STATE OF SOUTH CAROLINA
COUNTY OF BARNWELL

Henry Lee Carroll, II,

Plaintiff,

v.

Alex Webb Causey and Stacey Jenkins,

Defendants.

IN THE COURT OF COMMON PLEAS
SECOND JUDICIAL CIRCUIT

Civil Action No.: 2012-CP-06-00326

ORDER

This matter comes before the Court on Plaintiff's Motion for Reconsideration and to Alter or Amend Judgment. A hearing on Defendant Stacey Jenkins' Motion to Dismiss was held on September 8, 2014. Thereafter, an Order was filed on September 18, 2014 granting the motion. Plaintiff filed this Motion for Reconsideration and to Alter or Amend Judgment pursuant to Rule 59(e), SCRCP, on September 29, 2014. After careful consideration of the record in this case, this Court is unable to discover any material fact or principle of law that either has been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Plaintiff's Motion for Reconsideration and to Alter or Amend Judgment. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

AND IT IS SO ORDERED.

ALISON RENEE LEE
Presiding Judge

October 23, 2014
Columbia, South Carolina

STATE OF SOUTH CAROLINA **COUNTY OF BARNWELL**	**IN THE COURT OF COMMON PLEAS** **SECOND JUDICIAL CIRCUIT**
Henry Lee Carroll, II, Plaintiff, v. Alex Webb Causey and Stacey Jenkins, Defendants.	Civil Action No.: 2012-CP-06-00326 **ORDER**

This matter came before the Court on September 8, 2014 at a hearing on Defendant Stacey Jenkins' Motion to Dismiss. Present at the hearing were Tim Moore, Esquire, counsel for the Plaintiff; Andy Yoho, Esquire, counsel for Defendant Stacey Jenkins; and Anthony Livoti, Esquire, counsel for Defendant Alex Webb Causey. Also present but not participating were Julian Allen, Esquire, for Titan Insurance; and Ray Turner, Esquire, for Progressive Insurance. After considering the law, the briefs filed by the parties, the arguments of counsel, and all matters submitted, the Motion to Dismiss is **GRANTED**.

FACTS

This matter arises from a motor vehicle accident where Plaintiff was a passenger in a car allegedly driven by Defendant Causey on September 28, 2009. Plaintiff claims that Causey and another car collided while participating in a drag race. The driver of the other car was unknown at the time the suit was commenced. Therefore, on September 28, 2012, Plaintiff filed a Summons and Complaint and named Alex Webb Causey and John Doe as defendants. Defendant Jenkins was deposed on October 8, 2013. Subsequently, on March 19, 2014, Plaintiff filed a Motion for an Order Substituting Jenkins for Doe. The basis of the motion was "the discovery conducted thus far in this case to include the deposition of Stacy Jenkins." An Order was signed on June 26, 2014 and filed July 2, 2014 granting this motion and allowing Jenkins to be substituted for Doe. An Amended Summons and Complaint were filed July 9, 2014 with Jenkins substituted for Doe as a defendant. Jenkins filed an Answer on August 12, 2014, reserving a right to file a motion to dismiss pursuant to Rule 12, SCRCP, which is proper under the South Carolina Rules of Civil Procedure. Jenkins filed this Motion to Dismiss on August 19,

2014 claiming that Jenkins should be dismissed pursuant to Rule 12(b)(6), SCRCP, for failure to state a cause of action and because the statute of limitations expired before he was made a party.

STANDARD OF REVIEW

When deciding a motion to dismiss, the question to be considered is whether, in a light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007); *Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 614 S.E.2d 619 (2005). "A motion to dismiss should not be granted if facts alleged and inferences reasonably deductible therefrom would entitle the plaintiff to any relief on any theory of the case." *Slack v. James*, 356 S.C. 479, 483 589 S.E.2d 772, 773-774 (Ct. App. 2003). Where allegations of the complaint give rise to competing inferences on a question of material fact, dismissal under Rule 12(b)(6) is not appropriate. *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 306 (1993).

DISCUSSION

As a preliminary matter, Plaintiff objected at the hearing to the Court considering an affidavit Jenkins filed on September 8, 2014 because the only the allegations set forth in the Plaintiff's Complaint may be considered when ruling on a motion to dismiss pursuant to Rule 12(b)(6), SCRCP and because they were not timely served. This Court agrees that the affidavit is not proper for consideration on a motion to dismiss, and it did not consider the affidavit in making this ruling.

Additionally, Jenkins did not argue at the hearing or in its memorandum to the Court regarding dismissal for failure to state a cause of action. Based upon a review of the pleadings, Plaintiff's Amended Complaint clearly contains the required elements for recovery. Therefore, the motion to dismiss on these grounds is denied.

The primary point of contention regarding the Motion to Dismiss is whether the claims against Jenkins should be dismissed because the statute of limitations expired before he was made a party and whether the Amended Complaint relates back to the original Complaint such that Jenkins was appropriately substituted as a party. Plaintiff argues that the July 2 Order properly substituted Jenkins for Doe.

The statute of limitations for a personal injury cause of action is three years. *See* S.C. Code Ann. § 15-3-530(5). Under S.C. Code Ann. § 38-77-180, an injured party may file suit against an unknown owner or driver of a vehicle so that the injured party may collect uninsured

motorist's insurance. However, the bringing of an action against the unknown owner or operator as John Doe or the conclusion of that action does not constitute a bar to the insured from bringing an action against the owner or operator previously proceeded against as John Doe if the identity of the owner or operator who caused the injury or damages complained of becomes known. S.C. Code Ann. § 38-77-180. In the present case, Plaintiff believes the identity of the John Doe to be Jenkins and replaced Doe with Jenkins in an Amended Complaint. However, Jenkins claims that Plaintiff's filing the case originally against John Doe does not toll the statute of limitations for filing an action against Jenkins, and since the substitution was made nearly five years after the date of the accident, the action against Jenkins is barred pursuant to the statute of limitations.

The Court of Appeals dealt with a similar issue in *Jackson v. Doe*, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000). In that case, Jackson, an automobile accident victim, brought suit against John Doe as the unknown driver. *Jackson*, 342 S.C. at 554, 537 S.E.2d at 568. Almost four and a half years later, the court allowed Jackson to add an alleged driver, Milligan, as a second defendant while retaining John Doe as a named party. *Id.* In analyzing whether serving John Doe tolled the applicable statute of limitations for Milligan, the Court of Appeals stated that "there is no provision specifically allowing John Doe and a later added or *substituted party* to be considered the same entity for purposes of tolling the statute of limitations. That fact, coupled with the fact that there is no mention of the statute of limitations and its relationship to any subsequent action against a later identified tortfeasor, leads to the inescapable conclusion that each statute must be separately construed and enforced according to its plain language." *Id.* at 555, 537 S.E.2d at 569 (emphasis added). Therefore, pursuant to *Jackson*, the statute of limitations is not tolled.

The Court of Appeals then addressed the question as to whether the amendment related back to the original complaint pursuant to Rule 15(c), SCRCP. Under Rule 15(c), SCRCP, "[a]n amendment changing the party against whom a claim is asserted relates back if ... within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." The *Jackson* Court applied a four-part test set forth in *Hughes v. Water World*

Water Slide, Inc. to analyze this issue. The four-part test allows the substitution of a party to relate back to the original complaint as follows:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading;
> (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense;
> (3) that party must or should have known that, but for a mistake concerning identity, the action would have been brought against it; and
> (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 214, 442 S.E.2d 584, 586 (1994). The Court of Appeals held that because Milligan was not technically substituted for Doe, but was rather the added as a party, the four-part test was inapplicable to the facts. *Jackson*, 342 S.C. at 558, 537 S.E.2d at 570. However, the Court clearly stated "[h]ad Jackson *substituted* Milligan for John Doe..., then the amendment should have been analyzed in light of the requirements of Rule 15(c) as set forth in *Hughes* for a determination of whether the amended complaint properly related back to Jackson's original action." *Id.* at 558-59, 537 S.E.2d at 570 (emphasis added).

Pursuant to the *Jackson* case, the filing of a John Doe action does not toll the statute of limitations as to the alleged "real tortfeasor;" rather, that person must be sued within the confines of the applicable statute of limitations. Accordingly, Stacey Jenkins was not substituted as a party to this action until nearly five years after the accident occurred. Under the discovery rule, "the statute of limitations 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." *Graham v. Welch, Roberts & Amburn, LLP*, 404 S.C. 235, 239, 743 S.E.2d 860, 862 (Ct. App. 2013) (internal citation omitted). In the case at hand, Plaintiff was aware of the cause of action against Jenkins on the date of the accident, and the statute of limitations therefore expired on September 28, 2012. Additionally, other states have specifically addressed the issue of whether the statute of limitation is tolled when a John Doe served in their statutes. *See, e.g.*, Va. Code Ann. § 38.2-2206(G) (providing that bringing an action against an unknown owner or operator as John Doe tolls the statute of limitations). If the South Carolina legislature had intended what Plaintiff argues, it could have clearly provided such in our statutes. It did not; therefore, the Court of Appeals reasoning in *Jackson* is affirmed.

Furthermore, under Rule 15(c), SCRCP, Plaintiff's substitution of Jenkins as a defendant does not relate back to the original complaint. Because Jenkins was substituted for Doe, pursuant to *Jackson*, the four-part *Hughes* test should be applied. The fourth requirement of the test is that Jenkins is required to have had notice of the claims within the applicable statute of limitations. The statute of limitations expired September 28, 2012. Jenkins was not made aware of the action until his deposition on October 8, 2013, well after the running of the original statute of limitations. Accordingly, by not having notice of the action prior to the running of the statute of limitations, the substitution of Jenkins as a defendant does not relate back to the original complaint. The claims against Jenkins must be dismissed.

Plaintiff argues that the July 2 Order allowed for the substitution of Jenkins for Doe, and no party filed a motion for reconsideration of this order, making it the law of the case. However, until service of the Amended Summons and Complaint, Jenkins was not a party to the case, and therefore could not have asked for a reconsideration of the July 2 Order. Substitution of a party defendant does not prevent that party from raising any applicable defenses to the claims brought against him. It would not be just to allow the July 2 Order to foreclose the rights of Jenkins to assert his defense. Additionally, under Rule 12, SCRCP, it is proper to raise the defense of statute of limitations in an answer.

ORDER

For the reasons stated above, it is therefore **ORDERED** that Defendant Stacey Jenkins' Motion to Dismiss is **GRANTED**.

AND IT IS SO ORDERED.

ALISON RENEE LEE
Presiding Judge

Columbia, South Carolina
September 11, 2014

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