

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

SC Court of Appeals

The Honorable R. Keith Kelly, Circuit Court Judge
Case No. 2017-CP-10-01324

APPELLATE CASE NO. 2023-000898

Steven McLemore and Bonnie Jean Eagle as Natural Parents for the Estate of D. M.,

Plaintiffs,

vs.

Charleston County Parks and Recreation Commission d/b/a James Island County Park;
Yearround Pool Co., Inc.; SGA Architecture; South Carolina Department of Health and
Environmental Control; and John Doe and/or John Doe Corporation,

Defendants.

OF WHOM:

Bonnie Jean Eagle is Appellant

and

Charleston County Parks and Recreation Commission
d/b/a James Island County Park is

Respondent

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN HOLDING THAT IT LACKED SUBJECT MATTER JURISDICTION WHEN IT DISMISSED PLAINTIFF'S COMPLAINT UNDER RULE 12(b)(1), SCRCP?

STATEMENT OF THE CASE

On May 14, 2016, an unusually warm early summer day, Bonnie Eagle took her three-year old son D.M. and other children to the Charleston County Parks and Recreation Commission's James Island County Park to play on the spray-and-play pad which was near a pond in the park. Eagle was playfully chasing her nephew and did not immediately notice when her son D.M. left the spray-and-play area which was unfenced and ungated and fell into a pond and drowned. Several hours later police divers found the child's body submerged in the nearby pond. The parents of D.M. filed a wrongful death lawsuit on March 14, 2017 against Charleston County Parks and Recreation Commission d/b/a James Island County Park; Yearround Pool Co., Inc.; SGA Architecture; South Carolina Department of Health and Environmental Control and John Doe.

During the course of the litigation Appellant entered into a partial settlement of the wrongful death claim with the South Carolina Department of Health and Environmental Control. This settlement included a Full, Final and Complete Release of the South Carolina Department of Health and Environmental Control only. In the Release, the following bold language was cited:

Notwithstanding this Release, the Plaintiffs do not hereby release any claims against Defendants Charleston County Parks & Recreation Commission ("CCPRC") d/b/a James Island County Park, Yearround Pool Co., Inc., or SGA Architecture. This Release does not release any other governmental entity other than SCDHEC.

The Plaintiffs properly filed a petition for court approval of the partial settlement of the wrongful death claim. The petition was served on all parties including Charleston County Parks and Recreation Commission d/b/a James Island County Park. It was eventually heard in the Court of

Common Pleas for the Ninth Circuit by Resident Judge Jennifer McCoy on March 31, 2020 who approved the settlement. Despite being notified of the wrongful death settlement hearing, Charleston County Parks and Recreation Commission d/b/a James Island County Parks did not attend. Only counsel for the South Carolina Department of Health and Environmental Control and Plaintiffs' counsel were present at the hearing on March 31, 2020. All the other Defendants had notice of the hearing but chose not to participate, nor did they object to the terms of the settlement. The circuit court approved the settlement and stated as follows:

The compromise as recited in the Petition and the Release is approved as fair, just, and reasonable settlement of the contest and controversy existing between the Estate, its heirs, beneficiaries, and assigns and Defendant South Carolina Department of Health and Environmental Control. (R. ____).¹

Thereafter, the Plaintiffs continued their lawsuit against the remaining Defendants including Charleston County Parks and Recreation Commission d/b/a James Island County Park. The Defendant Charleston County Parks and Recreation Commission d/b/a James Island County Park filed a motion for summary judgment which was heard on February 11, 2022 by Judge Paul Burch. The motion argued that Plaintiff's claim was barred because of S.C. Code Ann. § 15-78-70(d) which provides:

A settlement or judgment in an action or a settlement of a claim under this chapter constitutes a complete bar to any further action by the claimant against an employee or governmental entity by reason of the same occurrence.

¹ The trial judge's Order holds that a plaintiff cannot pursue "any other governmental entities." This is not the language found in S.C. Code § 15-78-70(d). In fact, S.C. Code § 15-78-70(d) plain meaning is that a settlement against a governmental entity ends the claim against that governmental entity – not another governmental entity. If the legislature had wanted to end claims against two different governmental entities, it would have said so. S.C. Code §15-78-70(d) is silent as to the issue in this case and thus does not prohibit this lawsuit.

Judge Burch denied the motion and based his denial on the Order of Judge McCoy who approved the partial death settlement in which DHEC paid \$10,000.00 to be dismissed. Judge Burch held that Judge McCoy in her Order specifically approved the Release which allowed continued prosecution of a claim against Charleston County Parks and Recreation Commission d/b/a James Island County Park. Judge Burch further held that one circuit judge could not overrule another circuit judge and because Judge McCoy approved the Release and Petition, with notice to all interested parties of the hearing on March 31, 2020, he had no authority to overrule her Order.

Thereafter, on November 3, 2022, Charleston County Parks and Recreation Commission d/b/a James Island County Park filed a motion to dismiss pursuant to Rule 12(b)(1), SCRCPC. This new motion attempted to argue under Rule 12(b)(1), SCRCPC that the circuit court had no subject matter jurisdiction to hear this case. This motion was heard before Judge Kelly who agreed with Defendants and dismissed Plaintiff's complaint. Judge Kelly refused to consider the wrongful death settlement or the Release other than a short footnote on page 5 of his Order in which he held that the Release did not expand subject matter jurisdiction of the Court. Judge Kelly in the footnote stated:

The exclusionary language of the Release is only effective in not expanding the terms of the release to include CCPRC and does not expand the subject matter jurisdiction of the court to that which is prohibited. Otherwise, the paragraph is then an attempt to circumvent S.C. Code Ann. § 15-78-70(d) and confer subject matter jurisdiction upon the Court by consent.

Plaintiff thereafter timely filed a motion for reconsideration on March 24, 2023 which was promptly denied by Judge Kelly. Judge Kelly's Order did not address any of the arguments made in Appellant's motion for reconsideration nor did it address the Affidavit of Plaintiff's original attorney, John Harrell, which was presented before Judge Burch at the motion for summary judgment hearing and is part of the record. Attorney Harrell testified that he specifically reserved the right to sue

Charleston County Parks and Recreation Commission d/b/a James Island County Park and that the Release was approved by the circuit court with no objection (R. ____).

Despite the procedural history of the case, Judge Kelly held there was no subject matter jurisdiction and ignored the Orders of Judge McCoy and Judge Burch.

STANDARD OF REVIEW

A motion to dismiss under Rule 12(b)(1), SCRCF for lack of subject matter jurisdiction is a question of law: *Porter v. Labor Dept.*, 372 S.C. 560, 567, 643 S.E.2d 96, 100 (Ct. App. 2007). In this case, the motion to dismiss does not deal with subject matter jurisdiction, but with the Order of a circuit court approving a partial settlement with one governmental defendant under the South Carolina Tort Claims Act. As a result, Plaintiff asserts that the standard of review of a settlement agreement is governed by *Buckley v. Shealy*, 370 S.C. 317, 635 S.E.2d 76, 78 (2006). In *Buckley*, this court held, “To be enforceable, settlement agreements must either be entered into the court’s record or acknowledged in open court and placed upon the record.”

A settlement agreement between the parties was reached and placed on the record when the circuit court approved a settlement which allowed the Plaintiff to continue her claim against Charleston County Parks and Recreation Commission d/b/a James Island County Park. The settlement order was not appealed and is the law of the case and is enforceable on all parties.

ARGUMENT

I. A SETTLEMENT AGREEMENT REACHED IN CIRCUIT COURT AND PLACED ON THE RECORD IS ENFORCEABLE.

It is undisputed in this case that the parties reached a partial settlement agreement with the South Carolina Department of Health and Environmental Control which agreed to pay \$10,000.00. A Petition for Approval of Settlement of Claim for Wrongful Death and Survival Action Against

South Carolina Department of Health and Environmental was filed in the circuit court on March 26, 2020. The Release which was signed by the parties on March 17, 2020 stated:

Notwithstanding this Release, the Plaintiffs do not hereby release any claims against Defendants Charleston County Parks & Recreation Commission (“CCPRC”) d/b/a James Island County Park, Yearround Pool Co., Inc., or SGA Architecture. This Release does not release any other governmental entity other than SCDHEC.

Thereafter a hearing was held on the partial wrongful death settlement. The hearing was on the record in open court and a written Order Approving Petition for Settlement of Claim for Wrongful Death and Survival Action Against South Carolina Department of Health and Environmental Control was signed by Judge McCoy on March 31, 2020. (R. ____). The Order of Judge McCoy specifically provided:

IT IS ORDERD:

A. The compromise as recited in the Petition and the Release is approved as fair, just, and reasonable settlement of the contest and controversy (R. ____).

Charleston County Parks and Recreation Commission d/b/a James Island County Park, Yearround Pool Co., Inc., SGA Architect and the South Carolina Department of Health and Environmental Control were all duly notified of the partial wrongful death settlement hearing, and it was approved without objection by any co-defendant. As a result, because this was a settlement entered into the court’s record and also acknowledged in open court the settlement is enforceable against Charleston County Parks and Recreation Commission d/b/a James Island County Park. In *Ashfort Corp. v. Palmetto Construction Group, Inc.*, 318 S.C. 492, 493-94, 458 S.E.2d 533 (1995), this court held that Rule 43(k) is applicable to settlement agreements and that “the application of Rule 43(k) will increase the certainty of settlement agreements by avoiding disputes.” 458 S.E. at 535.

Here, there can be no dispute that Plaintiffs intended to settle the claim only with DHEC and no other governmental defendant. The bolded language in the Release clearly shows Plaintiffs' intent and the court approved the Release and Petition. As a result, the Order was not appealed and is the law of the case. The partial wrongful death settlement is effective as against all Defendants by order of the court.

II. THE WRONGFUL DEATH SETTLEMENT ORDER IS THE LAW OF THE CASE.

In this case, the circuit court approved a partial wrongful death settlement for Appellant. The wrongful death settlement order was signed by Judge McCoy after notice to all parties. It contained a release which allowed Appellant to proceed against Charleston County Parks and Recreation Commission ("CCPRC") d/b/a James Island County Park. No one objected and Judge McCoy signed the Order approving the settlement. It was not appealed by Charleston County Parks and Recreation Commission ("CCPRC") d/b/a James Island County Park and is the law of the case. In *Judy v. Martin*, 381 S.C. 455, 674 S.E.2d 151 (S.C. 2009), the Supreme Court held: "Under the law of the case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been raised, or raised on appeal but expressly rejected by the appellate court." Here, Charleston County Parks and Recreation Commission ("CCPRC") d/b/a James Island County Park offered no objection to the wrongful death settlement or the Release approved by the court despite being notified of the hearing. As a result, the doctrine of the law of the case applies. As stated in *Builders Mut. Ins. Co. v. Bob Wire Elec., Inc.*, 424 S.C. 161, 165, 817 S.E.2d 807, 809 (Ct. App. 2018):

the doctrine of "law of the case" is just that—the law of the case in which it was made, not the law of future cases. *Lifschultz Fast Freight, Inc. v. Haynsworth, Marion, McKay & Guérard*, 334 S.C. 244, 245, 513 S.E.2d 96, 96–97 (1999) (law of the case doctrine "applies only to subsequent proceedings in the same litigation following an appellate decision"); *Flexon v. PHC-Jasper, Inc.*, 413 S.C. 561, 571–72, 776 S.E.2d 397, 403 (Ct. App. 2015) (collecting cases and noting law of case

doctrine prohibits matters decided on appeal from being relitigated in the trial court in the same case). *See also Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed. 1152 (1912) (“[T]he phrase, ‘law of the case,’ as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.”); Wright & Miller, *Fed. Prac. & Proc.* § 4478 (2d. ed.) (law of the case rules “do not apply between separate actions”).
[emphasis added]

Thus, clearly the law of the case doctrine prohibits Charleston County Parks and Recreation Commission (“CCPRC”) d/b/a James Island County Park from arguing that S.C. Code § 15-78-70(d) bars recovery.

III. THE CIRCUIT COURT ERRED IN FINDING THERE WAS NO SUBJECT MATTER JURISDICTION IN THIS CASE.

It is obvious the circuit court had the ability to handle and dispose of claims filed under the South Carolina Tort Claims Act. The fact that a case may be barred if one of two governmental defendants settles their claim does not deprive the circuit court of subject matter jurisdiction. The issue of interpretation of the South Carolina Tort Claims Act is a matter for summary judgment which in fact was denied by Judge Burch in his Order denying summary judgment. In particular, the obvious question is: Can a second circuit court judge grant a Rule 12(b), SCRCF motion if one governmental defendant settles and it was court approved by another judge? In this case, Judge McCoy approved a Release allowing one governmental defendant to settle out after notice to all parties. Judge McCoy further signed a written partial wrongful death settlement order, and it was not appealed by Charleston County Parks and Recreation Commission (“CCPRC”) d/b/a James Island County Park.

In fact, the legislature specifically conferred subject matter jurisdiction of all tort claims against governmental entities on the circuit court. S.C. Code § 15-78-100(b) states:

Jurisdiction for any action brought under this chapter² is in the circuit court and brought in the county in which the act or omission has occurred.

² The parties agree Plaintiffs’ lawsuit is “any action brought under this chapter.”

Judge Kelly in his Order failed to address the seminal case of *Jeter v. South Carolina Dept. of Trans.*, 358 S.C. 528, 595 S.E.2d 827 (Ct. App. 2004), 369 S.C. 433, 633 S.E.2d 143 (2006). In *Jeter*, both the South Carolina Court of Appeals and the Supreme Court addressed S.C. Code § 15-78-100 and unlike Judge Kelly found that exclusive jurisdiction to hear South Carolina Tort Claims cases vest solely with the circuit court. The Supreme Court in *Jeter* made crystal clear that the South Carolina Constitution, art. V, § 11 provides that the circuit court is the general trial court in South Carolina with original jurisdiction in all civil and criminal cases. Further, S.C. Code § 15-78-100(b) specifically vests jurisdiction of all tort claims against a governmental entity in the circuit court. See *Jeter*, 633 S.E.2d 143 (2006).

The Supreme Court in *Jeter* tellingly stated, “Because there is but one circuit court in South Carolina, with uniform subject matter jurisdiction throughout the state, S.C. Code § 15-78-100(b) establishes subject matter jurisdictions for actions under the SCTCA in the circuit court throughout the state.” 633 S.E.2d at 144. Judge Kelly’s Order fails to address this provision of the SCTCA.

The *Jeter* Court then went on to cite numerous cases for the proposition that the circuit court was vested with subject matter jurisdiction. See *Dove v. Gold Kist*, 314 S.C. 235, 442 S.E.2d 598, 600 (1994); *Harrison v. S.C. Tax Comm’n*, 261 S.C. 302, 199 S.E.2d 763 (1973) (*overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985)). Each of those cases made clear that when a statute vests jurisdiction it is the only place in which a case may be brought by a party.

As a result of *Jeter*, the South Carolina Supreme Court specifically held that any issue regarding any matter concerning the South Carolina Tort Claims Act is vested exclusively in the circuit court and it has sole jurisdiction. Thus, Judge Kelly was erroneous when he held, “The court finds that jurisdiction of the subject matter of this litigation was lost when Plaintiffs settled with

DHEC, barring Plaintiff from any further action against CCPRC....” As a result of *Jeter, supra*, this Court must reverse the Order of Judge Kelly and find that this case is not barred based on Judge McCoy’s Order approving partial wrongful death settlement.

IV. CHARLESTON COUNTY PARKS AND RECREATION COMMISSION IS ESTOPPED.

Charleston County Parks and Recreation Commission (“CCPRC”) is estopped from arguing that the Order Approving Petition for Settlement of Claim for Wrongful Death and Survival Action Against South Carolina Department of Health and Environmental Control signed by Judge McCoy on March 31, 2020 is not applicable. Appellant obtained a partial wrongful death settlement approval Order from Judge McCoy which specifically allowed Appellant to proceed against Charleston County Parks and Recreation Commission. Notice was given to all parties including Charleston County Parks and Recreation Commission and the Release was approved in open court and filed in the Charleston County Judicial Center. Charleston County Parks and Recreation Commission failed to attend the hearing or to object in writing. Under the unique facts of this case, Charleston County Parks and Recreation Commission is estopped from asserting S.C. Code § 15-78-70(d) as a defense. It is estopped because it had notice but failed to object to the partial settlement with DHEC. South Carolina has recognized estoppel against a government agency. A relying party, in this case Eagle, must prove (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2) justified reliance upon the government’s conduct; and (3) a prejudicial change in position. *Grant v. City of Folly Beach*, 346 S.C. 74, 551 S.E.2d 229, 232 (2001).

In this case, Eagle sought and received approval of the partial wrongful death settlement against DHEC by a circuit court judge who approved not only the settlement but the Release which allowed Eagle to proceed against Charleston County Parks and Recreation Commission. At the hearing, Charleston County Parks and Recreation did not appear nor did it object nor make its position

known that no settlement could occur. Instead it remained silent. Eagle justifiably relied on Judge McCoy's Order approving the settlement and the Release. Eagle also changed her position to her prejudice based on Judge McCoy's Order approving the \$10,000.00 partial settlement. Eagle's conduct fits the three elements of estoppel against the government under the unique facts of this case.

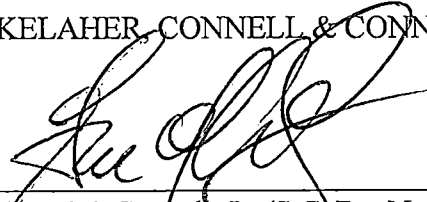
CONCLUSION

The facts of this case are tragic. A small child at a park at which his family paid admission drowns in a pond which was not protected by a fence. The family decides to partially settle the case with one of the Defendants (South Carolina Department of Health and Environmental Control). Since it is a wrongful death claim, a circuit court must approve the partial settlement and Judge McCoy does so with notice to all parties and a Release that allows the case to continue against Charleston County Parks and Recreation Commission. Thereafter, Judge Kelly, the third judge to hear motions in this case, dismissed the case for subject matter jurisdiction despite *Jeter, supra*. It is for this reason that this Court must reverse and remand the case for a trial.

Respectfully submitted,

(Signature on following page)

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November 13, 2023

Attorneys for Appellant Bonnie Jean Eagle

THE STATE OF SOUTH CAROLINA
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Court of Common Pleas

NOV 15 2023

SC Court of Appeals

The Honorable R. Keith Kelly, Circuit Court Judge
Case No. 2017-CP-10-01324

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vs.

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Defendants.

OF WHOM:

Bonnie Jean Eagle is..... Appellant

and

Charleston County Parks and Recreation Commission
d/b/a James Island County Park is

Respondent

PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of **Initial Brief of Appellant and Appellant's Designation of Matter** on the 13th day of November, 2023, by depositing a copy of same in the United States Mail, postage prepaid, to:

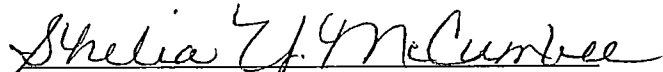
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SWORN AND SUBSCRIBED before me,
this 13th day of November, 2023.


Notary Public for South Carolina
My Commission Expires: 3-12-24

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November 13, 2023

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SC Court of Appeals

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Clerk, South Carolina Court of Appeals
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Columbia, South Carolina 29211

Re: Appellate Case No. 2023-000898
Steven McLemore, Individually and as Personal Representative of the Estate of D.M. and Bonnie Jean Eagle, Individually and as natural parent of deceased minor, D.M. v. Charleston County Parks & Recreation Commission ("CCPRC") d/b/a James Island County Park; et al.; Case No: 2017-CP-10-01324
Our File No. 2020-0393C

Dear Ms. Kitchings:

Enclosed please find the following for filing in the above-captioned case: Initial Brief of Appellant; Appellant's Designation of Matter to be Included in the Record on Appeal; and Proof of Service.

Please be so kind as to return a filed copy of the Proof of Service in the self-addressed, stamped envelope provided for your convenience.

By copy of this letter, we hereby serve the above-stated documents on counsel of record .

Sincerely yours,



Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

The Honorable Jenny Abbot Kitchings
November 13, 2023
Page 2

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