

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas
William H. Seals, Jr., Circuit Court Judge

Civil Action No. 2016-CP-28-00583
Appellate Case No. 2017-002514

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MAY 14 2018

SC Court of Appeals

James Teal,.....Appellant,

v.

Edwards Telecommunication, Inc. and Leroy Smith, Director of Dep't of Public Safety, Defendants,

Of which Leroy Smith, Director of Dep't of Public Safety is the Respondent.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE CIRCUIT COURT CORRECTLY DISMISSED APPELLANT'S AMENDED PLEADINGS BASED UPON THE STATUTES OF LIMITATIONS AND FOR FAILURE TO STATE A CLAIM.
2. WHETHER APPELLANT HAS ABANDONED HIS APPEAL.

STATEMENT OF THE CASE

Appellant, *pro se*, commenced this civil action by filing a Summons and Complaint on June 29, 2016. (Summons and Complaint, filed June 29, 2016) In his initial Complaint, Appellant alleged that a vehicle operated by Edwards Telecommunication, Inc., was illegally parked, with its bumper projecting into Appellant's lane. Appellant asserted that Edwards Telecommunication, Inc., was at fault and responsible for an accident that occurred. Appellant alleged that he suffered property damage and personal injuries to his left knee, right hip, and neck. *Id.*

Appellant, through counsel, filed an Amended Complaint (hereinafter referred to as Amended Complaint #1) on January 23, 2017. (Amended Complaint, filed January 23, 2017) Amended Complaint #1 clarified the date of the accident as September 11, 2014, and asserted a cause of action for negligence against Edwards Telecommunications, Inc., for improper parking and failure to provide warning devices. Appellant alleged that he suffered bodily injury and property damage. *Id.*

Thereafter, on August 7, 2017, Appellant, *pro se*, filed an "Amended Service Complaint for 2nd & 3rd Party" (hereinafter referred to as Amended Complaint #2). (Amended Service Complaint for 2nd & 3rd Party, filed August 7, 2017). This pleading, for the first time, named Leroy Smith, Director of Department of Public Safety, as a defendant. In this pleading, Appellant alleged that "the [highway] patrol arrived late at the accident scene and was not

present to safe guard [sic] . . . Plaintiff from damages.” *Id.* Appellant alleged that a vehicle operated by Edwards Telecommunications, Inc.,¹ was illegally parked with its rear bumper projecting into Appellant’s lane. Appellant also alleged that Respondent improperly found Appellant at fault for the accident. In addition, Appellant alleged that Respondent violated an OSHA regulation, failed to respond to a certified letter about the investigation of the accident, and did not honor a Freedom of Information Act (FOIA) request. Appellant claimed injuries to his right hip, left knee, and neck as a result of the collision with Edwards Telecommunications, Inc. *Id.*

On October 2, 2017, Respondent filed a motion to strike Amended Complaint #2 on the grounds that Appellant had not obtained leave of court prior to filing and serving the pleading. (Motion to Strike, filed October 2, 2017) Respondent’s motion also sought a dismissal on the basis of the statute of limitations, and on the grounds that the pleading failed to state a claim and was barred by certain exceptions to the State’s waiver of immunity. *Id.* As to the FOIA claim, Respondent attached an affidavit establishing that it had responded to Appellant’s FOIA requests no later than March 26, 2015, and that Respondent had not received any FOIA requests from Appellant after April 12, 2015. *Id.*

On September 21, 2017, Appellant filed a pleading entitled “2nd Amended Service Complaint” (hereinafter referred to as Amended Complaint #3). (2nd Amended Service Complaint, filed September 21, 2017) On that same date, the circuit court entered an order granting Appellant leave to amend the Complaint to add a defendant. (Order filed September 21, 2017)

¹ In this pleading, Appellant refers to Edwards Telecommunications, Inc., as “2nd party Defendant” and Respondent as “3rd party Defendant.”

Amended Complaint #3 was very similar in many respects to Amended Complaint #1. But, in addition to the cause of action for negligence against Edwards Telecommunications, Inc., Appellant asserted a cause of action for “Contributory Negligence” against Respondent. *Id.* Appellant alleged that Respondent was negligent in the following particulars: by arriving to the work zone late; in its investigation of the accident; and, in not reporting the accident to OSHA. Appellant also asserts that “Vidio [sic] by FOIA details the after-effect of [the] accident.” *Id.*

Respondent filed a motion to dismiss Amended Complaint #3 on October 4, 2017. (Motion to Dismiss, filed October 4, 2017) Respondent argued that the action had not been properly commenced within the statute of limitations, and that the pleading did not state a claim and was barred by the Tort Claims Act. *Id.*

The circuit court held a hearing on Respondent’s motions on October 24, 2017. (Transcript) The circuit court issued an order on November 16, 2017, dismissing Amended Complaint #2 and Amended Complaint #3. (Order filed November 16, 2017)

This appeal followed by Appellant filing a Notice of Appeal on or about December 5, 2017.

STANDARD OF REVIEW

A motion to strike pursuant to Rule 12(f), SCRCP, “seeks to have stricken from a pleading ‘any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.’” *Alladin Plastics, Inc. v. Wintenna, Inc.*, 301 S.C. 90, 390 S.E.2d 370 (Ct. App. 1990), (quoting Rule 12(f), SCRCP). “In ruling on such a motion, a Court decides whether a party should be allowed to plead a defense or other matter, not whether there are facts supporting what has been pleaded.” *Id.*

The matter of striking from a pleading is largely within the discretion of the court and the grant of a motion to strike will not be reversed except for an abuse of discretion or an error of law. *Robinson v. Code*, 384 S.C. 582, 682 S.E.2d 495 (Ct. App. 2009).

A Rule 12(b)(6) motion must be based solely upon the allegations set forth on the face of the complaint. *Brown v. Leverette*, 291 S.C. 364, 353 S.E.2d 697 (1987). Viewing the evidence in the light most favorable to the plaintiff, the motion must be granted if the facts alleged in the pleading and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case. *Id.*

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DISMISSED THE AMENDED COMPLAINT #2 BECAUSE PLAINTIFF HAD NOT OBTAINED LEAVE OF COURT PRIOR TO FILING THE PLEADING.²

The circuit court granted Respondent's motion to strike Amended Complaint #2. (Order, filed November 16, 2017) Appellant does not appear to argue that the circuit court erred in striking Complaint #2. Instead, Appellant admits error on his part in failing to follow court procedure. Appellant inquires in his brief whether the re-filing of Amended Complaint #3 on September 21, 2017, after being granted leave of court, would bring the case back on track.

Appellant has abandoned the issue of the dismissal of Amended Complaint #2, and appears to concede that the filing of Amended Complaint #3 would make that the operative pleading in this matter.

² Respondent's argument on this issue is in response to Appellant's Argument #3 ("Appellant's Court Procedure Error).

Turning very briefly to the merits, the circuit court was correct in striking Amended Complaint #2 on the grounds that Appellant had not obtained leave of court prior to filing the pleading. (Order, filed November 16, 2017) Rule 15(a), SCRCP, provides that once a defendant has filed a responsive pleading, plaintiff may amend his complaint only with leave of court or by written consent of the defendant. *Stanley v. Kirkpatrick*, 357 S.C. 169, 592 S.E.2d 296 (2004). Appellant admits he had not obtained leave of court, as required by Rule 15, SCRCP, prior to filing Amended Complaint #2, and there is no evidence that Plaintiff obtained consent of the adverse party. Therefore, the circuit court did not err in striking Amended Complaint #2.

In any event, the dismissal of Amended Complaint #2 was harmless given that Appellant was granted leave to file Amended Complaint #3.

II. THE CIRCUIT COURT CORRECTLY FOUND THAT APPELLANT'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS.³

Appellant argues that the circuit court erred by finding his tort claim was barred by the statute of limitations. Appellant first states that the discovery of his injury was October 5, 2015. But in the same breath, Appellant states that the injury to his left knee "accelerated after 2014" and that the "accident on 09-11-14 has left Appellant with total knee damage and right hip damage."

Amended Complaint #1, filed by counsel, states that Appellant suffered bodily injury as a direct result of the collision on September 11, 2014. (Am. Compl., filed January 23, 2017) Amended Complaint #3 is identical in this respect. (Am. Compl., filed September 21, 2017)

The statute of limitations for tort claims against a governmental entity is two years. *See* S.C. Code Ann. §15-78-110 (stating that any action brought pursuant to the Tort Claims Act is

³ Respondent's argument on this issue is in response to Appellant's Arguments #1, #2, #7, and #8.

forever barred unless the action is commenced within two years after the date the loss was or should have been discovered). “The discovery rule is applicable to actions brought under the Tort Claims Act.” *Young v. South Carolina Dep’t of Corrections*, 333 S.C. 714, 511 S.E.2d 413 (Ct. App. 1999). “According to the discovery rule, the statute of limitations begins to run from the date the injury resulting from the wrongful conduct either is discovered or may have been discovered by the exercise of reasonable diligence.” *Logan v. Cherokee Landscaping and Grading Co.*, 389 S.C. 611, 698 S.E.2d 879 (Ct. App. 2010). “[W]hether the particular plaintiff knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.” *Young*, 333 S.C. at 719, 511 S.E.2d at 416.

The statute of limitations for a claim for injuries arising out of a motor vehicle accident begins to run on the date of the accident. *Wiggins v. Edwards*, 314 S.C. 126, 442 S.E.2d 169 (1994). In *Wiggins*, the plaintiff argued that the statute should not run until she was able to investigate her claim, discover a cause of action existed, and determine who caused her injuries. *Id.*, 314 S.C. at 128, 442 S.E.2d at 170. The Court of Appeals, applying the discovery rule, held that the statute of limitations began to run on the date of the accident. *Id.* (stating the important date under the discovery rule is the date the plaintiff discovers the injury, not the date of discovery of the identity of another wrongdoer).

Here, the collision occurred on September 11, 2014, and Appellant alleges that he suffered bodily injury as a direct result of the collision. (Am. Compl., filed September 21, 2017) Therefore, Appellant was required to commence this action against Respondent on or before

September 11, 2016. Plaintiff did not attempt to assert any claim against Respondent until August 7, 2017, the date of filing of Amended Complaint #2.

Appellant now attempts to argue for the first time that he suffered a “progressive” injury to his left knee and that he did not discover his “total injury” until October 5, 2015.⁴ However, this argument is of no avail to Appellant. *See Wiggins v. Edwards, supra*.

Appellant also appears to argue that the statute of limitations should be tolled for a handicap or disability. Appellant cites S.C. Code Ann. §15-3-60. This issue is without merit. Section 15-3-60 addresses the tolling of the statute of limitations in the event a claimant has “two or more disabilities.” The “disabilities” referred to in this section are those set forth in section 15-3-40: infancy or insanity. *See* S.C. Code Ann. §15-3-40 (stating that if a party is either a minor or insane at the time the cause of action accrued, the time of such disability is not a part of the time limited for the commencement of the action). Sections 15-3-40 or -60 have nothing to do with whether a party previously suffered from a physical disability, such as an earlier injury. *Wiggins, supra*, also addresses the tolling issue raised by Appellant and explains that section 15-3-40 provides for tolling only in the limited situations of age of minority, or insanity. *Wiggins*, 314 S.C. at 129, 442 S.E.2d at 170. The statute does not include a tolling provision for a physical disability. *Id.* at 129, 442 S.E.2d at 171. Therefore, the statute of limitations should not have been tolled based on Plaintiff’s claim of a disability, and the circuit court correctly found that the pleadings should be dismissed.

Appellant also argues an “Issue of FOIA” and an “Issue of Affidavit”. These arguments arise from Appellant’s claims, respectively, in Amended Complaint #2 and Amended Complaint

⁴ Issues raised for the first time on appeal should not be considered by the appellate court. *See Lucas v. Rawl Family Ltd. Partnership*, 359 S.C. 505, 598 S.E.2d 712 (2004) (stating that the first step in preserving an issue for appellate review is to actually raise it to the lower court).

3, that Respondent did not honor Appellant's FOIA request, and that video by FOIA was negligent. Respondent filed an affidavit in support of its motion for dismissal of the FOIA claim. (Motion to Strike, filed October 2, 2017)

The circuit court correctly analyzed the FOIA claim by finding that the affidavit provided undisputed evidence that the FOIA claim was barred by the statute of limitations. (Order, filed November 16, 2017) *See* S.C. Code Ann. §30-4-100 (stating an application to enforce the provisions of the Freedom of Information Act must be made no later than one year after the date of the alleged violation). It is undisputed that the alleged FOIA violations occurred no later than April 12, 2015. (Affidavit attached to Motion to Strike)

In any event, Appellant's FOIA claim is without merit, and has been abandoned on appeal. *See First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994). Appellant "argues" in his brief that he is disenchanted with the state, and that "this dep't" needs to be investigated. However, Appellant does not include any argument as to why the circuit court erred. Despite his protestation, Appellant admits that he received a video.

The circuit court correctly found that the statute of limitations barred Appellant's claims against Respondent.

III. THE CIRCUIT COURT CORRECTLY DISMISSED APPELLANT'S CLAIMS BECAUSE THEY FAILED TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION AND BECAUSE THEY ARE BARRED BY THE TORT CLAIMS ACT.⁵

⁵ Respondent's arguments in this section are in response to Appellant's Arguments #4, #5, #6, and #9.

In addition to finding the statute of limitations barred Amended Complaint #3, the circuit court correctly found that Amended Complaint #3 failed to state a claim and that certain exceptions to the state's waiver of immunity barred the suit. (Order, filed November 16, 2017)

Plaintiff's Amended Complaint #3 alleges that Respondent arrived to the work zone after the accident had occurred, negligently investigated the accident, and failed to report the accident to OSHA. (Am. Complaint #3) On appeal, Appellant admits Respondent was not on the scene at the time of the accident.

In a negligence action, the plaintiff must prove (1) a duty on the part of the defendant; (2) a breach of that duty by an act of omission or commission; and (3) that such breach of duty was the proximate cause of the plaintiff's injuries. *Thomasko v. Poole*, 349 S.C. 7, 561 S.E.2d 597 (2002).

Plaintiff's allegations do not state a claim for negligence. Appellant alleges that Respondent was not on the scene at the time of the accident. Appellant does not allege that Respondent had a duty to be at the scene of the accident prior to the accident, or how Respondent breached any alleged duty. Appellant does not allege any facts to explain how Respondent's after-the-fact investigation of the accident scene proximately caused Appellant's damages. Even in the light most favorable to the Plaintiff, Amended Complaint #3 alleges nothing more than that a third party committed a traffic or safety violation that caused an accident. Therefore, circuit court correctly found that Appellant's Amended Complaint #3 failed to state a cause of action. (Order, filed November 16, 2017)

Likewise, the circuit court correctly found that numerous exceptions to the state's waiver of immunity would require dismissal of this action. To the extent Appellant's pleading asserts that Respondent failed to enforce laws, failed to provide police protection, or failed to inspect or

made an inadequate investigation, such claims would be barred by the South Carolina Tort Claims Act.

A tort claim against a governmental entity is governed by the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-10 *et seq.*, which is the exclusive remedy for any tort committed by an employee of a governmental entity. S.C. Code Ann. §15-78-70(a). The provisions of the Tort Claims Act must be liberally construed in favor of limiting liability. S.C. Code Ann. §15-78-20(f); *Adkins v. Varn*, 312 S.C. 188, 439 S.E.2d 822 (1993). The Tort Claims Act waives immunity for the sovereign, subject to a number of exemptions from liability which are set out in S.C. Code Ann. §15-78-60.

The exceptions applicable to the allegations of Amended Complaint #3 are found in subsections (4), (6), and (13) of section 15-78-60. These subsections provide that a governmental entity is not liable for a loss resulting from: a failure to enforce any law; a failure to provide police protection; or a negligent inspection to determine compliance with any law.

Appellant alleges that a third party parked improperly on the side of the road and failed to provide proper warning devices. (Am. Compl. #3) Respondent is not liable for failing to provide police protection from this condition created by a third party. Likewise, Respondent is not liable for failing to enforce traffic laws, even assuming Respondent had been on the scene earlier to notice the alleged traffic violation by the third party. In addition, Respondent cannot be liable for Appellant's injuries for a negligent investigation undertaken after the accident had occurred.

Appellant also argues there is an "Issue of OSHA." This issue was addressed correctly by the circuit court. Appellant argues that this accident should have been reported to OSHA, presumably by Respondent. Appellant does not explain how any failure to report this accident to OSHA proximately caused his alleged damages. As the circuit court found, the accident-

reporting regulation cited by Plaintiff in Amended Complaint #3, S.C. Code Ann. Regs. 71-339, applies only to an employer's responsibility for reporting work-related injuries. (Order) See S.C. Code Ann. Regs. 71-300 (stating the purpose of this subarticle is to require employers to record and report work-related injuries). This OSHA regulation has no applicability to the facts alleged by Appellant.

For the reasons stated herein, the circuit court correctly dismissed Appellant's claims.

IV. THE CIRCUIT COURT'S ORDER SHOULD BE AFFIRMED BECAUSE APPELLANT HAS ABANDONED HIS ISSUES ON APPEAL.

Many, if not all, of Appellant's arguments have been abandoned on appeal and should not be considered by the Court of Appeals. Appellant's entire Argument consists of approximately 2 pages of type-written material encompassing 9 separate arguments.

This Court's rules require each argument to be "followed by discussion and citations of authority." Rule 208(b)(1)(D), SCACR. Appellant's brief is devoid of any real discussion of the facts and application of the law to such facts.

Our courts have long held that issues are deemed abandoned where an appellant's arguments are short and conclusory and do not include supporting authority. For example, a half-page argument has been held to be an abandonment of an issue. See *Transportation Ins. Co. and Flagstar Corp. v. South Carolina Second Injury Fund*, 389 S.C. 422, 699 S.E.2d 687 (2010), citing *First Sav. Bank v. McLean*, 314 S.C. 361, 444 S.E.2d 513 (1994) (finding an issue deemed abandoned where appellant failed to provide arguments or supporting authority for assertion) and *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 584 S.E.2d 390 (Ct. App. 2003) ("[S]hort, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review.").

Appellant's brief is a prime example of issues that have been abandoned on appeal. Appellant's arguments are too short for any court to discern an argument. Appellant's arguments should be deemed abandoned on appeal.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the circuit court's order dismissing Appellant's claims should be affirmed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

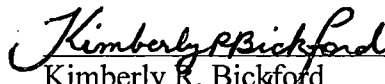
I do hereby certify that I caused to be served the RESPONDENT'S INITIAL BRIEF and RESPONDENT'S DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL upon the below-named party by depositing a copy of the same in the U.S. Mail, first class postage prepaid, and addressed as follows:

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SC Court of Appeals

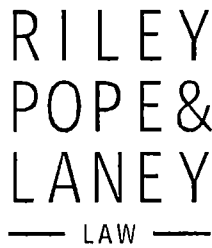


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SC Court of Appeals

VIA HAND-DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: James Teal, Appellant v. Edwards Telecommunication, Inc. and Leroy Smith, Director of
Dep't of Public Safety, Defendants, Of which Leroy Smith, Director of Dep't of Public
Safety is the Respondent
Civil Action No.: 2016-CP-28-00583
Appellate Case No.: 2017-002514
Our File No.: 5021.01117

Dear Ms. Kitchings:

Please find enclosed the original and one copy of the Respondent's Initial Brief and
Respondent's Designation of Matter to be Included in the Record on Appeal, with Certificate of
Service in the above-referenced matter. Please file the enclosed documents and return a filed
copy with my runner.

Please contact me if you have any questions or comments concerning this correspondence
or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter M. Balthazor", written over a horizontal line.

Peter M. Balthazor

PMB/krb

Enclosures

Cc: James Teal, *Pro Se*