

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from Berkeley County
Court of Common Pleas

Roger M. Young, Circuit Court Judge

Case No. 2010-CP-08-4453

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SC Court of Appeals

L.G. Elrod,

Appellant,

v.

Berkeley County Sheriff's Department, and
H. Wayne DeWitt,

Respondents.

Final Brief of Respondents

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STATEMENT OF THE ISSUES ON APPEAL

The Respondent would restate the issues on appeal as:

Did the trial court properly grant summary judgment to the Defendants on the ground that the claims are barred by the applicable statute of limitation because the Plaintiff did not commence his action until more than two years after the events in issue?

- I. Does the two-year statute of limitations found in the S.C. Tort Claims Act, S.C. Code Ann. § 15-78-110, or the three-year statute of limitations found in § 15-3-540(1) apply to the causes of action as asserted against the Berkeley Sheriff's Department and the County Sheriff in his official capacity?
- II. Is there any evidence that the Sheriff and his deputies were acting outside the scope and course of their official duties?

STATEMENT OF THE CASE

The Plaintiff, L.G. Elrod, filed a pro se complaint on December 16, 2010, asserting causes of action for false imprisonment and unlawful detention- abuse of process against Berkeley County, the Berkeley County Sheriff's Department, and the Berkeley County Sheriff, H. Wayne Dewitt. The events which form the basis of his claims occurred on January 10, 2008, and January 15, 2008. As alleged in the complaint, the Berkeley County Sheriff's Department sent two squad cars and deputies to Mr. Elrod's property on those dates to restrain him from interfering with workers from Comcast Cable while they worked on their equipment which was located on his property. [ROA 14; Complaint.]

The Defendants filed a Rule 12(b)(6) motion to dismiss on the ground that the action was barred by the S.C. Tort Claims Act two-year statute of limitations, S.C. Code Ann. § 15-78-110. [ROA 17; Motion, filed January 11, 2011.] The Plaintiff argued that the applicable statute of limitations is three years under S.C. Code Ann. §15-3-540. The trial court granted the motion to dismiss the claims against Defendant Berkeley County as barred by §15-78-110, but denied the motion as to the Sheriff and his Department. [ROA 2; Judge Jefferson's Order, filed June 16, 2011.] The trial court reasoned that "if the sheriff was acting in an official capacity and his actions were within the scope of his duties, he would be subject to the two (2) year statute of limitations from the date of discovery of loss as provided in Section 15-78-110 rather than the (3) year statute of limitations period provided in Section 15-3-540," and found that "the allegations of the complaint give rise to competing inferences on the question of material fact of whether

the Sheriff and his deputies were acting in their official capacity and whether their actions were within the scope of their duties.” [ROA 5; Order, p. 4.] The Sheriff and his Department filed a motion to reconsider which was denied. [ROA 19; Motion filed June 22, 2011. ROA 7; Order, filed June 30, 2011.]

Thereafter, the Defendants Sheriff and his Department filed a Motion for Judgment on the Pleadings, Rule 12(c), SCRCPC, based on the allegation of the complaint that “defendant H. Wayne Dewitt, (hereinafter defendant) is a citizen and resident of Berkeley County, South Carolina and at all times mentioned herein was the Sheriff employed by the defendant, Berkeley County Sheriff, who was acting within the scope and course of his employment and under color of state law.” [ROA 24; Motion, filed October 28, 2011.] When the Plaintiff sought to present matters outside the pleadings, the Defendants moved to convert the motion to a motion for summary judgment, and the trial court granted a continuance to allow the parties time to present other materials. [See ROA 9; Order filed May 21, 2012 n. 1. ROA 31-33; May 9, 2012 Tr. 4:24 – 6:10.] Thereafter, the Plaintiff obtained legal counsel, and the motion was heard by Judge Roger M. Young on May 9, 2012, at which time, both parties presented various evidence including the affidavits of Plaintiff and his son, and the Sheriff and his deputies with the official incident reports. The trial court granted the motion, ruling that the two-year statute, §15-78-110, applied because there was no evidence that the Respondents were acting outside the scope of their official duties. [ROA 9; Order, filed May 21, 2012.]

The Plaintiff timely served a notice of appeal from the order.

STATEMENT OF THE FACTS

By affidavit, the Plaintiff testifies that in 1991, he entered into an agreement with Storer Cable whereby Mr. Elrod agreed to allow the cable company to place a box on his property in Goose Creek to provide service to its customers in the area and in exchange Mr. Elrod was to provide him with free television service. Thereafter, when Comcast bought Storer Cable, they continued to provide Mr. Elrod television for the use of his property. However, in December 2007, difficulties arose between Comcast and Mr. Elrod, when some of his channels were cut off. [ROA 59; Elrod Affidavit.]

When Comcast refused to continue providing Mr. Elrod with free television service, he posted a “no trespassing” sign by the cable company’s pole and turned off the box (which left the Company’s customers without cable, internet, and phone service including 911 service.)¹ Later that day – January 10, 2008, Comcast arrived to access the property but Mr. Elrod told them they could not come on his property without a court order. Mr. Elrod also called the Berkeley County Sheriff’s Department and requested that a deputy come out to advise Comcast that they would need a court order. Deputy Randal Timmons came out and asked Mr. Elrod to let the cable company on the property, but he refused and the cable workers left. However, later that same day – January 10, 2008, the cable workers returned accompanied by two squad cars and several deputies at which point a confrontation occurred between Mr. Elrod and the Deputy. According to Mr. Elrod’s story, he was told that the Sheriff’s Department would lock him up if he interfered. Mr. Elrod contacted the Sheriff personally and asked why his deputies were

¹ ROA 52; Incident Report, 01/10/2008 20:58.

sent to restrain him on a civil matter without a court order, to which the Sheriff told him that the cable customers with phone service could not access the 911 service. On January 14, 2008, Mr. Elrod had his attorney fax Comcast a notice to cease and desist from any further trespass, and the next day Mr. Elrod turned off the service again. On January 15, 2008, Comcast returned to property to restore service and place a lock on their box at which time they were again accompanied by Sheriff's deputies.

Deputy Timmons testifies by his affidavit that he was dispatched to Mr. Elrod's property on January 10, 2008, at approximately noon in response to a call from Mr. Elrod himself about his not wanting Comcast employees on his property. Restoring the cable service was a high importance because numerous households were left with no access to emergency services through 9-1-1. However, Mr. Elrod was so belligerent and threatened problems that the Deputy convinced the cable workers to come back at a later time. [ROA 43, 46; Timmons Affidavit, Incident Report 01/10/2008 10:00.]

Deputy McElvogue testifies by his affidavit that he was dispatched on January 10, 2008, at approximately 9:00 pm to Mr. Elrod's property to meet with a representative of Comcast to provide as an escort while the cable workers restored service to their equipment because of concerns that Mr. Elrod had threatened cable workers earlier in the day. Mr. Elrod confronted the cable workers and the Deputy when they returned, and while they restored service, he declared that he would disable it again when they left. The Deputy advised Mr. Elrod that he could face criminal charges if he vandalized the cable box again. [ROA 50, 52; McElvogue Affidavit, Incident Report 01/10/2008 20:58.]

Five days later, Deputy Timmons and two other officers from the Sheriff's Department responded to Mr. Elrod's property at the request of Comcast while the cable

workers placed a lock on their server box disconnect so that he could not disable it again. [ROA 43; Timmons Affidavit.] When Comcast completed their work, the Deputy advised Mr. Elrod not to touch the cable equipment. [ROA 49; Incident Report 01/15/2008 14:30.]

Sheriff DeWitt testifies by his affidavit that he and his deputies who interacted with Mr. Elrod on January 10 and 15, 2008, were all acting in the scope of their official duties. [ROA 64; Sheriff Affidavit, filed 5/4/12.] In addition, each of the Deputies testifies that they were acting as employees of the Sheriff's Department in the scope of their official duties when they interacted with Mr. Elrod. [ROA43, 50; Timmons Affidavit, McElvogue Affidavit.]

ARGUMENT

THE CLAIMS AS STATED AGAINST THE SHERIFF AND HIS DEPARTMENT ARE BARRED BY THE APPLICABLE TWO-YEAR STATUTE OF LIMITATIONS.

The Applicable Statutes

The S.C. Tort Claims Act, S.C. Code Ann. §§15-78-10 et seq. provides a limited waiver of immunity and the exclusive remedy for governmental entities and their agents, while acting within the scope of official duty:

The General Assembly in this chapter intends to grant the State, its political subdivisions, and employees, ***while acting within the scope of official duty***, immunity from liability and suit for any tort except as waived by this chapter. The General Assembly additionally intends to provide for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty, only to the extent provided herein. All other immunities applicable to a governmental entity, its employees, and agents are expressly preserved. The remedy provided by this chapter is the exclusive civil remedy available for any tort

committed by a governmental entity, its employees, or its agents except as provided in § 15-78-70(b).

S.C. Code Ann. § 15-78-20 (emphasis added).

As defined in the Act” “Scope of official duty” or “scope of state employment” means (1) acting in and about the official business of a governmental entity and (2) performing official duties. S.C. Code Ann. § 15-78-30(i).

Under § 15-78-70(b), government employees can be sued personally if they act outside the scope of their official duties:

(b) Nothing in this chapter may be 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. (Emphasis added.)

The corresponding provision of § 15-78-60(17) provides that:

The governmental entity is not liable for a loss resulting from:

(17) employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude;

The Tort Claims Act, § 15-78-110, contains a two-year statute of limitations:

Except as provided for in Section 15-3-40², 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; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.

² § 15-3-40 provides for exceptions as to persons under disability.

The general statutes of limitations for most civil remedies are found in Title 15, Chapter 3, including § 15-3-540 which provides that:

Within three years: (1) An action against a sheriff, coroner or constable upon a liability incurred *by the doing of an act in his official capacity* and in virtue of his office or by the omission of an official duty, including the nonpayment of money collected upon an execution, subject to the provisions of § 15-3-560.... (Emphasis added.)

S.C. Code Ann. § 15-3-550(a) provides a two-year statute of limitations for false imprisonment. Claims for abuse of process are subject to the three-year statute of limitations in § 15-3-530(5) (“an action for any injury to the person or to rights of another, not arising on contract and not enumerated by law”). See Whitfield Const. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 525 S.E.2d 888, 897 n. 18 (Ct. App. 1999)

Summary of Argument

The Sheriff, H. Wayne DeWitt is a state official,³ and the Berkeley County Sheriff’s Department is a governmental entity, and thus the Tort Claims Act provides the exclusive remedy for any tort committed by the Sheriff or his deputies while acting within the scope of their official duties. § 15-78-20(b). The applicable statute of limitations for any action under the Tort Claims Act is two years. § 15-78-110. The actions on which the Plaintiff bases his claims occurred on January 10 and 15 of 2008, yet he did not file his complaint until December 16, 2010 – more than two years after the date the loss was or should have been discovered.

The Plaintiff argues that the three-year statute of limitations in § 15-3-540 applies because while the Defendants were acting in their official capacity, they were not acting

³ Cone v. Nettles, 308 S.C. 109, 417 S.E.2d 523 (1992).

within the scope of their official duties. More specifically, the Plaintiff argues that the Sheriff and his deputies were not acting within the scope of their official duties because the dispute between Mr. Elrod and Comcast was a civil dispute.

However, the Plaintiff specifically and affirmatively plead that the Sheriff “was acting within the scope and course of his employment and under color of state law.” In addition, as the trial court found, there is no evidence in the record that the Defendants were acting in any capacity other than as Sheriff and Sheriff’s deputies of Berkeley County, or that the Defendants were acting outside the scope of their official duties. Accordingly, the trial court properly granted summary judgment to these Defendants.

A. The Tort Claims Act two-year statute of limitations, §15-78-110, applies to the claims against the Berkeley County Sheriff’s Department and the Sheriff in his official capacity.

This case presents an apparent conflict between the Tort Claims Act which governs any action against the Sheriff and his Department for conduct “within the scope of his official duties,” and § 15-3-540 which purports to apply to actions against the Sheriff “in his official capacity.” The Plaintiff argues that the three-year period under § 15-3-540 applies to actions against a sheriff in his official capacity and/or the sheriff’s department for actions by the deputies outside the scope of their official duties. However, the Defendants maintain that any action against a sheriff in his official capacity and/or against his department falls within the exclusive remedy provisions of the Tort Claims Act and is subject to the two-year period of § 15-78-110.

Plaintiff cites to Allen v. Fid. & Deposit Co. of Maryland, 515 F. Supp. 1185, 1188 (D.S.C. 1981), affd, 694 F.2d 716 (4th Cir. 1982), wherein the federal district court

stated that: “In South Carolina, all actions which are brought against a sheriff by ‘virtue of his office or by omission of official duty’ must be brought within three (3) years. S.C. Code Ann. § 15-3-540 (1976).” However, that decision predated enactment of the S.C. Tort Claims Act, and Defendants would submit that § 15-3-540(1) is no longer applicable to any claims against the Sheriff in his official capacity since the Tort Claims Act was enacted with its own statute of limitations in § 15-78-110. *See* Stone v. City of Orangeburg, 313 S.C. 533, 443 S.E.2d 544, 545 (1994) (where two statutes are in conflict, the more recent and specific statute should prevail); *compare* Denman v. City of Columbia, 387 S.C. 131, 138-39, 691 S.E.2d 465, 468-69 (2010) (“Specific statutes are not to be considered repealed by a later general statute unless there is a direct reference to the earlier statute or the intent of the legislature to do so is explicitly implied.”). *See also* Hackworth v. Greenville County, 371 S.C. 99, 102-03, 637 S.E.2d 320, 322 (Ct. App. 2006) (applying §15-78-110 to action against Sheriff’s Department).

Plaintiff also cites to McCall v. Williams, 52 F. Supp.2d 611 (1999), but to the contrary, that decision does not support his theory. In that case, the court held that § 15-78-110 was inapplicable to the plaintiff’s assault and battery claim against a deputy sheriff in his individual capacity, and that instead, the two-year statute of limitations for assault and battery applied. *Id.* at 615, citing S.C. Code Ann. § 15-3-550(1). In so holding, the court noted that § 15-3-540 was not applicable:

Because this aspect of Plaintiff’s claims relates to Lieutenant Williams in his *individual* capacity, the three-year statute of limitations for suits against a sheriff for acts committed in his *official* capacity is also inapplicable to this case. *See* S.C. Code Ann. § 15-3-540(1) (1976).

Id. at 615 n. 4.

Plaintiff argues that “nothing in the Tort Claims Act may be 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.” [Appellant’s initial brief p. 8.] To the extent that may be a correct statement of § 15-78-70(b), the Plaintiff fails to appreciate the implications of his contention that the Sheriff’s deputies were acting outside the scope of their official duties. As Judge Young inquired: “Do you understand, if you prevail on this you don’t get to sue the County anymore, you are just suing these people as individuals?” To which Plaintiff’s Counsel responded that: “I understand that, Your Honor.” [ROA 36; Tr. 9:11-14.] However, it appears that Plaintiff does not, in fact, understand because if the Sheriff and his deputies were acting outside the scope of their official duties, as he now asserts, then he has no legal basis for any claim against the Sheriff in his official capacity or against Department under the provision of § 15-78-60(17). Accordingly, the Defendants would be entitled to judgment on that basis. *See* Rule 220(c), SCACR; *see also* Proctor v. Steedley, 398 S.C. 561, 577, 730 S.E.2d 357, 366 (Ct. App. 2012) (“this court may affirm an order upon any ground appearing in the Record on Appeal”).

If the Plaintiff seeks to pursue an action against the Sheriff personally, in his individual capacity, then he would need to replead. And, in such case, as the court noted in McCall v. Williams, § 15-3-540 would not apply; instead, the two-year period of limitations, § 15-3-550, would apply to any false imprisonment claim and the three-year period of § 15-3-530, would apply to any abuse of process claim.

B. The Sheriff and his deputies were acting in their official capacity and within the scope of their official duties.

The trial court found that the two-year statute of limitation in §15-78-110 applied because the Sheriff and his deputies were at all times acting in their official capacities and within the course and scope of their official duties. That decision is fully supported by the record.

In his complaint, the Plaintiff affirmatively, and specifically alleged that the Sheriff “was acting within the scope and course of his employment and under color of state law.” [ROA 14; Complaint ¶ 3.] In addition, at the motion hearing, Plaintiff’s Counsel conceded that “they were definitely acting in their capacity as sheriff’s deputies.” [ROA 35; Tr. 8:22-23.] Yet, the Plaintiff argues that there is a jury issue as to “whether or not the police responding to a civil call is in their official duties.” [ROA 36; Tr. 9:18-21.]

First, it is fundamental that the plaintiff is bound by the allegations of his complaint. Elrod v. All, 243 S.C. 425, 437, 134 S.E.2d 410, 417 (1964); Corley v. Centennial Const. Co., 247 S.C. 179, 187, 146 S.E.2d 609, 613 (1966).

It is well settled that parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements, or admissions contained in a pleading are conclusive as against the pleader and a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are taken as true against the pleader for the purpose of the action.

Postal v. Mann, 308 S.C. 385, 387, 418 S.E.2d 322, 323 (Ct. App. 1992) (citing Elrod v. All.) *See also* Hayne Fed. Credit Union v. Bailey, 327 S.C. 242, 252, 489 S.E.2d 472, 477 (1997) (applying judicial estoppel – “When a party has formally asserted a certain

version of the facts in litigation, he cannot later change those facts when the initial version no longer suits him.”)

Second, it is equally well-settled that Plaintiff is bound by the statement of his attorney at the motion hearing:

The parties to a suit are bound by admissions, made by their attorneys of record, in open court, or elsewhere, touching matters looking to the progress of the trial. Such practice is almost of everyday occurrence; and this statement is so elementary and understood so thoroughly by the profession, as to need no citation of authority.

Hall v. Benefit Ass'n of Ry. Employees, 164 S.C. 80, 161 S.E. 867, 868 (1932).

Third, there is no legal or evidentiary basis for the Plaintiff's contention that the Deputies were acting outside the scope of their official duty because they were responding to a “civil” call. Plaintiff provides no authority for the proposition that the Sheriff and his deputies are prohibited from assisting in civil matters, but instead, argues that the Sheriff and his deputies do not have any official duty to assist in a civil dispute, citing to S.C. Code Ann. § 23-13-280 which addresses the “Rights, powers and duties of deputies.” However, the Plaintiff's argument is not supported by the broad duties enumerated in that statute:

Any such deputy sheriff:

- (1) Shall have, do and exercise all the rights, duties and powers prescribed by law for constables or magistrates and such powers as are usually exercised by marshals and policemen of towns and cities;
- (2) Shall act as a conservator of the peace;
- (3) Shall take into custody and carry before the nearest magistrate any person who may, in his view, engage in riotous conduct or violation of the peace, refusing upon his command to desist therefrom;

(4) Shall arrest any person who may, in his view, commit any felony or misdemeanor and carry him before a court of competent jurisdiction; and

(5) Shall execute any and all criminal process from magistrates' courts.

Notably, deputy sheriffs are charged with acting as conservators of the peace, and the evidence establishes, as a matter of law, that that is exactly what the Berkeley County Sheriff's deputies were doing – attempting to preserve the peace.

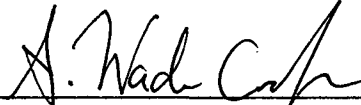
Plaintiff, by his own affidavit, establishes that he initiated contact with the Sheriff's Department on January 10, 2008, by calling and asking them to dispatch a deputy because Comcast was trespassing on his property. The affidavits and incident reports further establish that the deputies' subsequent involvements on the evening of January 10th and January 15th were requested by Comcast because of threats made by Mr. Elrod. The evidence of record could not reasonably lead to any finding that the deputies were assisting with a civil matter outside the scope of their official duties, and thus, there is no question for a jury to consider. Accordingly, summary judgment was proper and should be affirmed.

CONCLUSION

Wherefore, based on the foregoing, the Defendants submit that the Tort Claims Act two-year statute of limitations, § 15-78-110, applies to the claims as stated against the Sheriff in his official capacity and his Department for the actions of his deputies within the scope of their official duties. And, since the complaint was not filed until more than two years after the incidents occurred, the claims are barred and the trial court properly granted summary judgment. Accordingly, the judgment should be affirmed.

Respectfully submitted,

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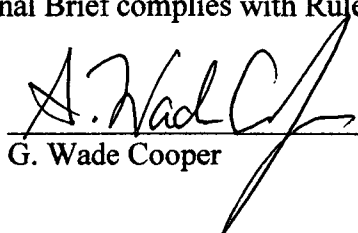
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Certification of Counsel

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

February 22, 2013

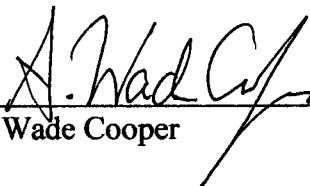


G. Wade Cooper

Certificate of Service

I, G. Wade Cooper , attorney for the Respondents , do hereby certify that on February 22, 2013, I served a copy of the foregoing Final Brief of Respondents on Counsel for Appellant, via U.S. Mail, first class, postage prepaid to the following address:

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