THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable L. Casey Manning, Circuit Court Judge

Civil Action Case No. 2018-CP-40-01224
Appellate Case No. 2020-000550

Kevin L. Paul .....Appellant,

v.

Walmart Stores East, L.P.: Wal-Mart Supercenter,
d/b/a Wal-Mart Store 1339; and Richland County Sheriff's Office, Defendants,

Of Which Richland County Sheriff's Office is the .....Respondent.

INITIAL REPLY OF THE APPELLANT

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ARGUMENT

I. APPELLANT ADEQUATELY PLED HIS GROSS NEGLIGENCE CLAIM AND HAS SUFFICIENTLY CHALLENGED THE TRIAL COURT'S RULING ON THE GROSS NEGLIGENCE CLAIM.

Respondent appears to argue that since the Appellant did not include the specific term "voluntary duty" in the Complaint, that somehow impacts the gross negligence claim that was pled.

> In his opening brief, the Appellant argues that the RCSO "voluntarily assumed" a duty "to clear the false charges against the Plaintiff." *See*, Appellant's Opening Brief, p.14. No such "voluntary duty" was even pled in the Complaint.

(Response brief, p.12).

The Appellant pled in the Complaint that:

> RCSO had a duty not to arrest an individual without having conducted an investigation and to re-evaluate their decision to charge/prosecute a particular individual upon learning of information which would invalidate the probable cause used to obtain the arrest warrant against that particular individual. RCSO was grossly negligent and breached that duty by failing to conduct even a rudimentary investigation, in failing to re-evaluate the criminal charge against KEVIN when informed of the exculpatory evidence in the criminal case and in

> failing to act within a reasonable amount of time to avoid further prejudice after they were notified that they had incorrectly charged KEVIN with a crime.

(Complaint, p.10, ¶48)

Further, that cause of action section in the Complaint re-alleged all previous paragraphs by reference "as if recounted at length herein." (Complaint, p.10, ¶47). Previously in the Complaint, Appellant had specifically pled:

> On or about June 22, 2017, Sgt. Holdorf sent an email to Wanda Durel under the subject line "Kevin Lee Paul." That email was courtesy copied to Attorney Moses and read:
>
> > Re warrant 2017A4010201103 – When the person was arrested he gave the name Kevin Lee Paul. This is not going to be the correct name. The subjs real name is Mack James Paul Jr. DOB 12-9-68. He is going to be the brother of the real Kevin Paul. I will be doing new warrants on Mack Paul and dropping warrant 201103

(Complaint, p.6, ¶26)

The purpose of a pleading is to put the adversary on notice as to what the issues are. Langston v. Niles, 265 S.C. 445, 455, 219 S.E.2d 829, 833 (1975). To ensure substantial justice to the parties, **pleadings must be liberally construed**. Quality Towing, Inc. v. City of Myrtle Beach, 340 S.C. 29, 33, 530 S.E.2d 369, 371 (2000), emphasis added. In construing a complaint or a responsive pleading, **the court must review the entire pleading**. Doe ex rel. Legal Guardian v. Barnwell School Dist. 45, 369 S.C. 659, 663, 633 S.E.2d 518, 520 (Ct. App. 2006), emphasis added; *see* Smith v. Nelson, 83 S.C. 294, 300, 65 S.E.261, 263 (1909)(construing the "complaint upon the whole"). It is well settled that, in considering a demurrer to a complaint, the factual allegations thereof "are to be considered as true and, together **with relevant inferences deducible therefrom**, are to be liberally construed in the plaintiff's favor." Franks v. Anthony, et al., 231 S.C. 191, 97 S.E.2d 891 (1957), (emphasis added).

The allegations in the complaint were sufficient under the above-cited case law to put the Respondent on notice of the "voluntary duty" they had assumed, which is likely why Respondent has not previously made this argument before it appeared in their initial brief.

Respondent then argues that because the Appellant did not challenge the trial court's decision based on a specific case, "his appeal on the gross-negligence claim is barred by the 'two-issue' rule". (Response Brief, p.13).

The case Respondent is referring to is Wyatt v. Fowler, 484 S.E.2d 590 (1997). In its order, the sole reference the trial court made to Wyatt appeared in a footnote, which read:

> This Court finds that Plaintiff's theory of liability in this response amounts to a "negligent investigation," for which no cognizable cause of action exists. In *Wyatt v. Fowler*, 326 S.C. 97, 484 S.E.2d 590 (1997), the South Carolina Supreme Court ruled that a sheriff and his deputies were entitled to a judgment as a matter of law on a negligence action arising out of the execution of an arrest warrant. The Supreme Court concluded that "the state does not owe its citizens a duty of care to proceed without error when it brings legal action against them." 484 S.E.2d at 592. The Court explained that "police owe a duty to the public at large and not to any individual." *Id.* Consequently, *Wyatt* demonstrates that South Carolina does not recognize a cause of action for negligent performance of a criminal investigation.

(Order, p.6, fn.2).

This argument by Respondent ignores the fact that the Appellant's gross negligence claim was not limited solely to negligent investigation, which is clearly the "theory of liability" under which the trial court cited Wyatt. As the Appellant argued initially in his Response in Opposition to Respondent's Motion for Summary Judgment:

> In the present case, Defendant RCSO wrongfully charged the Plaintiff with a crime. Setting aside whether they were negligent or grossly negligent in bringing those charges against the Plaintiff to begin with, Defendant RCSO has admitted they had notice that the criminal charge against the Plaintiff was false by the April 28, 2017 email. Not only did Defendant RCSO admit the false nature of the criminal charge in that email, but they also affirmatively acknowledged their duty (or in the least volunteered to undertake they duty) "to clear up the issue." Despite

> that acknowledgment, there is a material question of fact as to whether Defendant RCSO used due care in "clearing up" the issue.

(Response in Opposition, p.16)

The Appellant specifically pointed out the problem with this finding by the trial court in section II of his Motion to Alter/Amend/Reconsider:

> The Court's Order only briefly discusses Plaintiff's gross negligence cause of action via footnote 2, seemingly accepting RCSO's characterization of the cause of action as being limited to "negligent investigation." This characterization ignores the specific allegations of the Plaintiff's cause of action, that "RCSO was grossly negligent and breached that duty in failing to conduct even a rudimentary investigation, in **failing to re-evaluate the criminal charge against [the Plaintiff] when informed of the exculpatory evidence in the criminal case** and in **failing to act within a reasonable amount of time to avoid further prejudice after they were notified that they had incorrectly charged [the Plaintiff] with a crime**." ¶48 of *Complaint*, emphasis added.
>
> The Order also ignores Plaintiff's argument that **RCSO undertook a voluntary duty to clear the false charges against the Plaintiff.** An affirmative legal duty exists only if created by statute, contract, relationship, status, property interest, **or some other special circumstance**. Hendricks v. Clemson Univ., 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003), citing Carson v. Adgar, 326 S.C. 212, 486 S.E.2d 3 (1997), emphasis added. **Where an act is voluntarily undertaken, however, the actor assumes the duty to use due care**. Hendricks at 457, 714, citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991), emphasis added. *See* Faile v. South Carolina Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002) (holding that duty can arise by voluntary undertaking). *See also* Sherer v. James, 290 S.C. 404, 406, 351 S.E.2d 148, 150 (1986) (it has long been the law that one who assumes to act, even though under no obligation to do so, thereby becomes obligated to act with due care).
>
> In the present case, there is more than a mere scintilla of evidence that RCSO undertook a voluntary duty. There is actual documentary evidence produced to the Court in the form of correspondence from RCSO agents/employees to the magistrate's court wherein RCSO affirmatively states they were going to "clear this issue up." *See* Exhibits A, B and C *Plaintiff's Memo in Opposition*). It is reasonable that a jury could view this evidence and find that RCSO was grossly negligent in failing to complete this voluntary duty they undertook.

(Motion to Alter/Amend, p.4-6).

Wyatt has absolutely nothing to do with the "voluntary duty" it is alleged the Respondent breached. It is apparent from the very language Respondent quotes from Wyatt, that the court reached its decision in that case based upon the "public duty" rule:

> The Supreme Court explained that "the state does not owe its citizens a duty of care to proceed without error when it brings legal action against them." 484 S.E.2d at 592. The Supreme Court further ruled that "the police owe a duty to the public at large and not to any individual." *Id.* Consequently, based on *Wyatt*, the trial court found not duty of care was owed to Paul.

(Response Brief, p.13).

This was specifically an argument made by Respondent and addressed by the Appellant below:

> In the context of a negligence action, the public duty rule may be stated as follows: a statute prescribing the duties of a public office does not, without more, impose on the person holding that office a duty of care towards individual members of the public in the performance of those duties. Wells v. City of Lynchburg, 331 S.C. 296, 307, 501 S.E.2d 746, 752 (Ct. App. 1998). However, an affirmative legal duty may be created by statute, contract relationship, status, property interest, or some other special circumstance. Jensen v. Anderson County Dept't of Soc. Servs., 304 S.C. 195, 403 S.E.2d 615 (1991).
>
> As noted above, **where an act is voluntarily undertaken, however, the actor assumes the duty to use due care**. Hendricks at 457, 714, citing Russell v. City of Columbia, 305 S.C. 86, 406 S.E.2d 338 (1991), emphasis added. By voluntarily undertaking to relay information to third parties about the Plaintiff, by voluntarily undertaking to prosecute the Plaintiff, and by voluntarily undertaking to resolve their known false identification of the Plaintiff as the perpetrator of a crime, Defendant Lott assumed a duty that falls outside of any duty that may be imposed by statute. As such, the public duty rule does not bar the Plaintiff's causes of action.

(Response in Opposition, p.17-18).

Respondent's argument ignores the fact that Appellant's challenge to the trial court's dismissal of the gross negligence claim based on the voluntary duty argument is itself, as argued below, a challenge to the trial court's finding in footnote 2 of the order, which cited to Wyatt.

II. APPELLANT SUFFICIENTLY OPPOSED THE ISSUE OF QUALIFIED IMMUNITY BELOW.

Respondent's argument that the Appellant is challenging the finding of qualified immunity "based upon an issue that was never pled nor raised in the court below – that the RCSO had a duty 'to correct that false, defamatory publication once they had notice of its falsity." (Response Brief, p.16). "Because that argument was never made in the trial court, it cannot be made for the first time on appeal." (Response Brief, p.16).

This argument ignores the fact that the Appellant **did** raise this issue below:

> Where the defamation is made in good faith and with proper motives, a defendant may claim a qualified or conditional privilege. The privilege exists if the defendant correctly or reasonably believes that some important interest of his own or a third party is threatened. Cullum v. Dun & Bradstreet, Inc., 228 S.C. 384, 90 S.E.2d 370 (1955). A qualified privilege may exist where the parties have a common business interest. Conwell v. Spur Oil Company, 240 S.C. 170, 125 S.E.2d 270 (1962). However, the qualified privilege exists only when the publication has occurred in a proper manner and to proper parties only. Prentiss v. Nationwide Mutual Insurance Company, 256 S.C. 141, 181 S.E.2d 325 (1971). Notably, even if a party initially demonstrates a qualified privilege, **that privilege can be lost**. Abofreka v. Alston Tobacco Co., 288 S.C. 122, 126, 341 S.E.2d 622, 625 (1986),(emphasis added).
>
> In the present case, despite providing information to Wal-Mart falsely identifying the Plaintiff as the alleged shoplifter, and knowing that identification was false by April 28, 2017, Defendant Lott never contacted Wal-Mart to notify them that the Plaintiff was not the alleged shoplifter.
>
> Q: Did you ever reach out to anybody with Walmart?
> A: No.
> *Deposition of Sgt. Cris Truluck*, p.38, l.2 - 4.
>
> and,
>
> Q: Did anyone from Richland County Sheriff's Department ever contact Walmart and let them know that the information about the suspect was not correct?
> A: I, I did not myself. I don't know of anyone. I don't know.
> *Deposition of Sgt. Travis Holdorf*, p.73, l.13-17.

(Response in Opposition, p.14-15).

To the extent the Respondent also argues there being no South Carolina authority supporting that a publisher of a defamatory statement has a duty to make a retraction that the

statement may be incorrect, a) that argument was never made by the Respondent below, and b) Appellant argues the case law in the quoted section above is South Carolina authority supporting the denial of qualified privilege upon the theory that it can be lost.

III. APPELLANT SUFFICIENTLY CHALLENGED THE TRIAL COURT'S RULING ON HIS MALICIOUS PROSECUTION CLAIM.

Respondent argues that the trial court's alternative basis for granting summary judgment was correct and that the Appellant's failure to raise the issue in his Initial Brief makes this alternative basis the law of the case and precludes reversal.

The alternative basis the Respondent refers to came as two sentences in a footnote, that referenced S.C. Code §15-78-60(23) and a Federal District Court case that the Respondent claims supports its argument that there can be no malicious prosecution claims against law enforcement in South Carolina pursuant to the exception in the Tort Claims Act's waiver of liability.

That issue was briefed and argued below:

> To the extent the Court's Order relies on RCSO's argument that they are immune from liability for malicious prosecution claims and cites the Federal District case of McCoy v. City of Columbia, 929 F.Supp.2d 541 (D.S.C. 2013) in support, the Plaintiff would simply note again that there are no South Carolina appellate court decisions that support this position. Instead, existing South Carolina case law is directly at odds with this argument. See Law v. S.C. Dept. of Corr., 368 S.C. 424, 435-438, 629 S.E.2d 642, 648-650 (2006)(affirming trial court grant of summary judgment on malicious prosecution cause of action for failing to prove essential elements of the offense); McBride v. Sch. Dist. of Greenville County, 389 S.C. 546, 565-567, 698 S.E.2d 845, 855-856 (Ct. App. 2010)(finding trial court erred in finding malicious prosecution was barred by 15-78-60(17), as "actual malice" is not required); Jackson v. City of Abbeville, 366 S.C. 662, 669-669-670, 623 S.E.2d 656, 660 (Ct. App. 2005)(affirming trial court grant of summary judgment on malicious prosecution cause of action for failing to prove lack of probable cause); Chakrabarti v. City of Orangeburg, 403 S.C. 308, 319-320, 743 S.E.2d 109, 115 (Ct. App. 2013) (allowing Plaintiff to pursue causes of action under gross negligence theory and not granting immunity pursuant to §15-78-60(23)). In all of these cases, South Carolina

> appellate courts could have easily used §15-78-60(23) immunity as support for not allowing Plaintiffs to pursue their claims, but refused to do so.

(Motion to Alter/Amend/Reconsider, pp. 8-9).

The entire Section I of the Appellant's brief challenges the notion that law enforcement officers are immune from malicious prosecution claims under the South Carolina Tort Claims Act.

To the extent Respondent makes the argument that Respondent is immune from suit because the complained of conduct of whether to dismiss the false charge against the Appellant was "indisputably prosecutorial in nature" and they are entitled to "the same prosecutorial immunity the solicitors enjoy," the Appellant would note the "prosecutorial decision" to dismiss the charge was made before much of the complained of conduct. The fact that the charge stayed pending against the Appellant was not because the Respondent was exercising any "prosecutorial discretion." Instead, it stayed pending from the gross negligence of the Respondent to fulfill an administrative duty they had voluntarily assumed: to dismiss the pending warrant.

Respondent's failure to take the proper administrative steps to clear up an admitted mistake they had already volunteered to correct was purely administrative in nature and an attempt to claim absolute prosecutorial immunity for this failure is not supported by case law.

The actions of a prosecutor are not absolutely immune merely because they are performed by a prosecutor. Qualified immunity "represents the norm" for executive officers. Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993). Absolute immunity is not a favored status. Government officials "bear the burden of showing that public policy requires an exemption" from suit. Cleavinger v. Saxner, 474 U.S. 193, 106 S. Ct. 496 (1985).

Therefore, when a prosecutor "functions as an administrator rather than as an officer of the court" he is entitled only to qualified immunity. Imbler v. Pachtman, 424 U.S. 409 (1976).

Likewise, South Carolina courts have recognized similar concepts regarding immunity under South Carolina Tort Claims Act (SCTCA). In *Williams v. Condon,* the South Carolina Court of Appeals held "a prosecutor in the employ of this state is immune from personal liability under §1983 or the South Carolina Tort Claims Act for actions relating to the prosecution of an individual as a criminal defendant – regardless of the prosecutor's motivation – provided the actions complained of were committed while the prosecutor was acting as an 'advocate,' as defined by Imbler v. Pachtman and its progeny." Williams v. Condon, 347 S.C. 227, 250; 553 S.E.2d 496, 509 (2001).

By the trial court's own finding, the complained of conduct by the Respondent was "administrative actions." (Order, p.6). As such, they would not be subject to the absolute immunity prosecutors enjoy and which the Respondent seeks to blanket its deputies with.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the Circuit Court.

Respectfully submitted,

July 13, 2020

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Of Which Richland County Sheriff's Office is the .....Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Reply of the Appellant on the Defendant/Respondent by depositing a copy of it in the United States Mail, postage prepaid, on July 13, 2020, addressed to its attorney of record, Andrew F. Lindemann; Lindemann, Davis & Hughes, PO Box 6923, Columbia SC 29260.

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July 13, 2020

Honorable Jenny Abbott Kitchings
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Re: Appellate Case No. 2020-000550
Kevin L. Paul, Appellant v.
Walmart Stores East, L.P., et al

Dear Ms. Kitchings:

Please find enclosed for filing the following:

1. Initial Reply of the Appellant; and
2. Proof of Service.

By copy of this letter, I am serving Attorney for Respondent, Andrew F. Lindemann.

Also, please find enclosed a self-addressed stamped envelope for your convenience in returning a copy of the Proof of Service to me.

Thank you for your assistance in this matter.

Yours truly,

WUKELA LAW FIRM

PATRICK J. McLAUGHLIN

PJM:jpb

Enclosures

cc: Andrew F. Lindemann, Esquire
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