

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

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SC Court of Appeals

Brandon W. Hodge Appellant,

v.

Sumter County Respondent.

FINAL REPLY BRIEF OF APPELLANT

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ARGUMENT

A. There are facts and inferences in dispute.

Respectfully, it is clear that the Respondent's Brief does not answer some important questions. (1) Why did the Respondent file an Answer which stated a lack of information "to form a belief as to the truth and veracity of these allegations....?" See Paragraphs 5 and 23 of the Complaint, R. p. 5-6, 7-8; and Paragraph 8 of the Answer, R. p. 10. (2) Why did the Respondent never amend Paragraph 8 of the Answer? (3) Why did the Respondent not file an affidavit contesting the allegations of Paragraphs 5 and 23 of the Complaint and supporting its Motion to Dismiss?

It is a reasonable inference to be drawn from the record that the reason the allegations were not specifically denied by affidavit, or in the pleadings, is that one or more of the specifications of negligence, or the general allegation of negligence, involved a party or parties acting on behalf of the Respondent, or was a direct employee of the Respondent.

The record before the Court contains the allegations of the Plaintiff that "all employees of the Sumter County Sheriff's Department" were acting for the Respondent and "pursuant to the purposes and business of the Defendant." See Complaint, Paragraph 5, R. pp. 5-6. Also, Paragraph 23 of the Complaint makes allegations regarding the establishment of proper procedures for pursuits and training of the deputy (among other specifications of negligence). Paragraph 23 also includes a general allegation of negligence, "In failing to exercise the degree of care and caution necessary and reasonable under the circumstances." See Complaint,

Paragraph 23 (p), R. p. 8.

The Respondent argues in its Brief that “it is clear that the chain of command in the Sheriff’s Office responsible for supervision of deputies, training, and policy would consist of the Sumter County Sheriff and other deputies, none of whom are county employees as a matter of law.” Respondent’s Brief, p. 8. However, that is not clear in the record before the Court. The Respondent failed to file an affidavit supporting those allegations. The Respondent failed to amend its Answer to make those allegations. Those allegations are not in the record either pursuant to affidavit or to pleading. Those allegations are found only in the Respondent’s Brief, not in the record before the Court.

It is directly alleged that the Respondent was negligent in failing to establish policies and in training of Deputy Horton.

There simply is no record stating that all of the persons involved in establishment of policies or training of Deputy Horton were other deputies or the Sheriff himself. The identity of those persons, and their employer, is not in the record.

The Respondent’s Brief also alleges that the Appellant’s Complaint did not make specific allegations of negligent entrustment or negligent maintenance of the vehicle. Respondent’s Brief, p. 8. However, the Complaint does include a general allegation of negligence in Paragraph 23 (p), R. p. 8, which could be made more specific depending upon facts which are discoverable.

For Rule 12 motions of dismissal, all well pleaded allegations are to be taken

as true. But more than that, the pleadings must be construed in the light most favorable to the non-moving party. And more than that, the facts and the inferences reasonably deducible from them must be taken in the light most favorable to the non-moving party. The action should not be dismissed if further elucidation of the facts would be beneficial.

The Respondent relies in part upon the case of Heath v. County of Aiken, 295 S.C. 416, 368 S.E. 2d 904 (1988). That case held that some employees of the Sheriff were covered by county personnel policies and grievance procedures. The case held that S.C. Code Ann. Section 4-9-30(7) applied to some Sheriff employees and not to others. The Court held that section of the Code did not apply to deputies, but it ruled that the legislature could grant powers as it wished for the purposes of the statute. That case had nothing to do with the Tort Claims Act.

The Respondent relies heavily upon the case of Cone v. Nettles, 308 S.C. 109, 417 S.E. 2d 523 (1992). That case dealt with liability under 42 U.S.C. Section 1983. The case had nothing to do with liability under the Tort Claims Act.

The Respondent argues in its brief that liability under Section 1983 as opposed to liability under the Tort Claims Act is a "distinction without a difference." Brief of Respondent, p. 5. The Appellant respectfully disagrees. Liability under Section 1983 and liability under the S.C. Tort Claims Act are almost polar opposites. Section 1983 has to do with liability of "persons." The S.C. Tort Claims Act has to do with liability of governmental entities. Section 1983 is restricted by the U.S. Constitution to actors who are not acting primarily as state officials. The analyses of Section 1983 liability as it relates to Sheriffs and deputies is solely

concerned with the U.S. Constitution's protections of states from liability.

There are no such concerns connected with the S.C. Tort Claims Act. On the contrary the Tort Claims Act specifically provides that, "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.

It is respectfully submitted that it is a fundamental misunderstanding of the Section 1983 cases to confuse them with the S.C. Tort Claims Act. Section 1983 predates the S.C. Tort Claims Act and involves entirely different legal principles.

The Cone case was decided under Section 1983 and has nothing to do with the S.C. Tort Claims Act. It does not at all rule out a deputy being a county official but states that a deputy is "more closely connected to the state than to the county...." Cone, supra, at 417 S.E. 2d at 525. The deputy was found to be more closely connected to the state than to the county and a state official for purposes of Section 1983 liability. It does not address liability under the S.C. Tort Claims Act or the ways in which a deputy is also a county official.

B. There is a novel issue of law at issue.

The Respondent's Brief asserts that Judge Newman ruled that "the employees of the Sheriff's Office are not county employees as a matter of state law..." The Respondent asserts that ruling is correct. The Respondent further asserts that the matter of law has been previously decided and "reaffirmed on

numerous occasions.”

However, the Respondent fails to cite even one case under the S.C. Tort Claims Act for this proposition. The Respondent cites the Cone case. As noted in the previous section, the Cone case dealt with liability under Section 1983 and not the S.C. Tort Claims Act. The Respondent cites the Heath case. As noted in the previous section, the Heath case dealt with S.C. Code Ann. Section 4-9-30(7), which involved county personnel policies and grievance procedures. Heath found that deputies were not covered by the code section at issue, but contrary to the Respondent’s position, it also found that numerous other Sheriff’s employees were covered by the county’s policies and procedures. In this case, a number of persons allegedly negligent have not yet even been identified, because the case has not proceeded past the pleadings, and the Respondent submitted no affidavit to support its motion.

Finally, the Respondent cites the case of Edwards v. Lexington County Sheriff’s Department, 386 S.C. 285, 688 S.E. 2d 125 (2010). The Respondent relies upon a footnote. The footnote is clearly triple or quadruple dicta. The footnote states that “the Sheriff and sheriff’s deputies” are State, not county, employees.” However, the footnote makes it clear that (1) the parties did not address the issue, (2) the parties did not brief the issue, (3) the issue was not before the court, and, (4) the Court was not deciding the issue as a part of its opinion.

The Appellant does not believe that the Respondent is suggesting that the State is the proper party for all actions under the S.C. Tort Claims Act alleging

negligence by Sheriffs, deputies, or other Sheriff's employees. Yet the footnote in Edwards, supra, states that Sheriffs and deputies are "State employees." If that were truly the ruling of the Supreme Court under the S.C. Tort Claims Act, then the State of South Carolina would be the proper party defendant for all actions involving Sheriffs and deputies.

The footnote in Edwards, does not address employees other than deputies at all. In the case at bar, the inference can be drawn that other employees were involved in policies, procedures, and training. These could be direct employees of the Respondent or employees of the Sheriff's department other than deputies.

So, no case authority has been cited which decides the issue of liability under the S.C. Tort Claims Act. It is respectfully submitted that the issue is novel, and more facts should be developed than are found in the record before the Court in this case.

There is no doubt that deputies are at least in part county officials. As pointed out in the Appellant's brief the Sheriff himself is subject to the county auditor and the county treasurer, and, a Sheriff upon taking office takes an oath as a county officer. 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. Sheriffs' funding is controlled in part by the counties.

The S.C. Tort Claims Act provides that "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 (emphasis supplied), or in service of a governmental entity in the scope of official duty, whether with or without compensation....” S.C. Code Ann. Section 15-78-30.

Far from being settled, it is respectfully submitted that the issues of liability in this case have not been directly addressed under the S.C. Tort Claims Act. The Appellant requests that the case be remanded for further elucidation of the facts in the Circuit Court.

C. The issue of the Motion to Substitute Parties is properly before the Court.

The Circuit Court gave the parties 10 days to submit additional material to the Court after the date of the hearing, and an additional five days to submit more material. R. p. 44 lines 7-12. The hearing was on June 17, 2013. The Appellant submitted material to the Circuit Court by fax and mail on June 27, 2013. The Appellant submitted additional material to the Circuit Court by fax and mail five days later on July 2, 2013. See letter, additional proposed order, Supplemental Memorandum, and Motion to Substitute Parties. R. pp. 67, 61, 57, 63.

The Motion to Substitute Parties was submitted by fax and mail on July 2, 2013. The Respondent points out that the Motion to Substitute was not filed until July 5, 2013, and the Order Granting the Motion to Dismiss was signed on July 2, 2013. The material was submitted timely on July 2, 2013, so it must be assumed that Judge Newman had the opportunity to review it before he signed the Order Granting the Motion to Dismiss. Also, the Order Granting the Defendant Sumter County’s Motion to Dismiss was not filed until July 16, 2013, which allowed Judge

Newman considerable additional time for consideration of the Order before filing, if he so chose. R. p. 1.

It is respectfully submitted that the Circuit Court was timely presented with the request to decide the Motion to Substitute Parties. It is further submitted that the Court impliedly denied the request since the Order of Dismissal was filed two weeks after the Motion to Substitute Parties and the Supplemental Memorandum were submitted to the Circuit Judge.

It is respectfully submitted, that it was error to dismiss the case without hearing the Motion to Substitute Parties.

D. Conclusion.

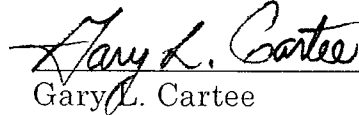
It is respectfully submitted that this case should not have been dismissed on the record before the Court. Respectfully, taking the well pleaded facts as true, viewing the pleadings in the light most favorable to the Appellants, and taking all reasonable inferences in the light most favorable to the Appellants, the case should not have been dismissed.

If the Respondents are confident that there are no allegations of negligence, specific or general, which involve a person acting on behalf of the Respondent, or who was a direct employee of the Respondent, it would be a simple matter on remand to file an affidavit to that effect and to file a motion for summary judgment.

There are good reasons that the standards for granting Rule 12 motions constitute a high bar. That is because the party opposing the motion loses his or her remedy.

The Appellant respectfully requests that this case be remanded to the Circuit Court for further proceedings.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

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



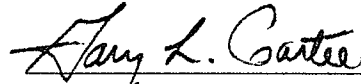
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CERTIFICATE OF COMPLIANCE

Counsel for the Plaintiff hereby certifies that the Final Reply 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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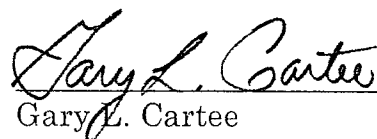
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CERTIFICATE OF SERVICE

Counsel for the Plaintiff hereby certifies that the Final Reply 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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