

# Britt v. Cty. of Charleston

United States District Court for the District of South Carolina, Charleston Division

February 8, 2022, Decided; February 9, 2022, Filed

Case No. 2:21-cv-03770-RMG-MGB

## Reporter

2022 U.S. Dist. LEXIS 48585 \*

Tabith Eileen Britt, as Personal Representative of the Estate of James Claude Britt, Jr., Plaintiff, v. The County of Charleston; David Abrams, in his official capacity and his individual capacity; Thomas Esdorn, in his official capacity and his individual capacity; Gregory Carney, in his official capacity and his individual capacity; and David M. French, in his individual capacity; Defendants.

**Counsel:** [\*1] For Tabitha Eileen Britt, as the Personal Representative of the Estate of James Claude Britt, Jr., Plaintiff: James Kevin Holmes, LEAD ATTORNEY, Steinberg Law Firm, Charleston, SC; Michael T Cooper, W Mullins McLeod, Jr, LEAD ATTORNEYS, McLeod Law Group LLC, Charleston, SC.

For County of Charleston, The, David Abrams, in his official capacity and his individual capacity, David M French M.D., in his Individual Capacity, Defendants: Elloree A Ganes, Evan Michael Sobocinski, LEAD ATTORNEYS, Hood Law Firm LLC, Charleston, SC.

For Thomas Esdorn, in his official capacity and his individual capacity other Chris, Defendant: Andrew F Lindemann, Lindemann and Davis PA, Columbia, SC.

For Gregory Carney, in his official capacity other Greg, Defendant: Amanda Kurzen Dudgeon, Lindsey McClain Byrd, LEAD ATTORNEYS, Chandler and Dudgeon LLC, Charleston, SC.

**Judges:** MARY GORDON BAKER, UNITED STATES MAGISTRATE JUDGE.

**Opinion by:** MARY GORDON BAKER

## Opinion

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### REPORT AND RECOMMENDATION

This action was filed by Plaintiff Tabitha Eileen Britt ("Plaintiff"), as personal representative of the estate of James Claude Britt, Jr. ("Britt" or "Decedent") pursuant to 42 U.S.C. § 1983, the South Carolina Tort Claims Act ("SCTCA"), S.C. Code Ann. § 15-78-10 *et. seq.*, the South Carolina Wrongful Death Act, S.C. Code Ann. § 15-51-10 *et. seq.*, the South Carolina Survival [\*2] Act, S.C. Code Ann. § 15-5-90 *et. seq.*, and South Carolina common law. (Dkt. Nos. 1, 5-1.) Plaintiff originally filed this action in the Charleston County Court of Common Pleas on October 15, 2021. (Dkt. Nos. 1, 1-1.) The case was removed to federal court on November 17, 2021. (Dkt. No. 1.)

Currently before the Court is Defendant Gregory Carney's Motion to Dismiss. (Dkt. No. 9.) In his Motion, Defendant Carney asks the Court to dismiss Plaintiff's state-law claims against him. (Dkt. No. 9.) Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B) and Local Rule 73.02(B)(2)(d), D.S.C., this matter has been assigned to the undersigned for all pretrial proceedings. For the reasons set forth below, the undersigned recommends that Defendant Carney's

Motion to Dismiss be granted in part and denied in part.

## **BACKGROUND**

According to Plaintiff, "a tire on Decedent's car blew out near the entrance of Snee Farm subdivision located in Mt. Pleasant" on September 30, 2019. (Dkt. No. 5-1 at 7.) Decedent pulled into the neighborhood and parked. (*Id.*) At approximately 7:15pm, a Mt. Pleasant Police Department ("MPPD") Officer ("Officer Burgess") "arrived at Decedent's location and offered to assist him in changing his tire." (*Id.*) Soon after Officer Burgess began helping Decedent, [\*3] "multiple additional MPPD police officers arrived at Decedent's location." (*Id.*) Plaintiff alleges that Officer Burgess then informed Decedent that she was "going to place him under arrest for public intoxication." (*Id.*) Decedent then asked to see Officer Burgess' supervisor "so that he could explain the situation and avoid being arrested and incarcerated." (*Id.*) After Officer Burgess' supervisor arrived, "he immediately initiated physical contact with Decedent in an effort to place him in handcuffs and take him into custody." (*Id.*)

Plaintiff claims that "[b]elieving he was well within his rights to pull over on private property and change his flat tire Decedent questioned the authority of the police action physically and verbally." (*Id.* at 8.) Plaintiff states that multiple officers then "physically overwhelmed Decedent and took him to the ground where they forced Decedent onto his stomach and restrained him by placing him in handcuffs with his arms behind his back and by placing shackles on his legs." (*Id.*) Plaintiff alleges that Decedent then proceeded to tell officers that he could not breathe "more than a dozen times." (*Id.*) Plaintiff claims that Decedent was "visibly and audibly [\*4] struggling to breathe." (*Id.*)

According to Plaintiff, Charleston County EMS unit, Medic 37, and Charleston County Fire Department unit,

Squad 504, arrived at the scene at approximately 7:40pm. (*Id.*) Plaintiff claims that EMS employees did not perform a medical evaluation of Decedent, but that Decedent continued to struggle to breathe. (*Id.*) Plaintiff states "[w]ithout doing any medical evaluation and without assessing whether a medical need exist[ed] whatsoever, Defendant Esdorn instruct[ed] Defendant Carney to get Ketamine . . . to sedate Decedent." (*Id.* at 9.) Plaintiff claims that Decedent was still handcuffed and hog-tied at this time, with his face pressed into the pavement. (*Id.*)

Plaintiff alleges that Defendant Carney brought a syringe of Ketamine solution over to Decedent. (*Id.*) Upon seeing the syringe, Decedent asked what it was. (*Id.*) Plaintiff claims that Defendant Carney responded it was "something to make him 'have a good time.'" (*Id.*) According to Plaintiff, Decedent immediately objected and repeatedly said "no, no, no." (*Id.*) Plaintiff claims that Defendant Carney nonetheless "administered a lethal dose of Ketamine to Decedent." (*Id.*)

After the injection, Plaintiff says [\*5] that Decedent cried out "I'm going to die!" before repeatedly stating that he could not breathe. (*Id.* at 10.) Soon after, the Ketamine took effect, Decedent stopped breathing, and Decedent's heart stopped pumping. (*Id.*) Emergency Medical Technicians ("EMTs") were able to resuscitate Decedent, but Plaintiff states that he "never regained consciousness and ultimately died on October 16, 2019." (*Id.*)

Plaintiff contends that "Defendants' use of Ketamine constituted an unreasonable and unconstitutional use of force and seizure against Decedent, which directly and proximately caused the deprivation of his right to be free from the use of excessive force as guaranteed by the Fourth Amendment and . . . Fourteenth Amendment" and that "[a]s a direct and proximate result of Defendants Carney and Esdorn's unlawful use of force

Decedent James Britt suffered serious and catastrophic bodily injuries resulting in his tragic and preventable death." (*Id.* at 13.) Plaintiff further claims that "the use of Ketamine by Defendant Carney and Defendant Esdorn constitutes a violation of Decedent's Fourteenth Amendment right to bodily integrity." (*Id.* at 14.) Plaintiff alleges that Defendant Esdorn "knew Defendant Carney was violating Decedent's constitutional rights" [\*6] and "had a reasonable opportunity to prevent the harm," but "chose not to act." (*Id.* at 15.) In the alternative, Plaintiff alleges that Defendant Esdorn ordered Defendant Carney to inject Decedent and/or that he had actual knowledge of Defendant Carney's violation of Decedent's constitutional rights but "acquiesced in that violation." (*Id.* at 16.) Finally, Plaintiff claims that "[t]he forcible contact by Defendants Carney and Esdorn" was an unlawful assault and battery that directly and proximately caused Decedent's death, that Decedent suffered conscious pain and suffering, personal injuries, and trauma prior to his death, and that his beneficiaries suffered injuries as a result of his death. (*Id.* at 23-26.)

Accordingly, Plaintiff filed the instant litigation alleging the following causes of action:

- First Cause of Action: Excessive Use of Force pursuant to 42 U.S.C. § 1983 as to Defendants Carney and Esdorn in their individual capacities;
- Second Cause of Action: Procedural and Substantive Due Process Violations of the Right to Bodily Integrity pursuant to 42 U.S.C. § 1983 as to Defendants Carney and Esdorn in their individual capacities;
- Third Cause of Action: Bystander Liability pursuant to 42 U.S.C. § 1983 as to Defendant Esdorn [\*7] in his individual capacity;
- Fourth Cause of Action: Supervisory Liability pursuant to 42 U.S.C. § 1983 as to Defendant Esdorn in his individual capacity;
- Fifth Cause of Action: Supervisory Liability

pursuant to 42 U.S.C. § 1983 as to Defendants Abram and French, in their individual capacities;

- Sixth Cause of Action: *Monell* Liability & Official Capacity Liability pursuant to 42 U.S.C. § 1983 as to the County of Charleston, and Defendants Abram and French in their official capacities;
- Seventh Cause of Action: Negligence and Gross Negligence pursuant to South Carolina Tort Claims Act as to the County of Charleston;
- Eighth Cause of Action: Negligent Supervision, Negligent Training, Negligent Retention pursuant to South Carolina Tort Claims Act as to the County of Charleston;
- Ninth Cause of Action: Assault and Battery pursuant to South Carolina Common Law (Non-SCTCA Claim) as to Defendants Carney and Esdorn;
- Tenth Cause of Action: Death by Wrongful Act pursuant to S.C. Code Ann. § 15-51-10, *et. seq.*, as to all Defendants;
- Eleventh Cause of Action: Survival Action pursuant to S.C. Code Ann. § 15-51-10, *et. seq.*, as to all Defendants;
- Twelfth Cause of Action: Punitive Damages as to Defendants Carney, Esdorn, Abrams and French in their individual capacities;
- Thirteenth Cause of Action: Attorney [\*8] Fees and Costs of Litigation pursuant to 42 U.S.C. § 1988 as to Defendants pursuant to 42 U.S.C. § 1983; and
- Fourteenth Cause of Action: Injunctive Relief pursuant to 42 U.S.C. § 1983 and Common Law as to the County of Charleston and its employees.

(*Id.* at 10-27.)

As noted, Plaintiff filed her initial Complaint in state court

on October 15, 2021. (Dkt. No. 1-1.) Plaintiff filed an Amended Complaint on November 15, 2021. (Dkt. No. 5-1.) The case was removed to federal court on November 17, 2021. (Dkt. No. 1.) On January 12, 2022, Defendant Carney filed a Motion to Dismiss, seeking to dismiss Plaintiff's "tort claims against [him] in his individual capacity per the South Carolina Tort Claims Act . . . and all state claims brought against him individually." (Dkt. No. 9 at 1.) Defendant Carney's Motion further asserts that "Plaintiff's claim for injunctive relief against this Defendant in his individual capacity should be dismissed." (*Id.* at 2.)

Plaintiff filed a response in opposition to Defendant Carney's Motion on January 26, 2022. (Dkt. No. 15.) Defendant Carney replied on February 2, 2022. (Dkt. No. 16.) As such, the Defendant Carney's Motion to Dismiss is ripe and ready for disposition.

## **LEGAL STANDARD**

Defendants seek dismissal under [\*9] 12(b)(6) of the Federal Rules of Civil Procedure. (Dkt. No. 9.) On a motion to dismiss pursuant to Rule 12(b)(6), a "complaint must be dismissed if it does not allege 'enough facts to state a claim to relief that is plausible on its face.'" *Giarratano v. Johnson*, 521 F.3d 298, 302 (4th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "In reviewing a motion to dismiss an action pursuant to Rule 12(b)(6) . . . [a court] must determine whether it is plausible that the factual allegations in the complaint are 'enough to raise a right to relief above the speculative level.'" *Andrew v. Clark*, 561 F.3d 261, 266 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). "A plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. 555

(quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)).

For purposes of a motion to dismiss, the district court must "take all of the factual allegations in the complaint as true." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). "In considering a motion to dismiss, [the court] accept[s] the complainant's well-pleaded allegations as true and view[s] the complaint in the light most favorable to the non-moving party." *Stansbury v. McDonald's Corp.*, 36 F. App'x 98, 98-99 (4th Cir. 2002) (citing *Mylan Labs., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993)). However, while the court must draw all reasonable inferences in favor of the plaintiff, it need not accept the "legal conclusions drawn from the facts, . . . unwarranted inferences, unreasonable conclusions or arguments." [\*10] *Nemet Chevrolet, Ltd. v. Consumer Affairs, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009) (citing *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999); *Giarratano*, 521 F.3d at 298).

## **DISCUSSION**

Defendant Carney argues for dismissal on the basis that: (1) Plaintiff failed to comply with the pre-suit notice and expert affidavit requirements for medical malpractice claims mandated by S.C. Code § 15-79-125; (2) Plaintiff failed to plead that Defendant Carney's conduct was outside the scope of his official duties as an EMT, or that his conduct constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude; and (3) Plaintiff's pursuit for injunctive relief against Defendant Carney is related only to his official capacity as an EMT. (Dkt. No. 9.)

At the outset, the undersigned notes that Plaintiff consents to dismissal of her claim for injunctive relief against Defendant Carney. (Dkt. No. 15 at 1.) The undersigned therefore recommends that Defendant

Carney's Motion to Dismiss should be **GRANTED** as to this claim, and that such claim should be dismissed. The undersigned considers Defendant Carney's remaining arguments, below.

### I. Medical Malpractice Claim

South Carolina law requires plaintiffs asserting medical malpractice claims to "contemporaneously file a Notice of Intent to File Suit and an affidavit of an expert witness, subject to the affidavit requirements [\*11] established in Section 15-36-100, in a county in which venue would be proper for filing or initiating the civil action" prior to filing suit. S.C. Code Ann. § 15-79-125(A). S.C. Code Ann. § 15-36-100 states that a plaintiff "must file as part of the complaint an affidavit of an expert witness which must specify at least one negligent act or omission claimed to exist and the factual basis for each claim." S.C. Code Ann. § 15-36-100.

Here, Defendant Carney claims that Plaintiff's assertion "that a jury in this case must consider the accepted medical standard of practice" brings her state-law claims against him "into the ambit of medical malpractice, invoking the [expert affidavit] requirements of S.C. Code § 15-79-1[25](A)." (Dkt. No. 9 at 4.) However, Plaintiff's claims do not sound in medical malpractice.

Plaintiff asserts that "Plaintiff's claims against Defendant Carney are not medical negligence claims . . . . Instead, Plaintiff's claim against Defendant Carney is that he illegally and unjustifiably injected [Decedent] with a sedative for a law enforcement objective and to assist in the arrest and seizure of [Decedent]." (Dkt. No. 15 at 4.) In support of her argument that her claims do not fall within the ambit of medical malpractice, Plaintiff points to a portion of her Amended Complaint which states: [\*12] "There was no medical purpose whatsoever for the intentional and willful acts of

Defendant Carney and Defendant Esdorn." (*Id.* at 5, citing to Dkt. No. 5-1 at 23.) Plaintiff's Amended Complaint also states that "[t]he purpose of the sedation was not medical in nature. Rather, the purpose of the sedation was a law enforcement action to affect a seizure and assist in the arrest of Decedent." (Dkt. No. 5-1 at 14.) Plaintiff argues that "it does not require specialized learning to discern that a citizen of Charleston County cannot be sedated against his will as a use of force to assist in his arrest and seizure - especially when he does not pose a threat to any person whatsoever." (Dkt. No. 15 at 6.) Plaintiff states that she "does not allege that Defendant Carney miscalculated the dose of Ketamine or any similar breach of medical standards of care." (*Id.* at 7.)

Viewing the allegations in Plaintiff's Amended Complaint as true and considering them in the light most favorable to her, it seems clear that Plaintiff's claims do not sound in medical malpractice. Plaintiff's Amended Complaint alleges that Defendant Carney administered a sedative while Decedent was being arrested, not while he was [\*13] being treated or evaluated for a medical condition. (*See generally* Dkt. No. 5-1.) As such, the undersigned recommends that the Court **DENY** Defendant Carney's request that "Plaintiff's state claims of Assault and Battery (Claim Nine), Wrongful Death (Claim Ten), and Survival (Claim Eleven)" be dismissed for failure to comply with South Carolina's pre-suit notice and expert affidavit requirements for medical malpractice claims.

### II. Immunity Under SCTCA

The SCTCA is the exclusive remedy for individuals suing government employees acting within the scope of their employment. S.C. Code Ann. § 15-78-70(a). The SCTCA specifies that "[i]n the event that the employee is individually named, the agency or political subdivision

for which the employee was acting must be substituted as a party defendant." S.C. Code Ann. § 15-78-70(c). The statute covers employee conduct insofar as it is not "outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-60; *see also* S.C. Code Ann. § 15-78-70(b); *Smith v. Ozmint*, 394 F. Supp. 2d 787, 792 (D.S.C. 2005) (holding "a state employee can, in these limited circumstances, be held personally liable by a federal court for some intentional torts committed within the scope of his employment"); *Roberts v. City of Forest Acres*, 902 F. Supp. 662, 671 (D.S.C. 1995) (noting that an employee [\*14] of a government entity is personally liable for a tort, only when the employee's conduct falls within the exceptions listed in § 15-78-70(b)). Further, "the SCTCA generally is not intended to protect state employees from liability for intentional torts." *Morning v. Dillon Cty.*, No. 4:15-cv-03349-RBH, 2017 WL 4276906, at \*6 (D.S.C. Sept. 27, 2017). Indeed, "[t]he terms 'actual fraud, actual malice, intent to harm, or a crime involving moral turpitude' must be liberally construed in favor of the governmental defendant, but these terms 'cannot be fairly construed to encompass every instance of any intentional tort.'" 2017 WL 4276906, at \*6 (quoting *Newkirk v. Enzor*, 240 F. Supp. 3d 426, 437 (D.S.C. 2017)).

Defendant Carney contends that Plaintiff's state-law claims against him should be dismissed because "Plaintiff has not pled or alleged Defendant Carney acted at any time outside the scope of his official duties" or that "Defendant Carney's conduct while administering emergency medical services 'constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude.'" (Dkt. No. 9 at 5.) In response, Plaintiff notes that her Amended Complaint "alleges in Paragraphs 138, 139, 140, and 141 that Defendant Carney illegally injected Ketamine 'for a law enforcement purpose only,'

'for a non-medical reason and [\*15] against his express will,' and 'acting completely outside any generally accepted standard of care.'" (Dkt. No. 15 at 4.) She further explains that "[w]hether or not Defendant Carney was acting outside the scope of his official duties when he injected Ketamine into [Britt's] body, will be a fact for the jury to decide in this case as the evidence bears out during discovery and at trial." (*Id.*) The undersigned agrees.

In addition to claims against Defendant County of Charleston under the SCTCA, Plaintiff's Amended Complaint brings an Assault and Battery claim against Defendant Carney "[p]ursuant to South Carolina Common Law (Non-SCTA Claim)." (Dkt. No. 5-1 at 23.) Under this cause of action, Plaintiff alleges that Defendant Carney's acts and the harm he caused were "intentional and willful." (*Id.*) Plaintiff's Amended Complaint also alleges that Defendant Carney "intended to forcibly inject [Decedent]" and that he "injected Decedent with this strong sedative despite not having Decedent's consent or approval, [and] not having any medical approval or authorization." (*Id.*) As such, Plaintiff has sufficiently alleged that Defendant Carney's conduct was "outside the scope of his official duties [\*16] or [] constitute[d] actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-60; *see also* S.C. Code Ann. § 15-78-70(b). It is unclear at this early stage of the proceedings whether Plaintiff's claims against Defendant Carney are covered by the SCTCA or by South Carolina common law. The undersigned therefore recommends that Defendant Carney should remain as an individual defendant in this civil action and that his Motion to Dismiss Plaintiff's state-law claims against him should be **DENIED**.

## CONCLUSION

For the foregoing reasons, it is **RECOMMENDED** that Defendant Carney's Motion to Dismiss (Dkt. No. 9) be **GRANTED IN PART AND DENIED IN PART**. Specifically, the undersigned recommends that Defendant Carney's Motion to Dismiss be **DENIED** as to Plaintiff's state-law claims against him and **GRANTED** as to Plaintiff's claim for injunctive relief against him.

**IT IS SO RECOMMENDED.**

February 8, 2022

Charleston, South Carolina

/s/ Mary Gordon Baker

MARY GORDON BAKER

UNITED STATES MAGISTRATE JUDGE

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