

The State of South Carolina
In the Supreme Court

RECEIVED

Mar 26 2021

S.C. SUPREME COURT

Appeal from Dillon County
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Supreme Court # 2021-000314

Common Pleas # 2014-CP-17-00348

Christopher Lampley, Respondent

v.

Major Hulon, Dillon County Sheriff, Petitioner

Return to Petition for a Writ of Certiorari

William P. Hatfield, Esq
S.C. Bar # 2840
Hatfield Temple, LLP
P.O. Box 1770
Florence, SC 29503-1770
(843) 662-5000

Robert N. Hill
S.C. Bar # 65074
Law Office of Robert Hill
322 Spring Mist Court
Lexington, SC 29072
(803) 520-4370

Counsel for Respondent

Introduction

Did the Sheriff employ Lampley, a county firefighter? The Court of Appeals unanimously held no under this Court's definition of who employs whom in the Tort Claims Act and because of the legally settled distinction between sheriffs and counties. App. at 4. This faithfully applies uniform law. The novelty is the Sheriff's definition of employer. Certiorari is unwarranted.

I. The statute unambiguously allows Lampley's third-party action.

The issue over who employs whom arises out of a car crash between the Sheriff's Deputy and Christopher Lampley, a firefighter employed by Dillon County, while both were on the job. App. at 2. The County paid Lampley workers' compensation benefits. App. at 2. These benefits did not compensate Lampley for his pain and suffering. *See Breeden v. TCW, Inc./Tenn. Express*, 355 S.C. 112, 118, 584 S.E.2d 379, 382 (2003) (workers' compensation does not compensate for pain and suffering). To recover for pain and suffering, Lampley had to sue the Sheriff as the entity employing the tortfeasor. *Faile v. S.C. Dep't of Juvenile Justice*, 350 S.C. 315, 329-330, 566 S.E.2d 536, 543 (2002) (a Tort Claims Act suit must be against the tortfeasor's employer).

The Sheriff invoked S.C. Code Ann. § 15-78-60(14) (2005) and claimed immunity from the personal injury claims. ROA 39 ¶ 4. The statute bars some claims but specifically allows "an injured employee to recover damages from any person other than the employer":

The governmental entity is not liable for a loss resulting from:
(14) any claim covered by the South Carolina Workers' Compensation Act, except claims by or on behalf of an injured employee to recover damages from any person other than the employer, the South Carolina Unemployment Compensation Act, or the South Carolina State Employee's Grievance Act.

The Act further defines the term "employee," as in the phrase "injured employee," to include those employed by a county. S.C. Code Ann. § 15-78-30(c) ("employee" includes employees of the State's political subdivisions); § 15-78-30(h) ("political subdivision" includes counties). And those "other than the employer," who may be sued, are governmental entities in that the statute describes when "[t]he governmental entity" is and is not liable for a loss. S.C. Code Ann. § 15-78-60. The Tort Claims Act does not apply to private tortfeasors.

So, did the Sheriff employ Lampley? The Court of Appeals answered no under the *Faile* test. App. at 4. There this Court defined what "employer" means in the Tort Claims Act and examined who has the right to control, who pays, who furnishes the equipment, and who has the right to fire. *Faile*, 350 S.C. at 329, 566 S.E.2d at 543.

This definition is not new. *See South Carolina Ind. Comm. v. Progressive Life Ins. Co.*, 242 S.C. 547, 550, 131 S.E.2d 694, 695 (1963) (applying the four factors). Decades earlier the Court held that the test

“is one of control” as “determined from the contract of employment.”
Carter’s Dependents v. Palmetto State Life Ins. Co., 209 S.C. 67, 71, 38
S.E.2d 905, 906 (1946). And over 145 years ago, the Court recognized
the relationships created by a contract for employment or service,
resting on the parties’ mutual will and agreement. *Daniel v.*
Swearngen, 6 S.C. 297, 302, 24 Am.Rep. 471 (1875). As so defined, one
is not an employer without the employee’s assent.

The Sheriff does not qualify. As the Court of Appeals found: “the
Sheriff does not control Lampley, does not pay Lampley, does not
furnish Lampley with equipment, and does not have the right to fire
Lampley. Thus, under *Faile*, the Sheriff is not Lampley's employer.”
App. at 4. The Sheriff now frankly admits that he never argued that
the term applied in its “traditional sense.” Petition for Cert. at 7. What
the Sheriff is calling the term’s traditional sense is its plain and
unambiguous meaning.

This ends the inquiry. The Sheriff is a person “other than the employer”
because the terms are clear. If the Sheriff wants to be a statutory employer,
the Sheriff needs to lobby the General Assembly. *See, e.g., Fullbright v.*
Spinnaker Resorts, Inc., 420 S.C. 265, 281, 802 S.E.2d 794, 802 (2017)
 (“However, the statute is not ambiguous, and our rules of statutory
interpretation require us to give effect to its unambiguous language. We

leave Defendant’s policy concerns for the legislature.”); *Smith v. Tiffany*, 419 S.C. 548, 555-56, 799 S.E.2d 479, 483 (2017) (“There is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning unless a statutory provision is ambiguous.”).

There is icing for this cake. The statute is not only clear; the Sheriff also forfeited his ability to challenge its clarity.

The Sheriff told the trial court that Lampley was a Dillon County firefighter and that “the County and Sheriff are each separate entities for purpose of applying the truth . . .” ROA 43 ll.9-11, 46 ll.4-7. The Sheriff then relied on canons and perceived policies for the court to apply “the spirit of the exception.” ROA 46 l.23 – 47 l.1. The trial court requested proposed orders and entered the order that the Sheriff proposed. ROA 49 l.24. This order ruled that the County and Sheriff “constitute[d] the same ‘employer’ as the term is used in § 15-78-60(14)” without first addressing the statute’s clarity. The order instead goes straight into canons and other extrinsic considerations. ROA 6-8.

Lampley emphasized on appeal that the trial court did not find the statute ambiguous, asserted it is unambiguous, and argued that the trial court erred by venturing outside the unambiguous text. Opening Brief, pp. 3-5, 7, 12. The Sheriff’s response never questioned the statute’s clarity or the trial court’s asserted failure to find an ambiguity. Appellee Brief, pp. 1-13. Lampley sent

up flares. The reply led off, “The statute’s clarity went unanswered, dooming the Sheriff’s reliance on canons and policy arguments. Unambiguous statutes like this one are applied, not construed.” Reply Brief, p. 1 and n. 1.

The Court of Appeals ruled that the statute unambiguously allows Lampley to recover damages from the Sheriff. App. at 3. It was only then, in the petition for rehearing, that the Sheriff attacked the statute’s clarity and said that the trial court found it ambiguous. App. at 11-12. The Sheriff forfeited the contention by raising it too late. *Herron v. Century BMW*, 395 S.C. 461, 719 S.E.2d 640 (2011).

We are again at the inquiry’s end. The Sheriff is a person “other than the employer” because the Sheriff forfeited his ability to challenge the statute’s clarity and because the terms are in any event just that clear.

II. The canons of construction favor Lampley.

But let us assume for the sake of argument that the statute is ambiguous enough to resort to canons of construction. The most apt one is that the General Assembly intended that a well-recognized term have its well-recognized meaning. *Grier v. Amisub of South Carolina, Inc.*, 397 S.C. 532, 536, 725 S.E.2d 693, 696 (2012). Undefined terms get their usual and customary meaning. *Travelscape, LLC v. South Carolina Dep’t of Revenue*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011). Employer still means employer.

To argue otherwise, the Sheriff misapplies the canon against duplication and surplusage. The key here is that Title 42 of the Workers Compensation Act applies to governmental employers/employees. S.C. Code Ann. § 42-1-320. Because of this, § 15-78-60(14) of the Tort Claims Act and § 42-1-540 of the Workers Compensation Act both bar workers' compensation claimants from suing their employer. But the Sheriff stops there. The statutes continue.

Both sets of statutes also allow claimants to sue tortfeasors other than their employer. Like § 15-78-60(14), §§ 42-1-540 and -550 and -560 provide that “a plaintiff may collect workers' compensation benefits *and* sue the third party responsible for causing the injuries.” *Machin v. Carus Corp.*, 419 S.C. 527, 534-35, 799 S.E.2d 468, 471-72 (2017) (emphasis in original). This too would be duplicative, such that Lampley could use Title 42 to bring his third-party action—if the Sheriff would just waive sovereign immunity.

That is the rub. The Workers Compensation Act does not waive sovereign immunity. Lampley cannot use Title 42 to bring a third-party suit against the Sheriff like he can a private tortfeasor. The Tort Claims Act is his exclusive remedy. *See* S.C. Code Ann. §§ 15-78-70(a), 15-78-200. This exclusive remedy gives § 15-78-60(14) of the Tort Claims Act ample, independent work. It waives sovereign immunity to give workers' compensation claimants the same right to sue a third-party governmental entity that others enjoy when the third party is not a governmental entity.

This Court reads the statute this way. In *Trousdell*, a sheriff's deputy ran his vehicle into the back of a trooper's patrol car while the trooper was on the job. The trooper got workers' compensation from the State and sued the sheriff. The Court reviewed § 15-78-60, stated that none of the exceptions apply, and concluded that the sheriff "is not immune from suit." *Trousdell v. Cannon*, 351 S.C. 636, 642, 572 S.E.2d 264, 267 (2002).¹

Buff is also on point. In *Buff*, then Judge Hearn, speaking for the Court, harmonized § 15-78-60(14) with §§ 42-1-550 and -560 by holding that a workers' compensation claimant may sue a governmental entity if the entity is not the claimant's employer. *Buff v. South Carolina Dep't of Transp.*, 332 S.C. 472, 475, 505 S.E.2d 360, 362 (Ct. App. 1998), *rev'd on other grounds*, 342 S.C. 416, 537 S.E.2d 279 (2000). And while the claimant in *Buff* was a private employee, *Trousdell* shows that the same holds true for governmental employees. The "employee" in § 15-78-60(14) who may sue to recover damages is statutorily defined to include them. S.C. Code Ann. § 15-78-30(c).

The Sheriff's view is also ironic. For it to work, § 15-78-60(14) only allows third-party suits against a non-governmental entity. Petition for Cert. at 8-9. Now that is duplicative. The Workers' Compensation Act already allows

¹ The Sheriff earlier disputed if this is a holding. Even so, *Trousdell* applied the Tort Claims Act where a governmental employee collected workers compensation and brought a third-party action against a sheriff. It is factually indistinguishable.

third-party suits against a non-governmental entity. *Machin*, 419 S.C. at 534-35, 799 S.E.2d at 471-72. To give §15-78-60(14) independent meaning, it must waive sovereign immunity by allowing third-party suits against the government. Subsection 14 is part of a list that describes when “[t]he governmental entity” is and is not liable for a loss. S.C. Code Ann. § 15-78-60.

III. Counties and sheriffs are legally distinct.

The Sheriff faces another even higher hurdle. The Sheriff claims a symbiotic relationship with the County when the Legislature built a wall between the two—and when the County is better off remaining separated.

The Court of Appeals applied the settled distinction between sheriffs’ offices and county governments. App. at 4, *citing Edwards v. Lexington County Sheriff’s Department*, 386 S.C. 285, 287 n.1, 688 S.E.2d 125, 127 n.1 (2010). This distinction is settled because sheriffs have for decades convinced the courts that the General Assembly walled sheriffs off from county governments, thus allowing sheriffs to escape civil rights claims, suits in federal court, and a county’s oversight of their deputies. *See Cone v. Nettles*, 308 S.C. 109, 111-112, 417 S.E.2d 523, 524-525 (1992); *Heath v. Aiken Cty.*, 295 S.C. 416, 418, 368 S.E.2d 904, 905 (1988); *Gulledge v. Smart*, 691 F. Supp. 947, 954-55 (D.S.C. 1988), *aff’d*, 878 F.2d 379 (4th Cir. 1989).

Lampley doubts that the Sheriff is willing to give up these protections.

The Sheriff apparently wants a symbiotic relationship only when it favors the Sheriff.²

The claimed relationship does not favor the County. The County has already separated itself from the Sheriff when it moved to dismiss the suit that Lampley brought against it because the Sheriff, and not the County, employed the alleged tortfeasor. ROA 17 ¶ 8; ROA 21 ¶ 31, ROA 24 ¶ 2.

And it is in the County's interest to remain separated. The County does not have a lien on a recovery for Lampley's pain and suffering. *See Breeden*, 355 S.C. at 118, 584 S.E.2d at 382. The County will, however, assuredly assert a lien on the sums it can recoup. *See* S.C. Code Ann. § 42-1-560(b) (establishing a workers' compensation lien on a third-party tort recovery). This statutory lien requires that the County and Sheriff remain separate. If the Court merges the two, there is no tort recovery on which to assert a lien.

IV. The Sheriff's proposed revision would create confusion.

Lastly, there is undoubtedly confusion over what the County intended by putting the Sheriff on the County's workers' compensation policy. We have only heard from the Sheriff on whether the County intended a merger that would destroy the County's workers' compensation liens. If this Court denies

² The Sheriff's symbiotic relationship also rests on office space in the courthouse. Petition for Cert. at 9-10, citing S.C. Code Ann. § 4-1-80.

certiorari, the County will assuredly assert its lien and recoup for its taxpayers the sums it may recoup.

Funding issues are also befuddling. Sheriffs independently collect a litany of fees. *See* S.C. Code Ann. § 23-19-10 (listing the fees). These sums are then comingled into the county's treasury. S.C. Code Ann. § 23-19-10(f). Once comingled, it is hard to track which source of funding paid what.

Similar issues bedevil federal court judges who grapple with funding in deciding who enjoys Eleventh Amendment immunity. The Fourth Circuit has noted the difficulty in a case involving who pays the Greenville County Sheriff's insurance premiums. *Cromer v. Brown*, 88 F.3d 1315, 1332 (4th Cir. 1996). Judge Norton rendered an even more telling decision. In *Nelson v. Strawn*, 897 F. Supp. 252 (D.S.C. 1995), *aff'd in part, vacated in part on other grounds*, 78 F.3d 579 (4th Cir. 1996), the City of Moncks Corner claimed that it was a state entity because it got its insurance through the Insurance Reserve Fund. The Court refused to base immunity on the choice of insurance carriers because it would create a situation in which some cities were immune while others were not. "This chaotic result is not necessary or desirable." *Id.* at 257.

The same is true here. If Tort Claims Act immunity turns on who paid for what insurance, parties will have to explore whether a particular sheriff at a particular time collected enough fees and other sums to pay that sheriff's fair

share of the insurance premiums. Immunity would vary from sheriff to sheriff and policy period to policy period. This is not necessary or desirable.

There is more. The Sheriff's point over funding at bottom turns on the County's ability under S.C. Code Ann. § 4-9-30(5)(a) to fund various activities. That is what the Sheriff convinced the trial court to rely on. ROA 7. The statute broadly lists a multitude of jobs as widely diverse as road-crew workers, clerks of court, and librarians. Does the Sheriff employ them too?

This gets far afield from discerning legislative intent. Courts discern legislative intent from what the statute says—not from its perceived spirit or policies unmoored to the text. As written, § 15-78-60(14) turns on who employs whom, not who insures whom.

Conclusion

Employer means employer. The General Assembly did not intend to make this unambiguous, 145-year-old term mean something brand new. Leave Lampley his statutory right to bring a third-party action for his uncompensated pain and suffering. Let the County keep its statutory lien to recoup the benefits it paid. Preserve the legally settled distinction between sheriffs and counties. And avoid creating confusion where immunity varies from sheriff to sheriff and over time. The Court should deny certiorari.

Respectfully,

s/ Robert N. Hill
S.C. Bar # 65074

Law Office of Robert Hill
322 Spring Mist Court
Lexington, SC 29072
(803) 520-4370

William P. Hatfield, Esq.
S.C. Bar # 2840

Hatfield Temple, LLP
P.O. Box 1770
Florence, SC 29503-1770
(843) 662-5000

Counsel for the Respondent
Christopher Lampley