S.E.2d 45 (1993). *Burgess v. Am. Cancer Soc'y, S.C. Div., Inc.,* 300 S.C. 182, 186, 386 S.E.2d 798, 800 (Ct.App.1989); see S.C. Code Ann. § 5-3–535 (2005) The courts 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. *Snell v. Columbia Gun Exchange, Inc.,* 276 S.C. 301, 278 S.E.2d 333 (1981). Moreover, the fact that the injured party may not comprehend the full extent of the damage is immaterial. *Dillon County School Dist. No. Two v. Lewis Sheet Metal Works, Inc.,* 286 S.C. 207, 332 S.E.2d 555 (Ct.App.1985), *cert. granted,* 287 S.C. 234, 337 S.E.2d 697 (1985), *cert. dismissed,* 288 S.C. 468, 343 S.E.2d 613 (1986). The phrases "with some promptness" and "claim against another party might exist" are very important.

The appellant did not act with any promptness, waiting more than four (4) years before inquiring about the recording that he was clearly made aware of during the second trial in 2009. The appellant has put forth no reason for this delay and has provided no basis under which the statute of limitations would have been tolled.

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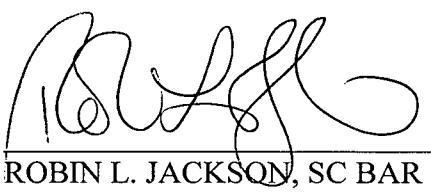
Therefore, the appellant's argument that there is some distinction between "exist" and "destroyed" is semantics and does not change the fact that he was on notice of the existence of the recording as early as April 2006, and most clearly in February 2009. The civil action in this case was not filed until February 18, 2015, more than six (6) years after discovery and four (4) years after the expiration of the statute of limitations under the South Carolina Tort Claims Act.

CONCLUSION

For the reasons stated, Respondent respectfully requests that this court affirm the trial court's grant of the Motion to Dismiss to Respondent and dismiss this action.

Respectfully submitted,



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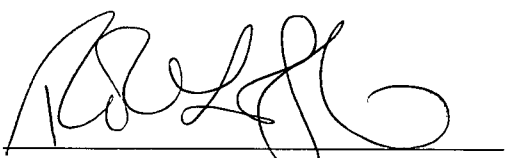
CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211 (b) of the South Carolina Appellate Court Rules.

Respectfully submitted,



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