

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

L.G. Elrod

Appellant,

v.

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

Respondent,

FINAL BRIEF OF APPELLANT

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SC Court of Appeals

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STATEMENT OF THE ISSUE ON APPEAL

The South Carolina Tort Claims Act does not provide immunity for governmental entities or their employees for acts committed while acting outside the scope of their official duties. There is clearly a genuine issue of material fact as to whether Respondents were acting within the scope of their official duties. Did the lower court err in granting Respondents summary judgment motion and shielding Respondents from liability?

STATEMENT OF THE CASE

Plaintiff/Appellant L.G. Elrod (“Appellant”) filed this case *pro se* in the South Carolina Court of Common Pleas for Berkeley County on December 16, 2010. Appellant brought the action for False Imprisonment and Unlawful Detention-Abuse of Process against Defendants Berkeley County, Berkeley County Sheriff’s Department, and H. Wayne Dewitt (Berkeley County Sheriff).

Defendants moved the court on January 11, 2011 for an order dismissing the action pursuant to 12(b)(6) on the grounds that Appellant’s Complaint failed to state facts sufficient to constitute a cause of action. Defendants’ motion was based on the grounds that, pursuant to the South Carolina Tort Claims Act, the applicable two-year statute of limitation (S.C. Code Ann. § 15-78-110) barred Appellant’s claims. However,

Appellant argued that the applicable statute of limitations was three years pursuant to § 15-3-540 of the Code of Laws of South Carolina because Defendants' actions were not within the scope of their official duties and therefore outside the shield of the Tort Claims Act.

The Honorable Deadra L. Jefferson granted the motion as to Defendant Berkeley County, but denied the motion as to Defendants' Berkeley County Sheriff's Department and H. Wayne Dewitt. The court stated that the allegations in Appellant's Complaint gave rise to competing inferences on a question of material fact as to whether the Berkeley County Sheriff's Department and H. Wayne Dewitt were acting in their official capacity and whether their actions were within the scope of their duties.

Berkeley County Sheriff's Department and H. Wayne Dewitt ("Respondents") filed a Motion to Reconsider on June 22, 2011, and the court denied Respondents' Motion to Reconsider on June 30, 2011.

Respondents filed a Motion for Judgment on the Pleadings pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure on January 17, 2012. During that hearing, the non-moving party presented matters outside the pleadings. Counsel for Respondents moved that the motion should be treated as one for summary judgment as prescribed in Rule 56 of the South Carolina Rules of Civil Procedure. However,

Appellant, at that time, was appearing *pro se* and in order to provide all parties involved a reasonable amount of time to present all pertinent materials, the Honorable Roger M. Young continued the converted motion.

Respondents' Motion for Summary Judgment was heard on May 9, 2012 before the Honorable Roger M. Young. The court granted Respondents' Motion for Summary Judgment stating that S.C. Code Ann. § 15-78-110 (and the applicable two year statute of limitations) applied, because the court found no evidence in the record that Respondents were acting outside the scope of their official duties the Appellant's Complaint was barred by the applicable two-year statute of limitations.

On May 24, 2012, Appellant received written notice of entry of the summary judgment order, and on June 19, 2012, Appellant served his Notice of Appeal.

UNDISPUTED FACTS

The following facts are not in dispute:

1. On January 10, 2008, Plaintiff L.G. Elrod and Jerry Williams put a "No Trespassing" sign on Plaintiff's property following a civil dispute with Comcast over the use of Plaintiff's property. (R. p. 61, lines 1-3.)
2. Later that day, Comcast arrived at the property and tried to access the cable box that was on Plaintiff's property, and Plaintiff told

them that they couldn't come on the property without a court order or it was trespassing. (R. p. 61, lines 5-7.)

3. Plaintiff called Berkeley County Sheriff's Department to inform them that Comcast was trying to trespass on his property. (R. p. 61, lines 8-9.)

4. Deputy Randal Timmons arrived, spoke to Comcast, and asked Plaintiff to let them on the property, but he refused. (R. p. 61, lines 12-13.)

5. Following that conversation, Deputy Timmons spoke with Comcast again, and they left. (R. p. 61, lines 14-15.)

6. Later that day (January 10, 2008), Sheriff H. Wayne DeWitt sent two squad cars and several deputies from the Berkeley County Sheriff's Department out with their lights flashing to assist Comcast in trespassing on Plaintiff's property. (R. p. 61, lines 18-20.)

7. Deputy Clifford McElvogue informed Plaintiff that this equipment belonged to Comcast and that Comcast had a right to work on it. He then told Plaintiff that if he interfered with Comcast, the Sheriff's Department would "lock him up." (R. p. 62, lines 1-3.)

8. The Police Reports from this day reflect that the Deputies were there on a civil matter only. (R. p. 72; R. p. 75.)

9. The Sheriff's Department restrained Plaintiff while Comcast trespassed on Plaintiff's property. (R. p. 62, lines 4-5.)

10. The Sheriff's Department did not provide a court order authorizing the use of Plaintiff's property. (R. p. 62, lines 6-7.)

11. On January 15, 2008, Plaintiff turned the cable box off again because of another civil dispute with Comcast over the use of Plaintiff's property. (R. p. 63 lines 1-2.)

12. Once again, Sheriff H. Wayne DeWitt sent out Berkeley County Sheriff's Deputies, without a court order, to restrain Plaintiff while Comcast trespassed and worked on Plaintiff's property. (R. p. 63, lines 3-5.)

13. The Police Reports from this day also reflect that the Deputies were there on a civil matter only. (R. p. 72; R. p. 75.)

DISPUTED MATERIAL FACTS

The following facts cited by Defendants are in dispute:

1. Defendant Sheriff H. Wayne DeWitt stated that his "Deputies who interacted with Plaintiff on January 10 and 15, 2008 were acting within the scope of their official duties" (R. p. 64, lines 10-14.) However, Sheriff H. Wayne DeWitt informed Mr. Elrod that he had sent his Deputies to Mr. Elrod's property on a civil matter to permit Comcast to trespass on Mr. Elrod's property (R. p. 64, lines 11-19); as such there is a

material fact in dispute as to whether or not Sheriff H. Wayne DeWitt was acting within his official duties.

2. Deputies Clifford McElvogue and Randal Timmons of the Berkeley County Sheriff's Department both stated that "[a]t all times relative to my interaction with the Plaintiff, and which is the subject of his Complaint, I was acting as an employee of the Berkeley County Sheriff's Department and within the scope of my official duties as a Berkeley County Sheriff's Deputy." (R. p. 44, lines 2-4; R. p. 51, lines 2-4.) However, the Deputies did not acquire a court order prior to permitting Comcast to trespass on Mr. Elrod's property. (R. p. 62, lines 6-7; R. p. 57, lines 8-14.) Moreover, the Deputies in their reports state that they were only at Mr. Elrod's property on a "civil matter." (R. p. 72; R. p. 75.) Therefore, there is a material fact in dispute as to whether or not the Deputies were acting within their official duties.

STANDARD OF REVIEW ON APPEAL

When reviewing the grant of a summary judgment motion, the appellate court applies the same standard which governs the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure: Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Pittman v. Grand Strand Entm't, Inc.*, 363 S.C. 531, 611 S.E.2d 922 (2005). In

determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn from them must be viewed in the light most favorable to the nonmoving party. *Medical Univ. of South Carolina v. Arnaud*, 360 S.C. 615, 602 S.E.2d 747 (2004). If triable issues exist, those issues must go to the jury. *Mulherin-Howell v. Cobb*, 362 S.C. 588, 608 S.E.2d 587 (Ct. App. 2005). In determining whether this drastic remedy should be invoked, “the court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.” *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006).

ARGUMENT

I. The lower court erred in applying the two-year statute of limitations because there is a genuine issue of material fact as to whether Respondents were acting within the scope of their official duties.

A. *There is a genuine issue of material fact as to whether Respondents were acting within the scope of their official duties.*

Although the South Carolina Tort Claims Act is the exclusive remedy for any tort committed by a governmental entity, its employees or its agents, it is not meant to shield an employee’s conduct that was *not within the scope of his official duties* or constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude. S.C. Code

Ann. § 15-78-20(b). Moreover, § 15-78-20(f) of the South Carolina Code of Laws expressly limits coverage of the Tort Claims immunity to employees “acting within the scope of official duty.” Therefore, 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*.

The South Carolina Supreme Court has held “that the term ‘scope of employment’ as used in an insurance policy is broader than the term ‘scope of official duties’ as used in the Tort Claims Act. *Frazier v. Badger*, 361 S.C. 94, 102, 603 S.E.2d 587, 591 (2004). Moreover, the Tort Claims Act provides a two-part test to determine whether a government employee is acting within the scope of his official duty or employment: The employee must be (1) “acting in and about the official business of the government entity,” and (2) “performing official duties.” S.C. Code Ann. § 15-7-30(i).

Here, although the lower court held that there was “no evidence in the record that [Respondents] were acting in any other capacity of than in their official capacities as Sheriff and/Sheriff’s deputies of Berkeley County (R. p.33, line 22 – p.34, line 2; R. p. 12, lines 14-15),” it is clear from the record that there is a genuine issue of material fact as to whether the Sheriff and his deputies were acting within the scope of their official duties. (Disputed Facts ¶ 1, 2.) The rights, power, and duties of a deputy

sheriff are outline in § 23-13-280 of the Code of Laws of South Carolina. Nowhere in the Code does it state that an official duty of a deputy sheriff is to assist in a civil dispute. In addition, although the Deputies state that they were acting within the scope of their official duties, they admit in their reports from both days that they were there on a civil matter **only**. (Undisputed Facts ¶ 8, 13.)

Appellant originally called the Sheriff's Department in an attempt to prohibit Comcast from trespassing on his property. (Undisputed Fact ¶ 3.) Deputy Randall Timmons asked Appellant to allow them on his property, but Appellant refused. (Undisputed Fact ¶ 4.) When Appellant would not permit Comcast to use his property, deputies of the Sheriff's Department restrained Appellant (without a court order) multiple times to permit Comcast to trespass on his property. (Undisputed Facts ¶ 6, 7, 9, 10, and 12.)

Although Respondents contend that the Deputies were only on the scene because threats had been made towards the Comcast workers (R. p. 37, lines 19-22; R. p. 12, lines 20-24), the Deputies did more than that. They permitted a company to trespass on the property owned by Appellant in order to allow them to set up a business without a court order. (Undisputed Fact ¶ 10.) In addition, their reports are replete with

references to them responding only to a “civil dispute.” (Undisputed Facts ¶ 8, 13.)

Clearly there is a genuine issue of material facts as to whether these acts constitute official duties of the Sheriff and his Deputies. (Disputed Material Facts ¶¶ 1,2.) What would be the outcome if an entrepreneur decided that the corner of your property would be the ideal spot for a sandwich shop, a pizzeria, or even a pub? Would it be in the official duties of the Sheriff and his Deputies to restrain you while this company built its business? Is it the landowner’s duty to file suit to make them stop, or is it the duty of the Sheriff and his Deputies to make sure all parties are safe while the courts determine the outcome of the “civil dispute.”

B. The applicable statute of limitations is three years pursuant to § 15-3-540 of the Code of Laws of South Carolina.

The Tort Claims Act provides that an action “brought pursuant to this chapter is forever barred unless an action is commenced within two years” S.C. Code Ann. § 15-78-110. Although the Tort Claims Act addresses circumstances under which a governmental entity is liable for the tortious conduct of its employees, immunity will not extend to an employee’s conduct that is “*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.” S.C. Code Ann. § 15-78-70(b) (emphasis

added). As such, if the alleged acts of Respondents were not within their official duties, the applicable statute of limitations is not two years and they are not shielded from liability. S.C. Code Ann. §§ 15-78-20(b) and 15-78-110.

In addition, § 15-3-540 of the Code of Laws of South Carolina provides that the applicable statute of limitations is three years for “[a]n 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” As such, if the Sheriff’s Department was acting within its official capacity but were not acting within the scope of its official duties, the applicable statute of limitations would be three years pursuant to § 15-3-540 of the Code of Laws of South Carolina. *Allen v. Fidelity & Deposit Co. of Maryland*, 515 F. Supp. 1185, 1188 (1981); see also *McCall v. Williams*, 52 F. Supp. 2d 611, 615 & n.4 (1999) (holding that the statute of limitations for assault and battery was applicable where the Sheriff was acting outside of the scope of his official duties but within his individual capacity and not his official capacity (emphasis in original)).

Here, there is an issue of material fact as to whether the Sheriff and his Deputies were acting within their official capacity but not within the scope of their official duties. (Disputed Material Facts ¶¶ 1,2.)

Although the Deputies state that they were acting within the scope of their official duties, they admit in their reports from both days that they were there on a civil matter **only**. (Undisputed Facts ¶ 8, 13.) In ruling on a motion for summary judgment, the lower court must view the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the non-moving party.” *Madison ex rel. Bryant v. Babcock Ctr., Inc.*, 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006). Therefore, there are issues of material fact that must be construed in favor of Appellant of whether the Sheriff and his Deputies were acting within their official capacity and whether their actions were within the scope of their duties.

Furthermore, § 15-3-540 of the Code of Laws of South Carolina provides Appellant the right to bring a suit against Respondents and is the applicable statute to be used. When an employee of the state is acting within its official capacity but not acting within the scope of its official duties, the employee will be held liable under this section. As such, the applicable statute of limitations under this section is three years.

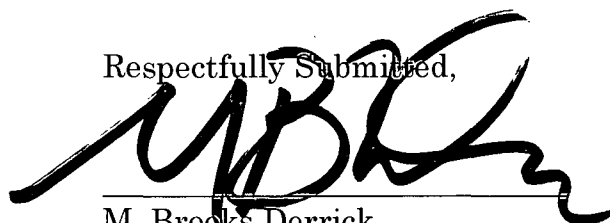
The Deputy Sheriff’s were acting within their official capacity as deputies from the Berkeley County Sheriff’s Department. However, the deputies were not acting within the scope of their official duties. The Sheriff, and by extension, his deputy sheriffs, cannot be said to be acting

within the scope of their official duties when they are simply responding to civil disputes.

CONCLUSION

For the reasons state, this court should reverse the judgment of the circuit court.

Respectfully Submitted,



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CERTIFICATION OF COUNSEL

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

February 25, 2013




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FEB 27 2013

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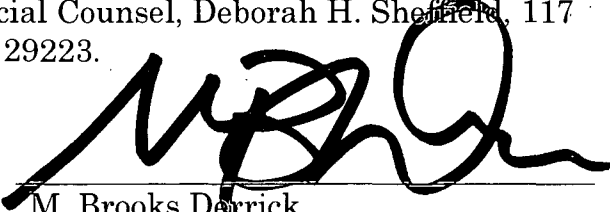
I certify that I have served the Final Appellate Brief by U.S. Mail, postage prepaid, on February 25, addressed to the Attorney for Respondents, G. Wade Cooper, Post Office Box 2424, Mount Pleasant, South Carolina 29465, and to Special Counsel, Deborah H. Sheffield, 117 Brook Valley Road, Columbia, SC 29223.

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