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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWALL COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2012-CP-06-00326

Henry Lee Carroll, II .....Appellant,

v.

Alex Webb Causey and Stacey Jenkins.....Defendants.
Of Whom Stacey Jenkins is the Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Plaintiff filed his first Summons and Complaint on September 28, 2012, alleging damages arising from an automobile accident in Barnwell County that occurred on September 28, 2009. Plaintiff named Alex Causey and John Doe as Defendants. On March 19, 2014, Plaintiff moved for an order substituting Respondent Stacey Jenkins for Defendant John Doe. The Motion to Substitute was granted by Order of Judge Dickson dated June 26, 2014, and filed July 2, 2014. Subsequently, Appellant filed an Amended Summons and Complaint on July 9, 2014 naming Respondent Jenkins as Defendant in place of John Doe. Respondent Jenkins was served with the Amended Summons and Complaint on August 12, 2014. Jenkins filed an Answer on August 12, 2014, and subsequently moved on August 19, 2014 for dismissal alleging Plaintiff's failure to name Jenkins as a party before expiration of the applicable statute of limitations. The Motion to Dismiss was heard before Judge Alison Renee Lee on September 8, 2014, in Barnwell. Judge Lee granted Jenkins' Motion to dismiss by Order dated September 11, 2014 and filed September 18, 2014. Plaintiff filed a Motion for Reconsideration on September 29, 2014, which was denied by Order dated October 23, 2014. Plaintiff served a Notice of Appeal on November 25, 2014.

STATEMENT OF THE FACTS

According to the allegations in Appellant's original Complaint, Appellant was injured while riding in the car of Defendant Alex Webb Causey on September 28, 2009. (R. p. 16). The Complaint alleges Defendant Causey and an unknown driver, designated as John Doe, were "engaged in an automobile race" in Barnwell County. (R. p. 16). The Complaint states that due to reckless behavior by Defendant Causey and John Doe, Defendant Causey lost control of his car and Appellant was injured. (R. p. 16). Appellant filed the first Complaint the day the statute of limitations expired, September 28, 2012. (R. p. 16).

Following the filing of the first Complaint, Plaintiff deposed Respondent. (R. p. 76). Subsequently, on March 19, 2014, Appellant moved to amend his Complaint to substitute Respondent for John Doe. A hearing was held on Appellant's Motion before Judge Dickson who signed an Order granting Appellant's Motion to Amend. (R. p. 2). Respondent did not receive notice of the motion and accordingly, was not present at the hearing. (R. pp. 84-85).

On July 9, 2014, nearly five years after the subject accident, Plaintiff filed an amended Complaint substituting Respondent as a Defendant in place of John Doe. (R. p. 34). Respondent filed an answer on August 12, 2014, reserving a right to file a motion to dismiss. (R. pp. 42-45). Respondent filed a Motion to Dismiss on August 19, 2014. (R. p. 48).

At the hearing on the Motion to Dismiss, Respondent argued the statute of limitations expired before Respondent was substituted as a party because the accident that formed the basis of the Complaint occurred nearly five years prior to Respondent's

substitution. (R. pp. 78-79). Respondent further relied on the Court of Appeals' Opinion of Jackson v. Doe,[1] which provides the filing of a John Doe action does not toll the statute of limitations as to the alleged "real tortfeasor." (R. pp. 79-80). Respondent further asserted the provisions of Rule 15(c), SCRCP, did not allow the amended complaint to relate back to the date of filing of the original complaint because the requirements of Rule 15(c) and the elements of the four-part substitution test in Hughes v. Water World Water Slide, Inc.[2] were not met.[3] (R. p. 80).

Appellant argued during the hearing that John Doe was properly served with the first Summons and Complaint and that Respondent was properly substituted. (R. pp. 82-83). Appellant asserted that because John Doe was served within the statutory time period, and Respondent was substituted for John Doe, John Doe and Respondent were the "same person" and, therefore, the amended complaint should relate back to the date of original filing. (R. pp. 82-83). Moreover, Appellant relied on Judge Dickson's Order allowing substitution of parties and asserted the order provided substitution under Rule 15(c) was proper, unchallenged, and, thus, the law of the case. (R. pp. 83-84).

On September 11, 2014, Judge Lee signed an order granting Respondent's Motion to Dismiss. (R. p. 9). Judge Lee relied on the rulings in Jackson and Hughes and determined 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. (R. p. 7). Judge Lee held the statute of limitations

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[1] 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000).

[2] 314 S.C. 211, 443 S.E.2d 584 (1994).

[3] See Infra pp.11-12.

expired three years after the date of the accident and acknowledged Respondent was named a party well after the expiration of those three years. (R. pp. 6-7).

Judge Lee further addressed Rule 15(c), and determined the substitution of Respondent as a Defendant did not relate back to the first complaint. (R. pp. 7-9). Judge Lee relied on the fourth requirement of the four-part Hughes test, which requires a party to have notice of the action within the applicable statute of limitations. (R. pp. 7-9). Judge Lee determined Respondent was not made aware of the lawsuit within the applicable statute of limitations period. (R. pp. 7-9).

Judge Lee further addressed Appellant's argument that the Substitution Order was the law of the case. (R. p. 9). Judge Lee held Respondent was not a party to the case at that time, was unable to seek reconsideration of the Substitution Order, and was not foreclosed from raising defenses to the allegations in the amended complaint. (R. p. 9).

Appellant moved for reconsideration of the Order granting Respondent's Motion and asserted the Substitution Order was controlling as to the Judge Lee's Rule 15 analysis. (R. pp. 63-66). Appellant also argued Respondent was present at the accident, and knew if an action was filed he would likely be named as a defendant. (R. pp. 63-66). Appellant also asserted the trial judge erred because Appellant met the remaining elements of the Hughes test and the trial judge's order makes it impossible to substitute parties in situations where the John Doe is sued at the end of the statute of limitations and the real tortfeasor is not discovered until much later. (R. pp. 63-66). Judge Lee denied Appellant's Motion for Reconsideration on October 23, 2014. (R. p. 10).

I. ISSUES I AND IV ARE NOT PRESERVED FOR APPELLATE REVIEW.

Appellant has presented several arguments and issues that were not raised to and

ruled on by the hearing judge or challenged via Appellant's Motion for Reconsideration.

A. ISSUE I: CONSIDERATION OF RULE 15(C) AND STATUTE OF LIMITATIONS.

In Appellant's Issue I, Appellant takes issue with the Judge Lee's Order and asserts that consideration of a statute of limitations defense necessitated findings of fact not evident on the face of the Complaint. (Brief pp.5-7). Appellant contends Respondent's statute of limitations defense "raises issues of fact that are not evident from the fact of the complaint . . ." (Brief p.5). Appellant argues Judge Lee was only permitted to review the Summons and Complaint and the Amended Summons and Complaint under the rubric of a motion to dismiss, which prohibits consideration of issues outside the pleadings. (Brief p.6). Appellant also contends a determination of whether a complaint "relates back" under Rule 15, SCRCP, requires the court to make a "finding of fact," which Appellant asserts was improper. (Brief p.6).

Appellant has presented these arguments for the first time in his Initial Brief. See Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011) (stating it is "axiomatic that an issue cannot be raised for the first time on appeal.") (citations omitted). Appellant did not raise these arguments before Judge Lee in his oral arguments, his memorandum in opposition, or motion for reconsideration. Id. (stating an issue must be raise to and ruled on by the trial judge to be preserved for appellate review). Rather, Appellant argued in the hearing and in his memorandum that the elements of Rule 15 were met and further asserted Appellant's compliance with the statute of limitations was found on the face of the original complaint. (R. pp. 60-61, 84). Appellant did not challenge Judge Lee's ability to consider the statute of limitations or Rule 15; rather, Appellant requested that Judge Lee review these issues, conduct the

analysis, and rule in his favor. See Graves v. Horry-Georgetown Technical College, 391 S.C. 1, 10, 704 S.E.2d 350, 355 (Ct.App. 2010) (stating a party may not present one argument to the trial court and another on appeal). Interestingly, Appellant's Issue III argues Judge Lee "erred in finding the amended complaint did not relate back to the original filing of the summons and complaint pursuant to Rule 15(c)[,] SCRCP." (Brief p.8). Appellant appears to argue Judge Lee should have ruled in his favor under the Rule 15 analysis while at the same time contending the judge erred in conducting a Rule 15 analysis during a motion to dismiss. Accordingly, these issues are not properly before this Court and should be disregarded. See Ulmer v. Ulmer, 369 S.C. 486, 490, 632 S.E.2d 858, 861 (2006) (stating an appellate court will not consider issues on appeal which have not been preserved for appellate review) (citations omitted).

Appellant further asserts in Issue I that Appellant suffered head injuries in the accident and contends S.C. Code Ann. Section 15-3-40 provides for the tolling of the statute of limitations in the event a party is mentally incapacitated. Appellant seeks to bolster his argument that the consideration of Rule 15(c) during a motion to dismiss is in error because the determination of Appellant's degree of capacity could not be determined from the face of the Complaint. This issue was raised for the first time in Appellant's brief. See Herron, 395 S.C. at 465, 719 S.E.2d at 642 (stating an issue must be raised and ruled on by the trial judge to be preserved for appeal). In addition, incapacity and tolling of the statute of limitations are not a factor in the analysis of relation back to the date of the original complaint under Rule 15. See Rule 15(c), SCRCP; See also Hughes 314 S.C. at 214, 443 S.E.2d at 586. This argument is also unpreserved for appellate review.

Appellant further challenges Judge Lee's conclusion on page 5 of the Order in which the Judge stated "[Respondent] was not made aware of the action until his deposition on October 8, 2013, well after the running of the original statute of limitations." Appellant asserts that statement indicated the hearing judge considered matters outside the pleadings. However, Appellant did not challenge that statement via his Motion for Reconsideration. Accordingly, the issue is waived and not properly before this Court. See First Union Nat'l. Bank v. S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998) (stating a failure to challenge a ruling is an abandonment of the issue and an unchallenged ruling, right or wrong, is the law of the case).

B. ISSUE IV: TOLLING OF STATUTE OF LIMITATIONS

In Appellant's Issue IV, Appellant asserts the hearing judge erred by failing to find service of the first Complaint upon John Doe tolled the statute of limitations as to Respondent. Appellant prefaces his argument by acknowledging "no clear statutory provision authorizing the tolling of the statute of limitations for the actual tortfeasor when service is made upon John Doe . . ." (Brief p.12). Despite that admission, Appellant asserts service of the first complaint on John Doe should have tolled the statute of limitations as to Respondent. This is a new argument that was not presented to the hearing judge. See Elam v. S.C. Dept. of Transp., 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (stating issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court). Furthermore, the argument is contrary to previous precedent of this Court. See Jackson v. Doe, 342 S.C. at 556, 537 S.E.2d at 569 (stating 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). In addition to being unpreserved for appellate review, the argument is not supported by any authority and should be deemed abandoned. See In re McCracken, 346 S.C. 87, 551 S.E.2d 235 (2001) (stating an issue is also deemed abandoned if the argument in the brief is not supported by authority or is only conclusory).

For the foregoing reasons, Appellant's Issues I and IV are not properly on appeal and should not be considered by this Court. See Ulmer, 369 S.C. at 490, 632 S.E.2d at 861 (stating an appellate court will not consider issues on appeal which have not been preserved for appellate review).

II. JUDGE LEE PROPERLY DETERMINED THE ORDER OF SUBSTITUTION WAS NOT BINDING ON RESPONDENT.

Appellant contends Judge Dickson's order granting Appellant's motion to substitute Respondent for John Doe was binding because it was not challenged by Respondent or appealed by any party, and as a result, is the law of the case. (Brief pp.7-8). Obviously, as the Motion to Substitute was filed to bring Respondent into the case, Respondent was not yet a party to the matter at the time the order was issued. In addition, Respondent did not receive notice of the hearing, did not attend, and could not have moved for reconsideration of an order Respondent was not a party to. Judge Lee correctly determined Respondent was not a party to the case at that time and could not have requested reconsideration of the Order of Substitution. (R. p. 9). In addition, Judge Lee held the Order of Substitution does not foreclose Respondent's right to assert defenses, including the statute of limitations. (R. p. 9).

Appellant's argument on this point fails to take into consideration Judge Lee's ruling that Respondent was not a party at the time the Order of Substitution was entered

and could not have challenged or appealed the order as a non-party. Rule 201, SCACR, provides that "[o]nly a *party* aggrieved by an order, judgment, sentence or decision may appeal." In this instance, Appellant is asserting an individual who was not a party to the motion to substitute, not given notice of the hearing, and who was not a party to the suit when the order was issued is thereby foreclosed from raising a statute of limitations defense when later named as a party to the suit. Such an argument borders on the absurd and has no relevant basis in the law. In addition, the argument is presented without providing any citation authority and should be deemed abandoned. See In re McCracken, 346 S.C. at 92, 551 S.E.2d at 238 (stating an issue is also deemed abandoned if the argument in the brief is not supported by authority or is only conclusory).

III. JUDGE LEE DID NOT ERR IN FINDING THE AMENDED COMPLAINT DID NOT RELATE BACK TO THE ORIGINAL FILING OF THE SUMMONS AND COMPLAINT.

The Trial Judge correctly determined the amended complaint did not meet the requirements of Rule 15(c) for relation back to the original filing of the Summons and Complaint.

As an initial matter, Appellant asserted in his arguments during the hearing on the motion to dismiss and in his memorandum in opposition to Respondent's Motion that Rule 15(c) was carefully considered by Judge Dickson prior to issuing an Order of Substitution. (R. pp. 60-61, 83-84). Appellant asserted below that because Judge Dickson relied on and cited Rule 15 in the substitution order and because it was unchallenged, as discussed above, that substitution of Respondent under Rule 15 was the law of the case. (R. pp. 60-61, 83-84). Appellant's arguments before Judge Lee relating to Rule 15 were premised solely on Judge Dickson's Order of Substitution and not the

merits of the Rule 15 analysis. Accordingly, Appellant's attempts to now argue the merits of Rule 15 and the holdings in Hughes should not be considered by this Court as they were not presented to Judge Lee. See Elam, 361 S.C. at 23, 602 S.E.2d at 779-80 (2004) (stating issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court). However, in the event the Court disagrees, a brief discussion of the merits here follows.

Under Rule 15(c), SCRCP, an amendment changing the party against whom a claim is asserted relates back to the date of original filing if the foregoing provision is satisfied and is 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. In construing that rule, our Supreme Court has adopted a four-part test to aid in interpreting the requirements of Rule 15(c). The four-part test allowing the substation of a party is 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, 314 S.C. at 214, 442 S.E.2d at 586.

As noted above, Appellant filed the original Summons and Complaint on September 28, 2012, the day the statute of limitations expired. See S.C. Code Ann. § 15-3-530(5) (providing a three year statute of limitations for a personal injury cause of action). Appellant filed an Amended Summons and Complaint on July 9, 2014. Appellant contends the Amended Complaint complies with the requirements of Rule 15(c) and the four-part Hughes test, despite his previous contention that Judge Lee erred in making a Rule 15 analysis. (Brief pp.8-12).

Appellant asserts there is no dispute the amended pleadings allege the same facts as the original Complaint and there is no evidence in the pleadings Respondent would suffer any prejudice in maintaining a defense. (Brief pp.9-10). Appellant further contends "no party has alleged that if Plaintiff had known the identity of [Respondent] at the time the complaint was filed, [Respondent] would not have been named as a party, thus meeting the third requirement of the Hughes test." (Brief pp.9-10). Appellant goes on to discuss in detail the facts surrounding the Hughes case and asserts that the factual situation in the Hughes matter mirrors the circumstances in the case at hand, thus the trial judge erred in granting Respondent's Motion to Dismiss. (Brief pp.9-12).

In the Hughes matter, plaintiff filed suit at the end of the statute of limitations and served the correct defendant within the time of service. However, plaintiff used the incorrect name for defendant and the statute of limitations expired before the name designation could be corrected via an amended complaint. 314 S.C. at 212, 442 S.E.2d at 585. The Hughes Court applied Rule 15(c) and a four part-test created by the United States Supreme Court and determined the amended complaint correcting the incorrect

name related back to the original date of filing. 314 S.C. at 215, 442 S.E.2d at 586. The Hughes court determined defendant was aware of the filing of the original complaint within the statute of limitations period, was properly served with the original complaint, and was aware that due to a mistake the wrong name was designated as defendant. Id. The Hughes court also noted that defendant was present on the date of the accident and defendant's trade name was named as defendant in the original complaint. Id.

The Hughes case paints a perfect picture of the true purpose of Rule 15(c). In Hughes, the defendant was aware of the institution of the action within the statutory time period, was served with the complaint, and knew, but for a mistake in the name of the defendant, the defendant corporation would have been correctly named as party defendant. The Hughes opinion presents a situation wherein a true mistake gave rise to a situation where injustice to plaintiff could have taken place and Rule 15 salvaged the cause of action.

In the case at hand, Appellant attempts to contort the facts of Hughes to apply to Respondent. Appellant contends, as in Hughes, the instant Complaint alleged Respondent was present at the accident that gave rise to the action and was thereby on notice that *if an action was filed* then he would likely be named as a defendant. Appellant misapprehends the point of Hughes and the purpose of Rule 15(c) and the four-part test. Notice of the facts giving rise to the cause of action is not dispositive in the Rule 15(c) and Hughes analysis. Rather, a party must have "notice of the *institution of the action*" within the statute of limitations period, as the Defendant did in Hughes. Rule 15(c), SCRCP (emphasis added). The mere allegation Respondent was present at the scene of the accident does not satisfy Rule 15. Rather, as in Hughes, notice of the filing

of the lawsuit provides the requisite notice. Furthermore, such notice must be effectuated prior to the expiration of the statute of limitations.

In the case at hand, the statute of limitations expired on the day the first complaint was filed. Respondent was served with the Amended Complaint on July 14, 2014, nearly five years after the accident. A review of the pleadings clearly demonstrates Respondent was not given notice of the institution of the action within the statute of limitations period. Furthermore, without notice of the institution of the action it would be impossible for Respondent to know a mistake in identify occurred.

Rule 15(c) and the Hughes test are meant to salvage causes of action that would normally be lost due to mistake. See Hiers by Hiers v. Mullens, 310 S.C. 63, 65, 425 S.E.2d 57, 59 (Ct. App. 1992) (stating the doctrine of relation back was included in Rule 15(c) to "salvage" causes of action otherwise barred by the statute of limitations). The relation back doctrine is there to protect plaintiffs in situations where, within the statute of limitations period, an individual is aware of an action, knew that a mistake in identity occurred, and knows that but for a mistake that individual would have been named a party. Rule 15(c) is not a mechanism by which a plaintiff can substitute a party nearly two years after the expiration of the statute of limitations when the to-be-added defendant was clearly *unaware* of the institution of the action within the statute of limitations period and could *not* have known a mistake in identify occurred. This case is not a situation wherein a mistaken party is seeking to have a cause of action salvaged; rather, Appellant is now seeking to employ the relation back doctrine in an effort to allege liability and damages against a new party for an accident that occurred in 2009, well outside the statute of limitations period.

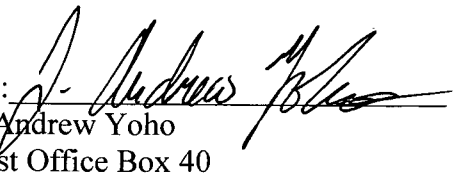
While a party who files suit against John Doe may later substitute Doe for the real tortfeasor, the filing of an action against John Doe does not toll the statute of limitations as to the alleged real tortfeasor. See Jackson, 342 S.C. at 555, 537 S.E.2d at 569. Appellant is seeking to disregard that rule and interpret the relation back doctrine to effectively toll the statute of limitations as to his claims against Respondent. Judge Lee correctly determined the Rule 15(c) relation back doctrine is not allowed in this instance. The face of the Amended Complaint makes clear the statute of limitations expired before Respondent was made a party, and the date of the original complaint indicates Respondent was not given notice of the institution of the action before the expiration of the statute of limitations. Accordingly, Judge Lee's Order should be affirmed.

CONCLUSION

Judge Lee correctly determined, based on the pleadings, that Respondent was substituted as a party to this action well outside the expiration of the statute of limitations and that the Rule 15(c) relation back doctrine did not apply. Appellant's Initial Brief challenging Judge Lee's Order contains numerous new arguments that are unpreserved for appellate review. Furthermore, Appellant's assertion that Judge Dickson's Order of Substitution is controlling in this instance is wholly without merit. For the foregoing reasons, Respondent respectfully submits that Judge Lee's Order should be affirmed.

(SIGNATURE ON THE FOLLOWING PAGE)

HOWELL, GIBSON & HUGHES, P.A.

By: 

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CERTIFICATE OF COUNSEL

The undersigned certifies that the submitted Final Brief of the Respondent complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I served the Final Brief of Respondent on Henry Lee Carroll, II by depositing a copy of it in the United States Mail, postage prepaid, on this 12th day of August, 2015, addressed to his attorneys of record, E.T. Moore, Jr., The Moore Law Firm Post Office Box 160, Barnwell, South Carolina 29812.

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