

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM PICKENS COUNTY

Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2014-CP- 39-0259

RECEIVED

DEC 16 2015

SC Court of Appeals

Mark Ostendorff,.....Appellant,

v.

School District of Pickens County, Board of Trustees,
Alex Saitta, Judy Edwards, Jimmy Gillespie,
Herbert Cooper, Jim Shelton, Ben Trotter, Kelly Pew,
Henry Hunt, Robert Folkman,

.....Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT ERR IN GRANTING DEFENDANTS' MOTION TO DISMISS IMPROPERLY NAMED DEFENDANTS AS THE SOUTH CAROLINA TORT CLAIMS ACT PROTECTS POLITICAL SUBDIVISIONS FROM LIABILITY WHEN EMPLOYEES ACT OUTSIDE THE SCOPE OF THEIR OFFICIAL DUTIES BUT DOES NOT PROTECT THOSE SAME EMPLOYEES FROM LIABILITY WHEN THOSE EMPLOYEES ACT OUTSIDE THE SCOPE OF THEIR OFFICIAL DUTIES ?
2. DID THE COURT ERR IN GRANTING DEFENDANTS' MOTION TO DISMISS IMPROPERLY NAMED DEFENDANTS AS A JURY TRIAL WAS DEMANDED AND WHETHER EMPLOYEES ACTED WITHIN THE SCOPE OF THEIR OFFICIAL DUTIES IS AN ISSUE OF FACT AND NOT LAW ?
3. DID THE COURT ERR IN GRANTING DEFENDANTS' MOTION TO DISMISS IMPROPERLY NAMED DEFENDANTS AS STRICT LIABILITY UPON EMPLOYERS FOR THEIR EMPLOYEES' ACTIONS DOES NOT APPLY TO THE SOUTH CAROLINA TORT CLAIMS ACT ?
4. DID THE COURT ERR IN GRANTING DEFENDANTS' MOTION TO DISMISS IMPROPERLY NAMED DEFENDANTS AS APPELLANT WAS DENIED DUE PROCESS ?
5. DID THE COURT ERR IN GRANTING DEFENDANTS' MOTION TO DISMISS IMPROPERLY NAMED DEFENDANTS AS APPELLANT WAS DENIED EQUAL PROTECTION OF THE LAW ?
6. DID THE COURT ERR IN GRANTING DEFENDANTS' MOTION TO DISMISS IMPROPERLY NAMED DEFENDANTS AS THE COURT FOUND NO FINDINGS OF FACT NOR CONCLUSIONS OF LAW ?
7. DID THE COURT ERR IN GRANTING DEFENDANTS' MOTION TO DISMISS IMPROPERLY NAMED DEFENDANTS AS THE BOARD OF TRUSTEES IS A SEPARATE ENTITY ?

STATEMENT OF CASE

On June 20, 2014, a hearing was held for Motion by Defendant to Dismiss Improperly Named Defendants. That decision by Circuit Court to Dismiss Improperly Named Defendants is this appeal.

Nature of action or manner : Wrongful discharge of employment of plaintiff Mark Ostendorff by defendant School District of Pickens County, et al. Jury trial demanded by plaintiff Ostendorff.

Action of Court: Granting of Defendant's Motion to Dismiss Improperly Named Defendants.

Date of hearing: June 20, 2014.

Mode of Trial: Circuit Court Judge, no jury.

Judgment appealed from: Circuit Court decision dated July 10, 2014

Date of service of notice of appeal: August 9, 2014

ARGUMENTS

1. BECAUSE THE SOUTH CAROLINA TORT CLAIMS ACT DOES NOT GIVE TOTAL IMMUNITY TO EMPLOYEES OF POLITICAL SUBDIVISIONS , THE DEFENDANTS' MOTION TO DISMISS IMPROPERLY NAMED DEFENDANTS SHOULD NOT HAVE BEEN GRANTED.

SC Code Section 15-78-30 (c) provides a definition to whom is considered an "employee" under the South Carolina Tort Claims Act, and (h) defines "political subdivision" , all defendants are considered to fall under the provisions of this code.

SC Code Section 15-78-20 (b) states "....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 Section 15- 78- 70(b)."

SC Code Section 15-78-70(b) states " Nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it 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."

Thus the Court 's granting of Defendants' Motion to Dismiss Improperly Named Defendants gave the employees total immunity.

2. BECAUSE A JURY TRIAL WAS DEMANDED , WHETHER AN EMPLOYEE OF A POLITICAL SUBDIVISION ACTED WITHIN THE SCOPE OF HIS OFFICIAL DUTIES UNDER THE SOUTH CAROLINA TORT CLAIMS ACT IS AN ISSUE OF FACT AND NOT ONE OF LAW, THE DEFENDANTS' MOTION TO DISMISS IMPROPERLY NAMED DEFENDANTS SHOULD NOT HAVE BEEN GRANTED.

Appellant demanded a jury trial and that jury would be the finders of fact. The Defendants' Motion to Dismiss Improperly Named Defendants was not decided by a jury but by a lone judge.

No affidavits were provided by any of the defendants with an explanation how they acted within the scope of his official duties.

SCRCP Rule 39 (a) By Jury. " When trial by jury has been demanded as provided in Rule 38..., The trial of all issues so demanded shall be by jury,...."

SCRCP Rule 38 (a) Right Preserved. "... Issues of fact in an action for the recovery of money only or of specific real or personal property must be tried by a jury, unless a jury trial be waived."

3. BECAUSE STRICT LIABILITY OF AN EMPLOYER FOR AN EMPLOYEE'S ACTIONS IS NOT APPLICABLE TO POLITICAL SUBDIVISIONS, THE DEFENDANTS' MOTION TO DISMISS IMPROPERLY NAMED DEFENDANTS SHOULD NOT HAVE BEEN GRANTED.

SC Code Section 15-78-60 . Exceptions to waiver of immunity.

States "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;..."

Thus a political subdivision may not necessarily have all responsibility for the actions of its employees.

4. BECAUSE A POLITICAL SUBDIVISION IS PROTECTED UNDER THE SOUTH CAROLINA TORT CLAIMS ACT FROM LIABILITY DUE TO ACTIONS OF EMPLOYEES NOT ACTING WITHIN THE SCOPE OF THEIR OFFICIAL DUTIES, APPELLANT WAS DENIED DUE PROCESS.

SC Code Section 15-78-60. Exceptions to waiver of immunity.

States " 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;..."

A jury trial was demanded, and if during the trial , the School District proves to the jury that the employees , and not fully the School District, were responsible for plaintiff Ostendorff's damages while acting outside the scope of their official duties, plaintiff Ostendorff would not be able to recover his losses. By granting Defendants' Motion to Dismiss Improperly Named Defendants, the Court has circumvented Ostendorff's ability to recover his losses.

Article I, Section 3 of the South Carolina Constitution provides that no " person be deprived of life , liberty, or property without due process of law, nor any person be denied the equal protection of the law..."

The procedural due process component of this constitutional provision guarantees that a person have an "opportunity to be heard 'at a meaningful time and in a meaningful manner'" before he is deprived of any life, liberty or property right. Tall Tower , Inc., v. South Carolina Procedure Review Panel, 294 S.C. 225, 232, 363 S. E. 2d 683, 686-87 (1987).

This due process guarantee ensures a fair " decision- making process" before the government impairs a person's life, liberty or property rights. J. Nowak, R. Rotunda and J. Young, Constitutional Law, 10.6 (3rd ed. 1986).

5. BECAUSE A POLITICAL SUBDIVISION IS PROTECTED UNDER THE SOUTH CAROLINA TORT CLAIMS ACT FROM LIABILITY DUE TO ACTIONS OF EMPLOYEES NOT ACTING WITHIN THE SCOPE OF THEIR OFFICIAL DUTIES , APPELLANT WAS DENIED EQUAL PROTECTION OF THE LAW.

The SC Code Section 15 Chapter 78 provides protection to the School District but denies Ostendorff's ability to recover his losses if the Granting of the Motion to Dismiss Improperly Named Defendants is not reversed.

The equal protection clause of the South Carolina Constitution parallels that of the U S Constitution . Article I, Section 3 of the South Carolina Constitution provides that no person shall be denied the equal protection of the laws. SC Const. Art I, § 3.

Although the Supreme Court of South Carolina has stated that the concept of equal protection of the laws is " difficult to define and not susceptible of exact delimitation," it has provided general guidance on the subject:

[T]he constitutional guaranty of equal protection of the laws requires that all persons shall be treated alike under similar circumstances and conditions , both in the privileges conferred and in the liabilities imposed... The equal protection guaranty is intended to secure equality of protection not only for all, but against all similarity situated. Thompson v. South Carolina Comm'n on Alcohol and Drug Abuse, 267 S.C. 463, 471, 229 S.E. 2d 718, (1976)., Marley v. Kirby, 271 S.C. 122, 245 S.E. 2d 604 (1978)., Thompson , 267 S.C. at 471, 229 S.E. 2d at 722.

6. BECAUSE NO FINDINGS OF FACT, NOR CONCLUSIONS OF LAW , WERE FOUND IN THE GRANTING THE DEFENDANTS' MOTION TO DISMISS IMPROPERLY NAMED DEFENDANTS, THAT MOTION SHOULD HAVE NOT BEEN GRANTED .

Whether a servant's acts are within the scope of his employment is usually a question of fact for the jury. Hamilton v. Miller , 301 S.C. 45 389 S.E. 2d 652 (1990).

On appeal from an action at law that was tried without a jury , the appellant court can correct errors of law, but the findings of fact will not be disturbed unless found to be without evidence which reasonably supports the judge's findings. Townes Assoc .Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E. 2d 773 , 775 (1976).

In an equitable action tried without a jury , the appellate court can correct errors of law and may find facts in accordance with its own view of the preponderance of the evidence. Townes Assoc. Ltd v. City of Greenville, 86, 221,S.E. 2d at 775-76.

The findings of fact are essential to determine if each named employee acted within the scope of his official duty and thus the applicability of Chapter 78.

The Complaint clearly sets forth facts in the allegations a cause of action. SCRCP 12(b) states " If, on a motion asserting number (6) to matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all matters made pertinent to such a motion by Rule 56.

SCRCP 56 (d) Case Not Fully Adjudicated on Motion. " If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary , the court at the hearing of the motion , by examining the pleadings and evidence before it and by interrogating counsel , shall if practical ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It may thereupon make an order specifying the facts that appear without substantial controversy,....."

The defendants offered no affidavits, nor any evidence to how each acted in the scope of their official duties in the Motion. No defendant offered any evidence or even an explanation of how they acted in the scope of their official duties while given numerous opportunities before the Complaint was served.

The order contained no findings of fact nor conclusions of law.

What is of material fact is an issue to be determined by a jury. In *Anderson ,et al, v. Liberty Lobby, Inc., et al* 477 U.S. 242 (1986). The Court's opinion is replete with boilerplate language to the effect that trial courts are not to weigh evidence when deciding summary judgment motions: "[I]t is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter..." Ante, at 249. " Our holding... does not denigrate the role of the jury... Credibility determinations , the weighing of the evidence , and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed , and all justifiable inferences are to be drawn in his favor." Ante. at 255.

Regarding SCRCP Rule 12 (b) (6), cause of action. Black's Dictionary defines as : 1. A group of operative facts giving rise to one or more bases for suing; "What is a cause of action? Jurists have found it difficult to give a proper definition...." Edwin E. Bryant, *The Law of Pleading under the Codes of Civil Procedure* 170 (2d ed. 1899).

The U. S. Supreme Court in *Conley , et al; v. Gibson, et al*, 355 U.S. 41 (1957) held that " a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

In *Baird v. Charleston County*, 333 S.C. 519, 511, S.E. 2d 69 (1999), Since it is a drastic remedy, summary judgment should be cautiously invoked so that no person will be improperly deprived of a disputed factual issues. In general, if the pleadings and evidentiary matter in support of summary judgment do not establish the absence of a genuine issue of material fact, summary judgment must be denied, even if no opposing evidentiary matter is presented. Summary judgment must not be granted until the opposing party has a full and fair opportunity to complete discovery. Motion may not be sustained if the facts alleged and inferences therefrom would entitle the plaintiff to any relief on any theory.

In *Woodell by Allen v. Marion School Dist. One*, 307 S.C. 297, 414 S.E. 2d 794, 73 Ed. Law Rep. 552 (Ct App. 1992), the trial court must construe the complaint in the light most favorable to the nonmoving party, and must consider the facts alleged in the complaint as true.

7. BECAUSE THE SCHOOL BOARD OF TRUSTEES IS A SEPARATE ENTITY, THE DEFENDANTS' MOTION TO DISMISS IMPROPERLY NAMED DEFENDANTS SHOULD NOT HAVE BEEN GRANTED.

The School Board of Trustees is an elected body. It is not accountable to the School District but to the electorate. It does not take directives from the School District. The School District does not pay the Board for its services. The School District cannot fire or replace the Board or any of its members.

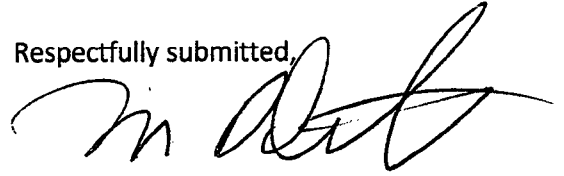
Black's Dictionary defines entity as "An organization (such as a business or a governmental unit) that has a legal identity apart from its members."

CONCLUSION

For the reasons stated, this Court should reverse the order of the circuit court.

December 22, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'M. Ostendorff', written over the words 'Respectfully submitted,'.

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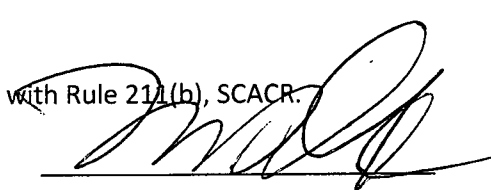
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.....Respondents.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(h), SCACR.

December 10, 2015


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