

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM NEWBERRY COUNTY COURT OF COMMON PLEAS EIGHTH

DEC 08 2021

JUDICIAL CIRCUIT

SC Court of Appeals

Donald B. Hocker, Circuit Court Judge

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Date

Appellate Case No. 2021-000817

By (officer initials) me JR

Lower Tribunal Case No. 2020-CP-36-0050b

Terence L. Rush,

Appellant,

v.

Michael B. Stribble, Individually and in his Official capacity as Sergeant
at the Newberry County Sheriff's Office, Respondent.

BRIEF ON APPEAL

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STATEMENT OF THE CASE AND FACTS

Plaintiff, Terence L. Bush, proceeding pro se, filed this act on November 16, 2020 after several attempts to file it in 2018, 2019, then successfully in 2020.

In the complaint, Plaintiff sets forth facts that the Defendant made the fraudulent representation under the color of law that he had probable cause obtained from a warrant for a person who fits the Plaintiff's description named Corey Pena being at the Plaintiff's address.

The Defendant having neither probable cause or a warrant to enter on private property and obtain the name and identity of the Plaintiff, which he discovered after the facts stated above that the Plaintiff had a failure to appear out of Orange County, Florida.

Since the date of arrest on October 2nd, 2015 by Michael B. Strible, the Plaintiff had not been released from custody and in 2017 been sentenced and committed to the custody of Florida Department of Corrections (F.D.O.C.).

Using the only means available to the Plaintiff while incarcerated to gain sufficient facts about the person he was mistaken for which is by use of the United States Postal Service to inquire of the Governor of Florida about whether or not he had demanded South Carolina's Executive Authority to

go and get Corey Pena from 2809 S.C. Hwy 66, Whitmire, S.C. 29178.

The Plaintiff received no responses. The Plaintiff had no Date of Birth

(D.O.B.), County of residence, or other information about Corey Pena to

search by mail for him from government officials to verify whether

there was an actual warrant for him or not.

The Plaintiff's family came to Florida while the Plaintiff was fighting

his legal case until he subsequently lost in 2017. They returned to

South Carolina in 2018 and learning from them that all of their possessions

at 2809 S.C. Hwy 66, Whitmire, S.C. 29178 and his green energy generator

he invented has been withheld from his wife and children as well as their

home, the Plaintiff attributed it to his absence. His absence resulting

from his arrest due to Michael Strible's actions.

While researching to find cases that describe the actions of F.D.O.C.

employees who invaded the rights of the Plaintiff and caused him injury,

he came across the elements for an action for Fraud which describe what

Michael B. Strible had done by making a representation of having probable

cause to invade the privacy of the Plaintiff. In 2019, the Plaintiff discovered sufficient

enough facts, like the description, D.O.B. and county of residence for Corey Penn
to put the Plaintiff on notice that he had a claim against Michael B. Strible
for fraud which injured not only the Plaintiff's rights but also those of
his childrens whether he had a warrant or not.

The Plaintiff having no access to South Carolina's Rules of Court,
Procedures and laws, filed this suit according to the Fourth (4th) Circuit's
cases that only informed him of the elements for fraud, the statute of
limitations for fraud and for injury to the rights of a person which pursuant
to South Carolina's law, the statute of limitations is informed by the "Discovery
Rule" and begins to run from the date the injured party either knows or
should know by the exercise of reasonable diligence that a cause of action
exists for the wrongful conduct.

The Defendant relied on the South Carolina Tort Claims Act to provide
him with the exclusive remedy for torts committed by state employees
as found in S.C. Code Ann. § 15-78-70(a); the 2 year statute of limitations
in the S.C.T.C.A.; as well as him being the proper party under the tort
claims act in S.C. Code Ann. § 15-78-10 and the language in S.C. Code Ann.

§ 15-78-120 to deny the Plaintiff punitive damages and attorney fees.

Michael B. Stribble is sued in his Individual capacity and in his Official capacity as the Plaintiff has alleged throughout his complaint and that Michael B. Stribble's actions constitute actual fraud, actual malice and an actual intent to harm which are actions outside the course and scope of his official duties [of to protect and serve] and are not governed by the SCTCA.

Pursuant to S.C. Code Ann. §15-78-70 (b), nothing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employees conduct was not within the scope of his official duties or that it constituted actual fraud, malice or intent to harm.

The legal standard in granting a motion to dismiss is assessed under the same standard as a Rule 12(b)(6) motion in South Carolina as a motion under Federal Rules of Civil Procedure where after accepting

all pleaded allegations as true..... there must be no disputed issue of fact raised by the Defendant's affirmative defense[s], and it must be apparent on the face of the complaint that the facts cannot support the legal conclusion. After the Court granted the Defendant's motion to dismiss the Plaintiff's claims, the Plaintiff appealed the Court's decision and this brief follows.

SUMMARY OF THE ISSUES

The Appellant intends to show that he and his complaint was discriminated against by the lower Court. There has never been any probable cause for the Defendant to have trespassed on the Plaintiff's property on October 2nd, 2015. Michael B. Stribble made a representation that caused the Plaintiff to suffer loss of all his property and possession in the end of 2018 and discovered in 2019 that the representation was actually fraudulent, when the Plaintiff discovered the description to the name of Corey Pena after reasonable diligence, revealed that Michael B. Stribble did not possess the probable cause or a warrant for the

Plaintiff's description under the name of Corey Pena to invade the rights of the Plaintiff.

The pleading equates that the respondent's actions constitute fraud, was done in malice and with an intent to harm the Plaintiff, making the exclusive remedy found in the South Carolina Tort Claims Act unavailable to the Respondent, nor are the rest of the affirmative defenses in the chapter due to these actions being outside of the respondent's course and scope of his official duties and employment. The defendant's actions make him personally and individually liable by suit and not the state agency, due to his actions being outside the scope of his official duties.

With the Discovery Rule controlling the commencement of the statute of limitations of this type of action for fraud and injuries to the rights of the [Plaintiff], the commencement of the limitations began in the end of the year 2018 and is set for three (3) years under S.C. Code Ann. § 15-3-530(5) as the appellant intends to show the pleading contains this discovery.

Furthermore, the Appellant intends to show that Equitable tolling is appropriate to apply in this case due to the Plaintiff being locked up in the custody of a foreign state that do not specialize, store, house, or utilize on a common everyday practice, the laws, rules and procedures of South Carolina's law or its Constitution. Moreover, the Plaintiff having no access to the world wide web, through a computer or electronic device with internet access to discover the fact that knowing the description of Corey Pena would reveal earlier on that the actions of Michael B. Stribble constituted ~~to~~ actual fraud, malice and intent to harm because he knew that the Plaintiff did not know or had a way of knowing in the moment of their interaction that Corey Pena's description could not be mistaken for the Plaintiff, thereby allowing the Plaintiff to know that the Respondent was trying to and had invaded some right of the Plaintiffs or cause him injury to his rights and thus cause him to know that he has a cause of action against the Respondent.

In these related issues, the Plaintiff seeks to enlighten this Court that his discrimination resulted from these errors and that it

would be a gross injustice to not send instruction back to the lower

court to grant him hearings on all issues as a matter of law and

where material facts are in dispute to then place them before a

jury.

ISSUE I

DID THE RESPONDENT SUBMIT AN APPLICATION FOR A SEARCH WARRANT IN NEWBERRY COUNTY BEFORE CONDUCTING A SEARCH OR SEIZURE?

No, he did not. His probable cause was established by a magistrate Judge Ron Halfacre after the arrest of the Plaintiff for being a fugitive from justice not before. According to the Supreme Court, the reasonableness requirement of the FOURTH AMENDMENT requires that law enforcement obtain a judicial warrant before performing a search or seizure. *Id.* (citing *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653, 115 S.Ct. 2386, 132 L.Ed. 2d 564 (1995)). In this case, Deputy Strible utilized his official position to act on his own individual scheme to interrogate and search the Claimant's mental knowledge of himself in order to obtain the identity of the Claimant and an arrest, without giving the Claimant the procedural and substantial due process or equal protection of the law by obtaining a warrant from a magistrate judge before intruding into the private affairs of the Claimant, especially since he wasn't summoned to the residence, wasn't in fresh pursuit of the Claimant and had no knowledge of the Claimant having broken any South Carolina law or committed any crime to even petition a

magistrate judge for a warrant in order to come to his residence, cross over his threshold and into his fenced off back yard without probable cause or a warrant to question him about anything, including his identity.

An application for a search warrant must provide a basis for a magistrate to find that there is probable cause for a search. See *United States v.*

Gary, 528 F.3d 324, 328 (4th Cir. 2008).

ISSUE II.

DID THE RESPONDENT HAVE PROBABLE CAUSE TO SEARCH FOR A BLACK MALE AT 2809 S.C. HWY 66, WHITMIRE, S.C., 29178 ?

No, he did not. The failure to appear the Plaintiff had in Orange County, Florida as of October 2, 2015 was over 3 years old. There was no way Michael Stribble possessed any of the facts surrounding a(n) three (3) year old failure to appear in Orange County, Florida to seek a South Carolina Magistrate Judge to issue him a warrant to intrude into the private life of one of its citizens. The warrant Clause in the FOURTH AMENDMENT in the United States Constitution for its citizens would require that the affidavit containing the facts for a magistrate to find that there is

probable cause for a search would be more specific, than just having only a name on a warrant. Probable cause requires that, given the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, 462 U.S. at 238. The affidavit in the arrest warrant of Exhibit-C of the Record on Appeal does no more than establishes that the Plaintiff had a failure to appear out of Orange County, Florida, it does not establish the probable cause of how or why Respondent Michael B. Strible, came to be in the back yard on private property of the fenced off house of 2809 S.C. Hwy 66, Whitmire, S.C. 29178 in the morning of October 2nd, 2015 to be performing a search or seizure of the Plaintiff. Such issues as to whether a particular set of facts can justify a finding that [Sheriff Deputy Strible] had probable cause to conduct a search is a question of law. See *Ornelas v. U.S.*, 517 U.S. 690, 116 S. Ct. 1167, 134 L. Ed. 2d 911 (1996). Questions of law are reviewed de novo. This lack of knowledge of a particular set of facts surrounding the Claimant's failure to appear would have not allowed Deputy Strible to be able

to obtain a warrant from a magistrate judge further revealing the fraud that he employed to gain access on the private property and into the private life of the Claimant to conduct an unwanted, unreasonable and intrusive search for evidence of a crime in order to make an arrest, which could not have been found out by the Claimant on the date of arrest of the Claimant without committing the fraudulent representation that was undetectable or easily found out on the arrest date contrary to what the Court averred in their dismissal, creating a material issue of disputed facts as to the discovery of the fraud which by law needed to be placed before a jury.

The Plaintiff is seeking to have the conviction of giving the wrong identity to Deputies set aside and removed from the South Carolina database by the data entry officer of the Newberry County Sheriff's Office, due to the "fruits of the poisonous tree doctrine" resulting from the fraud. *Wong Sun v. United States*, 33 S.Ct. 407, 9 L. Ed. 2d 441, 371 U.S. 471, and its 'fruit of the poisonous tree' analysis lead to exclusion of derivative evidence only where the underlying police misconduct

infringes a 'core' constitutional right." Like the Appellant's Fourth Amendment rights violation.

ISSUE III

COULD THE PERSONAL DESCRIPTION OF COREY PENA
BE MISTAKEN FOR A BLACK MALE?

No, his personal description cannot be mistaken for a black male.

The personal description of Corey Pena contained in the Record on Appeal to be inserted behind Exhibit - A of the Plaintiff's complaint

list the personal descriptions for Corey Johnathan Pena, D.O.B:

10-12-96, Race: white, Sex: Male, Eyes: Gray, Height: 5ft.

5in., Hair: Brown, weight: 132 lbs.

These facts revealing several things that the cause of action committed by the Respondent to be actual fraud; like his statement about having a warrant for Corey Pena and that I look like Corey Pena, a fraudulent representation to gain access on private property, his and the others invasion of privacy, a trespass and a violation on the rights of the Plaintiff, the validating of the fraud by the other deputy

Saying that I look like Corey Pena too, reveals that they clearly saw a

picture of this person Corey Pena as they stated, then that's another

fraud because our descriptions to our identities are unmistakable,

making their representation of fact that they had a warrant, also a fraud,

revealing that those deputies had no official reason or business of the

County or the State of South Carolina to be conducting a search or

Seizure on the morning of October 2ND, 2015 at 2809 S.C. Hwy 66,

Whitmire, S.C. 29178 for a black male no matter what that black

male's name is because it is clearly evident that this person Corey

Pena is not black; cannot be mistaken for being black and that makes

the deputies representation of having an warrant, actual fraud when it

comes to being for the Claimant whom is supposed to look like Corey Pena.

These are facts that could not have been discovered on the day of his

arrest as the chief judge averred beings as the Claimant was detained,

arrested and isolated in a maximum security cell at the Newberry County

Jail where he could not exercise reasonable diligence in a cell to

discover a cause of action or the facts about the personal description

of the male person he is supposed to look like which would put him on

notice that some right or an injury sustained from what transpired would let him know to file a claim against Michael B. Strible and the other deputies as well.

Therefore, the lower tribunal Court is in error that the date of the statute of limitations began to run on the date of arrest, clearly establishing again an issue of material facts that are in dispute, which should have been submitted to a jury and by not doing so, denied the Claimant of due process and equal protection of the law. The Appellant would like this Appellate court, with regard to this issue, to rescind the dismissal of the Petitioner's Complaint and send it back to the lower tribunal court for arbitration and mediation, and if unsuccessful in reaching an agreement then set it for jury trial.

ISSUE IV

HAS THE PETITIONER BEEN DISCRIMINATED AGAINST
BY THE LOWER TRIBUNAL COURT?

Yes. The Plaintiff submitted his documents to the Court of Common pleas back in September of 2018 together with a Motion to Proceed In Forma Pauperis (Case # 2018 CP3600465). It was being

considered by Chief Judge Donald B. Hocker. In 2019, the Appellant's motion to Proceed in Forma Pauperis was denied by Judge Hocker in 2019. While this motion was before Judge Hocker and waiting for it to be filed unaware that it would be denied, the Claimant discovered the Personal description of Corey Pena, which substantiated his claim against Deputy Strible about his actions equating to actual fraud for there could be no mistake about the two identities or what a warrant would contain as to the description of Corey Pena.

Chief Judge Donald B. Hocker is the same presiding Judge who ordered the dismissal of the Plaintiff's complaint¹¹. The obstacles of being incarcerated and the access one is afforded, is not the same as someone who isn't incarcerated. The Governor's office did not respond to the information request of whether a State Attorney in Florida submitted a requisition to the Governor to demand South Carolina's executive authority to take Corey Pena into custody from

2809 S.C. Hwy 66, Whitmire, S.C., 29178 and hold him for Florida
1. See the Plaintiff's Reply Brief on the Motion to Dismiss which was not included in the record on appeal due to c.o. Heartline, untimely mailing (which is being grieved at Walton C.I.) (Exhibit-A).

authorities with proper documents to transport him to Florida to answer any charges against him, or for the Petitioner/Appellant Terence L. Bush for that matter. The Petitioner's Reply Brief on the Motion to Dismiss hasn't even been included as part of the record which would escape review because it is not part of the record on appeal. (Please see EXHIBIT-A of said Reply Brief), further supporting the Appellant's claim that he is being discriminated against by the lower tribunal court through their control and authority over this legal proceeding.

With regard to this issue, the Appellant would like the lower court to receive instruction from this Appellate Court on how it should further proceed in handling this matter. The Appellant would also like for this Honorable Appeals Court to send instruction to the lower tribunal to hold a telephonic video hearing on all material issues of facts that are in dispute before a jury, and allow the Appellant to proceed with his complaint.

ISSUE V

ARE THE PLAINTIFF'S CLAIMS BARRED BY THE SOUTH CAROLINA TORT CLAIMS ACT (S.C.T.C.A.)?

No, they are not. Although Michael B. Stribble committed his actions under the color of law as a Sheriff of Newberry County, he is sued in his Individual capacity, and the S.C.T.C.A. is not applicable to Plaintiff's claims against [Stribble] in his individual capacity 2017 U.S. Dist. LEXIS 220699 :: Rosendall v. Voight :: September 11, 2017.

The Defendant would have this court to only look to Section §15-78-70(a) of the South Carolina Tort Claims Act (SCTCA), to provide the exclusive remedy for any tort committed by an employee of governmental entity. However, there is the exception to South Carolina's waiver of immunity as expressly provided for in subsection (b) of that same chapter where it expressly states that "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" is an exception to South Carolina's waiver of immunity. 2021 U.S. Dist. LEXIS 80450 :: Secka

v. Florence County Sch. Dist Three :: March 31, 2021. These statutory phrases have been alleged in the Appellant's complaint and as noted in *Elder v. Gaffney Ledger*, 341 S.C. 108, 117, 533 S.E. 2d 899 (2000) ... [these] terms of art clearly intended to apply to specific situations where an employee's behavior is so wildly beyond what could have been anticipated or managed by his or her employer that the state cannot reasonably be held responsible for it.

Additionally, *Roberts v. City of Forest Acres*, 902 F. Supp. 662, 671 (D.S.C. 1995) notes that an employee of a governmental entity is personally liable for a tort, only when the employees conduct falls within the exceptions listed in § 15-78-70(b). cited out of 2021 U.S. Dist. LEXIS 52718 :: *Beaufort v. Thompson* :: March 22, 2021. These citations clearly reveal that Michael B. Stribble is personally liable, that as alleged in the complaint his actions waives his immunity and the state is not liable for these actions, making him and the other deputies the proper party. So again the SCTCA is not

applicable to the Petitioner's complaint against Michael B. Stribble for his actions which constitute an actual fraud that he had probable cause for a black male named Carey Pena whom actually is a white male, that it was a malicious intent to actually use his authority to deprive a citizen of both South Carolina and the United States of equal protection of the law to enjoying procedural and substantive due process, and that he actually intended to make an arrest of the Petitioner if he can discover the true identity of the Petitioner and find out whether he was wanted on anything. These actions are outside of his official duties to uphold the law and to serve and protect. Violating his oath and breaking the law must not go unpunished and therefore with regard to this issue the Appellant is seeking this Court to remand the Appellant's Complaint back to the lower court for proper handling as so filed within the three year statute of limitations for fraud under S.C. Code Ann. § 15-3-530 seeing as Michael B. Stribbles'

actions place him outside of the SCTCA immunities and protections. The Appellant would also seek the Courts instruction to the lower tribunal to apply equitable tolling seeings as how the Petitioner has not been released from custody since the date of his arrest by Michael B. Strible and has been held in a foreign state that do not commonly practice South Carolina's Laws or hold its constitution on hand as it does its own.

CONCLUSION

Accordingly the Appellant asks this Court to remand his complaint back to the lower tribunal for further proceedings in accordance with its instructions on how the lower court is to proceed, require the Clerk to appoint an ADR neutral, as these proceedings went past the timeframe for one to be appointed, order the lower court to hold telephonic/ video conference hearings of the Alternative Dispute Resolution (ADR) meetings and what matters not agreed upon but triable by jury and at law, then hold a jury trial and grant what relief this Court deems just and fit.