

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas

Clifton Newman, Circuit Court Judge

Appellate Case No.: 2013-001845
Case No. 2012-CP-43-1463

Brandon W. Hodge. Appellant,

v.

Sumter County. Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- A. DID THE CIRCUIT COURT ERR IN DISMISSING THE CASE PURSUANT TO RULE 12(b)(6) ON THE RECORD BEFORE THE COURT, WITHOUT ADDITIONAL DEVELOPMENT OF FACTS?
- B. DID THE CIRCUIT COURT ERR IN HOLDING THAT SOUTH CAROLINA HAS “CLEARLY ESTABLISHED THAT DEPUTIES ARE STATE AND NOT COUNTY OFFICIALS” EXCLUSIVELY AND UNDER ALL CIRCUMSTANCES FOR PURPOSES OF LIABILITY UNDER THE S.C. TORT CLAIMS ACT?
- C. DID THE CIRCUIT COURT ERR IN RULING ON THE RESPONDENT’S 12(b)(6) MOTION WITHOUT FIRST HEARING AND RULING UPON THE APPELLANT’S MOTION TO SUBSTITUTE PARTY?

STATEMENT OF THE CASE ON APPEAL

This action was commenced by the filing of a Summons and Complaint seeking damages pursuant to the South Carolina Tort Claims Act on July 24, 2012. The Respondent responded with an Answer containing a qualified general denial and with a Motion to Dismiss pursuant to Rule 12(b)(6). The Respondent also stated a lack of information to form a belief as to the truth and veracity to respond to many of the allegations of the Complaint, including paragraphs 5 and 23. The Defendant's Motion to Dismiss was heard on June 17, 2013, the matter was taken under advisement, and the Court granted the Motion to Dismiss by Order dated July 2, 2013, and filed July 16, 2013. Appellant received written notice of the entry of the Order on Saturday, July 26, 2013. The Notice of Appeal was filed on August 26, 2013.

ARGUMENT

INTRODUCTION

The Plaintiff was injured as a minor when a car owned by the Respondent, Sumter County, and driven by Sumter County Sheriff's Deputy, Anthony L. Horton, collided with a vehicle in which the Plaintiff was a passenger. The Plaintiff brought suit against the Respondent alleging negligence, recklessness, willfulness, and wantonness in the operation of the vehicle, in creating and following practices and procedures, and in the training of the deputy.

The Plaintiff alleged that, "At all times pertinent to this action, all employees of the Sumter County Sheriff's Department, including but not limited to Deputy Anthony L. Horton, were acting within the course and scope of their authority and duties as employees, officers, and or servants of the Defendant, and at all times pertinent to this action, the Sumter County Sheriff's vehicle was being operated pursuant to the purposes and business of the Defendant." Complaint, Paragraph 5; R. pp.5-6. In Paragraph 23 of the Complaint, the Plaintiff alleged a number of specifications of negligence involving operation of the motor vehicle; involving establishment and following of reasonable and proper procedures for pursuits; and, involving training of Deputy Hodges. Paragraph 23 also included a general allegation of negligence, "In failing to exercise the degree of care and caution necessary and reasonable under the circumstances." Complaint, Paragraph 23 (p); R. pp. 7-8.

The Defendant responded in its Answer, in part, that, "As to paragraphs ...5...23... of the Plaintiff's Complaint, this Defendant lacks information upon which to form a belief as to the truth and veracity of these allegations, and therefore, denies these allegations." See Answer, Paragraph 8; R. p. 10.

The Summons and Complaint were served upon the Défendant on November 20, 2012, the Answer stating a lack of information was filed on January 18, 2013, and the hearing on the Respondent's Motion to Dismiss was June 17, 2013. But the Respondent never sought to amend its Answer, and never filed an affidavit changing its allegation that it lacked information to form a belief as to the allegations of Paragraphs 5 and 23.

For a Rule (12)(b)(6) motion a plaintiff's allegations must be taken as true. (The Respondent's Motion in this case is actually a 12(c) motion for judgment on the pleadings, since the motion states that it is based upon the pleadings). Motion to Dismiss, p. 2; R. P. 14. In this case, the record contains a statement by the Respondent in its Answer that it does not know whether the allegations of Paragraph 5 and 23 are true.

Since the case was decided on a Rule 12(b)(6) motion, the facts of the Respondent's involvement are not known. Did the Defendant own the Sumter County Sheriff's vehicle? The accident report is not part of the record, but Appellant's Counsel certifies that it states that the Respondent Sumter County was the owner. Was the pertinent insurance policy owned and provided by the Respondent Sumter County? This is a fact beyond the scope of the pleadings and is not known by the Court or Appellant's Counsel. Was the Respondent otherwise involved? This is unknown by the Court or Appellant's Counsel. Were other employees of the Sheriff's Department involved in causation of the accident? This is unknown by the Court or by Appellant's Counsel. Are there other negligent actions pursuant to the general allegation of negligence, in addition to the specifications of negligence? This is unknown by the

Court or by Appellant's Counsel. These and other relevant and material facts are unknown because the case has been cut short by dismissal pursuant to Rule 12(b)(6).

If the Respondent has obtained information to oppose the allegations of Paragraphs 5 and 23 of the Complaint, it should at the least be required to file an affidavit setting forth its position. Not only has the Respondent not filed an affidavit, but it has not even made an effort to amend the Answer to take out the admission that it does not know the truth and veracity of Paragraphs 5 and 23 of the Complaint.

A. DID THE CIRCUIT COURT ERR IN DISMISSING THE CASE PURSUANT TO RULE 12(b)(6) ON THE RECORD BEFORE THE COURT, WITHOUT ADDITIONAL DEVELOPMENT OF FACTS?

1. Applicable standard.

There are many appellate cases of this Court, the South Carolina Supreme Court, many federal courts, and many appellate courts of other states which strictly limit the application of Rule 12(b)(6) motions. There is good reason for these strict rules. A Rule 12(b)(6) dismissal deprives the plaintiff of his cause of action without any development of the facts of the case.

The Motion to Dismiss in this case is actually a motion for judgment on the pleadings pursuant to Rule 12(c) since it says it "is based upon the pleadings filed in this case...." In such motions, all of the plaintiff's well pleaded allegations are taken as true. Carolina Winds Owners' As'n v. Joe Harden Builder, Inc., 297 S.C. 74, 374 S.E. 2d 897 (Ct. App. 1988). Also, the pleading must be construed in the light most favorable to the non-moving party. Woodell Allen v. Marion Shc. Dist. One, 307 S.C. 297, 414 S.E. 2d 794 (Ct. App. 1992).

Where the development of facts in addition to the pleadings would be useful,

cases should not be decided on 12(b)(6) motions or 12(c) motions. Where a more full development of the facts would be useful, even summary judgment motions should not determine cases. Where an issue is novel, it should not be decided on a Rule 12(b)(6) or a Rule 12(c) motion. See Keiger v. Citgo v. Coastal Petroleum, Inc. , 326 S.C. 369, 482 S.E. 2d 792 (Ct. App. 1997) at 373.

There are important policy reasons for courts to be required to develop adequate facts before deciding a case. Where there are complex, new or novel issues, and where there are procedural issues involving the application of law to fact, the quality of justice is diminished when the record is inadequate.

Under the S.C. Tort Claims Act a person "acting on behalf of or in service to a governmental entity" is defined as an employee. S.C. Code Ann. Section 15-78-30 (c).

2. There is a novel issue for the South Carolina Appellate Courts in this case.

In its Order the Circuit Court relies upon cases decided pursuant to 42 U.S.C. Section 1983. These cases do not apply to the S.C. Tort Claims Act.

The Court's Order states that "In South Carolina, it is clearly established that deputies are State and not County officials. See Cone v. Nettles, 308 S.C. 109, 112, 417 S.E. 2d 523, 524-525 (S.C. 1992). This case dealt not with the South Carolina Tort Claims Act, but with 42 U.S.C. Section 1983. The analysis in Section 1983 cases is for the purpose of determining whether there is individual liability for certain defined claims under federal law. If a person is determined to be predominantly a State official, then that person is exempt under the 11th Amendment to the U.S. Constitution. Virtually all of the Section 1983 cases in South Carolina, whether federal or state cases, hold that sheriffs and their deputies are partly state and partly county officials.

If the Section 1983 cases referred to by the Respondent and the Circuit Court

applied to the S.C. Tort Claims Act, then cases against sheriffs or deputies would be filed against the State of South Carolina or the County where they serve. If the Circuit Court is correct in the Order in this case that it "is clearly established that deputies are State not County officials," then an action against a sheriff or deputy would be properly filed against the State of South Carolina.

The Court also relies upon Edwards v. Lexington County Sheriff's Department and County of Lexington, 386 S.C. 285, 688 S.E. 2d 125 (2010), footnote 1. In that case the Supreme Court in a footnote indicated that the sheriff and his deputies are State employees and distinct for liability purposes. However, the same footnote states that the Court is not ruling upon the issue as it relates to the Tort Claims Act. The Defendant did not raise the issue and it was not briefed. The S.C. Supreme Court did not decide the issue.

The South Carolina Appellate Courts have not ruled directly that a sheriff's deputy can never be sued under the S.C. Tort Claims Act, and this is a novel issue which should not be dealt with in a Rule 12(b)(6) motion.

3. Application of law to facts.

In this case all that is before the Court are the pleadings. All of the pleaded facts must be taken as true, and all inferences must be considered in the light most favorable to the Appellant. It is undisputed that the Appellant alleged that "all employees of the Sumter County Sheriff's Department, including but not limited to Deputy Anthony L. Horton, were acting within the course and scope of their authority and duties as employees, officers, and or servants of the Defendant, and at all times pertinent to this action, the Sumter County Sheriff's vehicle was being operated pursuant to the

purposes and business of the Defendant.” Complaint, Paragraph 5; R. pp. 5-6. In Paragraph 23 of the Complaint, allegations were made of negligence in the operation of the vehicle, in establishment and following of practices and procedures, and in training of the deputy. Paragraph 23(p) also states general allegations of negligence.

It is undisputed that the Respondent expressly stated that it “lacks information upon which to form a belief as to the truth and veracity” of the allegations of Paragraph 5 and of Paragraph 23. Answer, Paragraph 8; R. p. 10. The Respondent’s Motion to Dismiss expressly stated that it relied upon the “pleadings filed in this case.” Motion to Dismiss, p. 2; R. p. 14. Therefore the admission of a lack of knowledge of truth and veracity of the allegation of the Complaint’s Paragraphs 5 and 23, including 23(p) are before the Court.

So the record before the Court is that the deputy and other employees of the sheriff’s department were acting as employees for the Respondent while engaging in negligent activities. Some of the negligent activities alleged involve the operation of the vehicle, some involve development and application of policies and procedures, and some involve training of the deputy. The Respondent has admitted ignorance as to these allegations.

Because the matter is being decided solely on the pleadings, the Court does not have the benefit of other information. Was the Sumter County Sheriff’s Car owned by the Respondent? The accident report says that it was. It is unknown whether the Respondent provided the liability insurance, the maintenance, and other factors. It is unknown which employees established policies and procedures for pursuits, who provided funding for the policies and procedures, who provided training and funding for training and many other issues.

Further, the South Carolina Appellate Courts have not dealt directly with the issue of the application of the Tort Claims Act as it applies to this case. It has not been decided whether liability is exclusive to one entity under the S.C. Tort Claims Act, S.C. Code Ann. Section 15-78-10.

It is respectfully submitted that this case should be reversed and remanded for the development of additional facts.

B. DID THE CIRCUIT COURT ERR IN HOLDING THAT SOUTH CAROLINA HAS "CLEARLY ESTABLISHED THAT DEPUTIES ARE STATE AND NOT COUNTY OFFICIALS" EXCLUSIVELY AND UNDER ALL CIRCUMSTANCES FOR PURPOSES OF LIABILITY UNDER THE S.C. TORT CLAIMS ACT?

By dismissing the Summons and Complaint in this action pursuant to Rule 12(b)(6), the Circuit Court ruled that it is clearly established under existing law that conduct by deputy sheriffs cannot ever result in liability to a county.

Under the South Carolina Tort Claims Act, S.C. Code Ann. Section 15-78-10, actions may be brought only against a political subdivision or agency. The act provides "for liability on the part of the State, its political subdivisions, and employees, while acting within the scope of official duty...." S.C. Code Ann. Section 15-78-20.

For purposes of the Tort Claims Act an employee is defined as "any officer, employee or agent of the State or its political subdivisions, including elected or appointed officials, law enforcement officers, and persons acting on behalf of or in service of a governmental entity in the scope of official duty...." S.C. Code Ann. Section 15-78-30(c).

Under procedure prior to the Tort Claims Act, a sheriff could be held liable for the actions of his deputy. S.C. Code Ann. Section 23-13-10. The Tort Claims Act is now

the exclusive remedy available. Suits against individuals, including sheriffs, are no longer allowed. See Robinson v. Metts, 86 F. Supp. 2d 557 (D.C.S.C. 1997).

In Pelfrey v. Oconee County, 207 S.C. 433, 36 S.E. 2d 297 (1945), it was held that a sheriff's clerk who was injured in a wreck while acting as a deputy was an employee of Oconee County for purposes of workers' compensation. In Willis v. Aiken County, 203 S.C. 96, 26 S.E. 2d 313 (1943), a sheriff's deputy who died as the result of breaking up a liquor still was found to be an employee of Aiken County for purposes of workers' compensation.

In Trammell v. Fidelity & Casualty Co. of New York, 45 F.Supp. 366 (D.C.S.C. 1942), applying South Carolina law, it was stated that, "the Sheriff of a county is the chief law enforcement officer of that county...."

The case of Heath v. County of Aiken, 295 S.C. 416, 368 S.E. 2d 904 (1988), dealt with S.C. Code Ann. Section 4-9-30(7). In that case the Supreme Court ruled that deputies are not "employees" under that Code section for purposes of personnel policies and grievance procedure. However, the Supreme Court ruled that other employees working for the Sheriff were covered by certain county procedures. The Court ruled that the legislature could grant powers as it wished for the purposes of the statute. This case did not deal with the Tort Claims Act.

There have been many cases involving federal civil rights lawsuits pursuant to 42 U.S.C. Section 1983. These cases deal with whether there is immunity under the 11th Amendment to the U.S. Constitution. For purposes of Section 1983 it has been held that a sheriff and his deputy are more like a state official than a county official. These cases are distinct from the S.C. Tort Claims Act. The Tort Claims Act explicitly deals with this issue: "Nothing in this chapter is construed as a waiver of the state's or

political subdivision's immunity from suit in federal court under the Eleventh Amendment to the Constitution of the United States nor as consent to be sued in any state court beyond the boundaries of the State of South Carolina." S.C. Code Ann. Section 15-78-20.

Section 1983 is vastly different than the Tort Claims Act. Section 1983 actions can only be brought against a "person" under the statute and is constitutionally prohibited from being brought against a state or a state official. Section 1983 actions feature unlimited liability. The S.C. Tort Claims Act limits liability in the case at bar to \$250,000.00, it prohibits in most cases actions against individuals, and it provides liability not only for permanent employees, but for anyone acting on "behalf" of a political subdivision.

An example of a Section 1983 case, which was decided in the South Carolina state courts, is Cone v. Nettles, 308 S.C. 109, 417 S.E. 2d 523 (1992). This case was decided under Section 1983, and it had nothing to do with the S.C. Tort Claims Act. In that case it was found that a sheriff was a state official for purposes of Section 1983. The Court pointed out that the state had the "potential power of control" over the sheriff, and that was all that was required for Section 1983 immunity. As to the deputy in that case, the Court found that he was "more closely connected to the state than to the county," which was all that was required to find him a state official for purposes of Section 1983 immunity. It was clear in the case that the deputy was a county official for other purposes. Any inference beyond purposes of Section 1983 liability is dicta not necessary for the ruling.

It is clear that sheriffs and sheriff's deputies are in large part county officials. For

example, sheriffs are required by statute to submit strict monthly accounts of all funds received to the county auditor and the county treasurer. S.C. Code Ann. Section 23-15-130. A sheriff upon taking office is required to take not only the oath of office in Article 3, Section 25 of the S.C. Constitution, but he is required to take the oath as a county officer set forth in S.C. Code Ann. Section 8-3-20. S.C. Code Ann. Section 23-11-20. Deputies are required to take an oath as a "county deputy," and they are required to file a bond approved by the county attorney and filed with the county clerk of court. S.C. Code Ann. Section 23-13-20.

Deputies are required by statute to patrol the entire county. S.C. Code Ann. Section 23-13-70. The funding of sheriffs by the counties is in part controlled by S.C. Code Ann. 4-9-30(5). And there are many more county duties regarding sheriffs and deputies.

The case of Edwards v. Lexington County Sheriff's Department and County of Lexington, 386 S.C. 285, 688 S.E. 2d 125 (2010), does not decide the issue before the Court in this case. In fact, the Supreme Court did not decide the issue of whether Lexington County was a proper party. In a footnote (footnote 1), the Court stated that a sheriff is a state official and liability is distinct from the county, but the Court stated that it was not deciding the issue. The Court respected the pleadings of the parties. The issue was not before the Court, it was not briefed, and it was not decided by the Supreme Court.

In the South Carolina District Court case of Carroll v. Greenville, County Sheriff's Dept., 871 F. Supp. 844 (1994), the Court dismissed the case for lack of jurisdiction. The court ruled that Section 1983 did not apply. There is dicta in the case regarding a suit against a sheriff in his official capacity. But the case does not involve directly the

issues of this case, and if it did, it is not binding precedent. Likewise, the South Carolina District Court case of Ramos v. Berkeley County, Not reported in F. Supp.2d (2012), 2012 WL 5292895, contains some dicta regarding an employee of a sheriff's department. However, the employee liability issues in the case have no bearing on the issues in this case.

The South Carolina Appellate Courts have not directly addressed the issue before this Court. There has been no South Carolina Appellate Court case which has explicitly held that under no circumstances can a county be held responsible for the actions of a deputy acting on behalf of the county.

Also, there has been no South Carolina Appellate Court case which has addressed the issue of whether a person may be an employee of more than one entity for the purpose of the South Carolina Tort Claims Act.

This is a novel issue which should not be decided on a Rule 12(b)(6) motion. In this case allegations which could apply to employees other than the deputy have been made. In this case allegations have been made in Paragraph 5 and 23 of the Complaint which implicate the Respondent. And before the Court is the Respondent's admission of ignorance of whether the allegations of Paragraphs 5 and 23 of the Complaint are true.

It is respectfully submitted that the South Carolina Appellate Courts have not ruled on the precise issue before this Court, and that the case should be reversed and remanded for the development of a fuller record.

C. DID THE CIRCUIT COURT ERR IN RULING ON THE RESPONDENT'S 12(b)(6) MOTION WITHOUT FIRST HEARING AND RULING UPON THE APPELLANT'S MOTION TO SUBSTITUTE PARTIES

The Honorable Circuit Judge in this case generously granted the parties additional time to file supplemental material for the consideration of the Court. The Appellant, after the hearing, and before the decision of the Court, filed a motion to substitute the Sumter County Sheriff's Office for the Respondent. A copy of the Motion to Substitute Party was forwarded to the Honorable Circuit Judge along with the request that the Court take judicial notice of the filing of the motion. Letter of Counsel, R. p. 67. Counsel for Appellant also referred to the Motion to Substitute Party in the Plaintiff's Supplemental Memorandum Opposing Defendant's Motion to Dismiss. The supplemental memorandum also referred to the Motion to Substitute Party. Plaintiff's Supplemental Memorandum Opposing Defendant's Motion to Dismiss, p. 3; R. p. 59, lines 10-12.

The Tort Claims Act provides explicitly for the substitution of an entity for an individual. S.C. Code Ann. Section 15-78-70(c).

Under the circumstances of this case, the Appellant should at least have been afforded a hearing on the Motion to Substitute Party before the action was dismissed pursuant to Rule 12(b)(6). The Respondent alleged in its Answer that it lacked information as to whether it was true that the persons alleged to have acted negligently were acting on behalf of the Respondent. It is clear that the deputy and other sheriff employees are also county officials. Even the Section 1983 cases relied upon by the Respondent often state that the deputies have county duties. By statute a county deputy is required to patrol the entire county. S.C. Code Ann. Section 23-13-70.

It is respectfully requested that this case be reversed and remanded for a hearing on the Motion to Substitute Party, before any ruling on the Respondent's Rule 12(b)(6) motion.

CONCLUSION

The record before the Court includes allegations that the Respondent was negligent in a number of respects. It includes allegations that the employees of the Sumter County Sheriff's Department were acting as employees and on behalf of the Respondent. The Respondent in its Answer stated explicitly that it lacked information to form a belief as to the truth and veracity of the pertinent allegations of the Complaint. The Respondent then moved to dismiss based upon the pleadings. Under the record before the Court, with the allegations of the Complaint taken as true and in the light most favorable to the Plaintiff, respectfully, it must be found that dismissal pursuant to Rule 12(b)(6) or Rule 12(c) is error.

Respectfully, if the Respondent after remand, desires to change its positions as to whether it knows if the pertinent allegations of the Complaint are true, it obviously may do so. And it can move for summary judgment with an affidavit.

As argued above, there are many facts pertinent to this case which are not before the Court. This includes ownership of the vehicle, insurance on the vehicle, identities and involvement of all individuals for whom negligence is alleged, other involvement of additional employees of the Respondent, and other important issues.

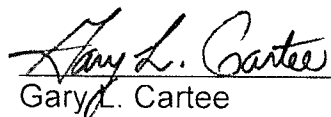
Respectfully, it would be wrong to allow the Respondent to have a dismissal under this record and without being required to provide additional facts.

Further, it is respectfully submitted that the South Carolina Appellate Courts have not yet ruled upon the issue of whether a deputy can be a county official under some circumstances under the Tort Claims Act. It has also not been ruled upon by the South Carolina Appellate Courts whether an official may be acting in a dual capacity for

purposes of the Tort Claims Act.

Finally, the Circuit Judge was made aware of a Motion to Substitute Party prior to the dismissal of this case. It is respectfully submitted that the Appellant should at least have been given an opportunity for this motion to be heard.

It is respectfully submitted that the dismissal of this case, on the record before the Court, should be reversed and remanded for further proceedings. Respectfully, the Appellant should not be deprived of the remedy sought upon this record.



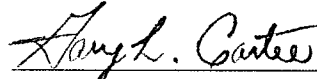
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CERTIFICATE OF COUNSEL

Counsel for the Plaintiff hereby certifies that the Final Brief of Appellant is
in compliance with Rule 211(b), SCACR.



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CERTIFICATE OF COMPLIANCE

Counsel for the Plaintiff hereby certifies that the Final Brief of Appellant is in compliance with the South Carolina Supreme Court's Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings, dated April 15, 2014.



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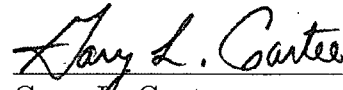
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January 29, 2015.

CERTIFICATE OF SERVICE

Counsel for the Plaintiff hereby certifies that the Final Brief of Appellant was served by mail upon all counsel of record for the Respondent by placing a copy in the U.S. Mail, postage prepaid, this 29th day of January, 2015, addressed as follows:

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