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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

RECEIVED

AUG 11 2015

SC Court of Appeals

Case No. 2012-CP-06-00326

Henry Lee Carroll, II	Appellant,
Henry Lee Carroll, II	Appellant.
Alex Webb Causey and Stacey Jenkins,	Defendants.
Of Whom Stacey Jenkins is the Respondent	Respondent.

FINAL BRIEF OF APPELLANT

July 21, 2015

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STATEMENT OF ISSUES ON APPEAL

- I. THE COURT ERRED IN GRANTING DEFENDANT JENKINS' MOTION TO DISMISS ON THE BASIS OF THE STATUTE OF LIMITATIONS BECAUSE THE DETERMINATION OF WHETHER THE ACTION WAS BARRED BY THE STATUTE NECESSITATED FINDINGS OF FACT NOT EVIDENT ON THE FACE OF THE COMPLAINT.
- II. THE COURT'S ORDER GRANTING DEFENDANT JENKINS' MOTION TO DISMISS WAS IMPROPER BECAUSE A PREVIOUS ORDER, WHICH NO PARTY APPEALED, FOUND THE SUBSTITUTION WAS PROPER AND DEFENDANT JENKINS WOULD SUFFER NO PREJUDICE BY BEING SUBSTITUTED AS A PARTY, AND THAT ORDER IS THE LAW OF THE CASE.
- III. THE COURT ERRED IN FINDING THE AMENDED COMPLAINT DID NOT RELATE BACK TO THE ORIGINAL FILING OF THE SUMMONS AND COMPLAINT PURSUANT TO RULE 15(C) SCRPC.
- IV. THE COURT ERRED IN NOT FINDING THAT SERVICE UPON JOHN DOE PURSUANT TO SOUTH CAROLINA CODE SECTION 38-77-180 TOLLED THE STATUTE OF LIMITATIONS FOR JENKINS.

STATEMENT OF THE CASE

Plaintiff filed a Summons and Complaint on September 28, 2012 seeking damages for personal injuries resulting from an automobile accident which occurred on September 28, 2009. The named Defendants in the original Summons and Complaint were Defendant Alex Causey

(driver of the vehicle in which Plaintiff was a passenger) and John Doe, the unidentified driver of the other vehicle with which Causey's vehicle collided. The Defendants were properly served and discovery proceeded. During the discovery process, Plaintiff learned the identity of Stacey Jenkins and learned that he was the likely unknown driver of the other automobile involved in the wreck. Plaintiff deposed Stacey Jenkins on October 8, 2013. Based upon Jenkins' admissions during the deposition, Plaintiff filed a Motion for an Order substituting Jenkins for Defendant John Doe on March 19, 2014. The motion to substitute Jenkins for John Doe was granted by Order dated June 26, 2014 and filed July 2, 2014. An Amended Summons and Complaint was filed July 9, 2014 substituting Jenkins for John Doe as a defendant. Jenkins was served with the Amended Summons and Complaint on July 14, 2014 and filed an Answer on August 12, 2014. Jenkins then filed a Motion to Dismiss on August 19, 2014 claiming he should be dismissed as a party pursuant to Rule 12(b)(6), SCRCPP, for the complaint's failure to state a cause of action upon which relief could be granted because the statute of limitations expired before he was made a party.

Jenkins' motion to dismiss was heard before the Honorable Alison Renee Lee on September 8, 2014. Judge Lee granted Jenkins' motion to dismiss based upon the expiration of the statute of limitations by Order dated September 11, 2014 and filed September 18, 2014. Plaintiff properly filed a Motion for Reconsideration and to Alter or Amend Judgment pursuant to Rule 59(e) SCRCPP on September 29, 2014, which was denied by Order dated October 23, 2014. Appellant received written notice of the order denying his motion for Reconsideration on November 3, 2014. Appellant served his Notice of Appeal on all parties on November 25, 2014.

FACTS

Henry Lee Carroll, II was severely injured in an automobile accident on September 28,

2009, when he was a passenger in a vehicle driven by Alex Causey and Causey's vehicle collided with the vehicle of an unknown driver. Mr. Carroll suffered severe head injuries in the wreck and had no knowledge of the identity of the driver of the other vehicle in the crash.

Mr. Carroll filed the Summons and Complaint in this action on September 28, 2012, naming as Defendants Alex Webb Causey and John Doe, pursuant to S.C. Code Ann. Section 38-77-180. (R. p. 13.) The Defendants were served, answers were filed on behalf of both Defendants, and discovery proceeded. As depositions were taken and eyewitnesses were interviewed, Plaintiff discovered that Stacey Jenkins was the driver of the other vehicle involved in the collision which caused his injuries. Mr. Carroll moved the Court for permission to amend his Complaint to substitute Stacey Jenkins for John Doe under Rule 15(c). (R. p. 31.) A hearing was held on Plaintiff's motion, and attorneys for John Doe and Defendant Causey were present. The Honorable Edgar W. Dickson signed an Order dated June 26, 2014, finding that the substitution of Stacey Jenkins for John Doe was permissible under South Carolina Rule of Civil Procedure 15, that justice required allowing the substitution of parties, and that Stacey Jenkins would not be prejudiced by the amendment. (R. p. 2.) Judge Dickson ordered that Stacey Jenkins should be substituted for the Defendant John Doe. (R. p. 2.) No party has appealed Judge Dickson's order.

Plaintiff filed an Amended Summons and Complaint on July 9, 2014, substituting Stacey Jenkins for John Doe. (R. p. 33.) Mr. Jenkins was served with the Amended Summons and Complaint on July 14, 2014. (R. p. 39.) Stacey Jenkins served an Answer to the Amended Complaint on August 8, 2014 by and through his attorney, Clarissa Warren Joyner, alleging the Amended Complaint failed to state a cause of action upon which relief could be granted and alleging that the action was barred by the applicable statute of limitations, among other defenses.

(R. p. 42.) On or about August 14, 2014, attorney Robert Achurch III, on behalf of Jenkins, served a Motion to Dismiss on the Plaintiff alleging that the Amended Complaint failed to state a cause of action upon which relief could be granted and that Plaintiff failed to bring the action within the applicable statute of limitations, among other defenses. (R. p. 48.) Neither the Answer nor the Motion to Dismiss addressed Judge Dickson's Order substituting Jenkins or raised any question that he was not properly substituted as a party.

A hearing was held on Jenkins' Motion to Dismiss on September 8, 2014, before the Honorable Alison Renee Lee, who granted Jenkins' Motion to Dismiss based upon the expiration of the statute of limitations in her order dated September 11, 2014. (R. p. 5.) Plaintiff filed a timely Motion for Reconsideration and to Alter or Amend Judgment, (R. p. 63.) which was denied by Judge Lee's Order dated October 23, 2014. (R. p. 10.) This appeal followed.

ARGUMENTS

I. THE COURT ERRED IN GRANTING DEFENDANT JENKINS' MOTION TO DISMISS ON THE BASIS OF THE STATUTE OF LIMITATIONS BECAUSE THE DETERMINATION OF WHETHER THE ACTION WAS BARRED BY THE STATUTE NECESSITATED FINDINGS OF FACT NOT EVIDENT ON THE FACE OF THE COMPLAINT.

Defendant Jenkins filed a motion to dismiss the Plaintiff's amended complaint substituting him as a party on the basis that the complaint failed to state a cause of action upon which relief could be granted because the statute of limitations barred any recovery from Jenkins. (R. p. 48.) At the hearing on the motion to dismiss, counsel for Jenkins sought to introduce an affidavit from Jenkins. (R. p. 77, ll. 4-9). Plaintiff's counsel objected to the consideration of the affidavit, which had not been previously provided to him, on the basis that only matters alleged in the

complaint should be considered by the court when ruling on a motion to dismiss under South Carolina Rule of Civil Procedure 12(b)(6). (R. p. 77, ll. 15-19). The court declined to convert the motion to a motion for summary judgment and requested that counsel for Jenkins argue the motion to dismiss. (R. p. 78, ll. 22-23.) In its order granting the motion to dismiss, the trial court stated that it did not consider the affidavit of Jenkins. (R. p. 6.) However, Plaintiff asserts that because the statute of limitations defense raises issues of fact that are not evident from the face of the complaint, the trial court erred in granting the motion to dismiss.

In ruling on a motion for failure to state a cause of action under SCRPC 12(b)(6), the court must dispose of the motion based solely upon the allegations set forth on the face of the complaint. Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (S.C., 1987). Such a motion “cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief *on any theory of the case.*” Brown, 353 S.E.2d 697, 698 (S.C., 1987), citing Blandon v. Coleman, 285 S.C. 472, 330 S.E.2d 298 (1985), emphasis added. In Brown, the court held that the trial court erred in considering affidavits in support of the 12(b)(6) motion and that the defense of statute of limitations was not apparent on the face of the complaint. See Brown, 353 S.E.2d 697, 699 (S.C., 1987). The Supreme Court of South Carolina stated that a 12(b)(6) motion “may not be sustained if the facts alleged and the inferences therefrom would entitle the plaintiff to any relief on any theory.” Baird v. Charleston County, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (S.C., 1999).

In this action, the only pleadings the court should have considered in ruling on Jenkins’ motion to dismiss were the summons and complaint and the amended summons and complaint. The original summons and complaint was filed within the statute of limitations. Although the amended summons and complaint was filed after the expiration of the statute of limitations,

South Carolina Rule of Civil Procedure 15 allows for relation back in certain circumstances, and it follows that the statute of limitations defense could not be disposed of solely by examining the face of the amended summons and complaint. The Rule 15 analysis described in detail below requires the court to make findings of fact regarding issues of whether the claims alleged in the amended pleading involve the same conduct alleged in the original pleading, whether the party knew or should have known that the action would have been brought against him but for a mistake regarding his identity, and whether the party had sufficient notice of the action within the applicable statute of limitations such that the party would not be prejudiced in defending the action. In addition, the plaintiff suffered severe injuries, including head injuries, that rendered him incapacitated for a period of time. South Carolina Code Ann. Section 15-3-40 provides for the tolling of the statute of limitations in the event the plaintiff is a minor or is mentally incapacitated. In Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 (S.C. 1994), the court stated that “[i]nsanity or mental incompetency that tolls the statute of limitations consists of a mental condition which precludes understanding the nature and effects of one’s acts, an incapacity to manage one’s affairs, an inability to understand or protect one’s rights, because of an over-all inability to function in society, or the mental condition is such as to require care in a hospital.” See Wiggins v. Edwards, 314 S.C. 126, 442 S.E.2d 169 170 (S.C. 1994). The court could not make a determination of the Rule 15(c) issues or determine the plaintiff’s degree of incapacity simply from the face of the plaintiff’s amended summons and complaint. Therefore, the grant of the motion to dismiss was improper.

In addition, on page 5 of the court’s Order, Judge Lee stated that “Jenkins was not made aware of the action until his deposition on October 8, 2013, well after the running of the original statute of limitation.” (R. p. 9.) This information appears nowhere in the summons and

complaint or the amended pleadings. It is clear the court considered the information contained in the affidavit of Jenkins in determining whether the statute of limitations barred the action, and that is improper. Therefore, the trial court erred in granting Jenkins' motion to dismiss and this matter should be remanded to the trial court.

II. THE COURT'S ORDER GRANTING DEFENDANT JENKINS' MOTION TO DISMISS WAS IMPROPER BECAUSE A PREVIOUS ORDER, WHICH NO PARTY APPEALED, FOUND THE SUBSTITUTION WAS PROPER AND DEFENDANT JENKINS WOULD SUFFER NO PREJUDICE BY BEING SUBSTITUTED AS A PARTY, AND THAT ORDER IS THE LAW OF THE CASE.

After a hearing upon Plaintiff's motion under SCRCF Rule 15 to substitute Jenkins for John Doe, as contemplated by S.C. Code Ann. Section 38-77-180, the Honorable Edgar W. Dickson found that "justice requires the Plaintiff be allowed to substitute parties in this case and that the new defendant will not be prejudiced." (R. p. 2, ll. 9-10.) Judge Dickson granted Plaintiff's motion to substitute Jenkins for John Doe in accordance with the public policy of the statute and the Federal Rules of Civil Procedure, and Plaintiff filed the amended summons and complaint substituting Jenkins for John Doe and served Jenkins with the same. Jenkins has not pled or alleged that he was not properly substituted as a party. No party has appealed Judge Dickson's order, and Plaintiff asserts that Judge Dickson's order finding the substitution was proper is the law of the case and Jenkins' subsequent motion to dismiss was improper.

III. THE COURT ERRED IN FINDING THE AMENDED COMPLAINT DID NOT RELATE BACK TO THE ORIGINAL FILING OF THE SUMMONS AND COMPLAINT PURSUANT TO RULE 15(C) SCRPC.

At the hearing on Jenkins' motion to dismiss, counsel for Jenkins argued that no relief could be had against Jenkins because Jenkins did not receive notice of the action within the three-year statute of limitations for personal injury actions, so he should be dismissed as a party. Counsel for the Plaintiff disagreed and asserted that the amended complaint against Jenkins relates back to the date of filing the original complaint pursuant to South Carolina Rule of Civil Procedure 15(c), and the action against Jenkins is not barred.

Rule 15 of the South Carolina Rules of Civil Procedure substantially mirrors Federal Rule 15. The Federal Rules of Civil Procedure are designed to "facilitate a proper decision on the merits" of the case and are not meant to foreclose justice on the basis of procedural technicalities.¹ As recognized by the Fourth Circuit Court of Appeals in Goodman v. Praxair, Inc., 494 F.3d 458 (4th Cir. 2007), the Federal Rules of Procedure "favor simplicity in pleadings, see Fed.R.Civ.P. 8(a), and their liberal amendment, see Fed.R.Civ.P. 15(a); Foman v. Davis, 371 U.S. 178, 181, 83 D.Ct. 227, 9 L.Ed.2d 222 (1962), as well as the administration of cases to secure their just determination. See Fed.R.Civ.P.1." Goodman v. Praxair, Inc., 494 F.3d 458 (4th Cir. 2007).

South Carolina courts have held the following factors must be analyzed in determining whether a pleading relates back under South Carolina Rule of Civil Procedure 15(c):

1. The basic claim alleged in the new pleading must have arisen out of the conduct set forth in the original pleading;

¹ Conley v. Gibson, 355 U.S. 41, 48 (1957).

2. The party to be brought into the action 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;
4. The second and third requirements of this test must have been fulfilled within the prescribed limitations period. Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 442 S.E.2d 584 (1994).

As discussed above, in ruling on this motion to dismiss under SCRCP 12(b)(6), the court must examine only the complaint itself and must not consider evidence outside the pleadings. Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (S.C., 1987). There is no dispute that the amended pleadings in this case meet the first requirement of the Hughes test because the amended pleadings allege the same facts as the original complaint. Regarding the second portion of the test, Plaintiff asserts there is absolutely no evidence in the pleadings that Jenkins would suffer any prejudice in maintaining a defense as a result of the delay in identifying him as a party. In fact, Judge Dickson, in his order allowing the substitution, specifically found that Jenkins would suffer no prejudice. Further, no party has alleged that if Plaintiff had known the identity of Jenkins at the time the complaint was filed, Jenkins would not have been named as a party, thus meeting the third requirement of the Hughes test. Federal courts have held the amendment of a John Doe complaint to add the previously unidentified party is a mistake under Rule 15 such that the amendment can relate back. See Varlack v. SWC Carribean, Inc., 550 F.2d 171 (3d Cir. 1977); Robinson v. Clipse, 602 F.3d 605, 609 (4th Cir. 2010); Goodman v. Praxair, Inc. F.3d 458, 468-73 (4th Cir. 2007). The remaining issue is whether Jenkins received notice of the action within the statute of limitations so the complaint can properly relate back.

In analyzing relation back under Rule 15, South Carolina courts have emphasized that the South Carolina Supreme Court has adopted “a more liberal construction of Rule 15(c) than the United States Supreme Court” because the United States Supreme Court’s interpretation would have been “inconsistent with Rule 8(f) SCRCP, which requires that ‘all pleadings shall be construed as to do substantial justice to all parties.’” Jackson v. Doe, 342 S.C. 552, 537 S.E.2d 567 citing Hughes, 314 S.C. at 214, 442 S.E.2d 584 at 586 (1994). In Jackson v. Doe, Chief Judge Hearn stated in her dissent that “[t]he purpose of Rule 15(c) is to salvage causes of action otherwise barred by the statute of limitations.” Jackson v. Doe, 342 S.C. 552, 537 S.E.2d 567 at 571 (Ct.App. 2000), citing Thomas v. Grayson, 318 S.C. 82, 88, 456 S.E.2d 377, 380 (S.C. 1995).

Jackson v. Doe held that the substitution of a party under Rule 15(c) requires an analysis of the four-part test set forth in Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 442 S.E.2d 584 (1994). In Hughes, the Plaintiff filed a summons and complaint on the deadline of the statute of limitations (just as the Plaintiff did in this case), but named the Defendant as Water World Water Slide, Inc. instead of the true name of the corporation, which was Wet World, Inc. The Plaintiff amended her complaint to correct the name of the Defendant after the statute of limitations had run and argued that her amendment related back to the original filing. The trial judge dismissed the complaint on the basis that the action was not filed and served on the proper party within the statutory period. The Supreme Court of South Carolina reversed the trial court, finding that the Plaintiff met all the requirements of SCRCP 3(b) and 15(c) such that the amendment related back to the original filing date. The Hughes court applied the four-part test the United States Supreme Court set forth in Schiavone v. Fortune, 477 U.S. 21, 29, 106

S.Ct. 2379, 2384, 91 L.Ed.2d 18, 27 (1986) but departed from the *Schiavone* court, holding that Rule 8(f) SCRPC required that the rules of procedure be liberally construed to provide substantial justice to all parties. Considering the four factors enumerated above, the Hughes court found that because the pleadings described an incident which occurred *while the president of the corporation was present*, the name on the pleadings was a trade name used by the Defendant corporation, and the pleadings were served on the corporation under the time prescribed by Rule 3(b) SCRPC, the amended complaint related back to the filing of the original pleading and the action should not have been dismissed. Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 442 S.E.2d 584 (1994), emphasis added.

The amended complaint in this case alleges that Jenkins was present at the time of the wreck and had notice of plaintiff's injuries. Beyond that, there is simply no evidence within the amended complaint to determine when Jenkins received notice of the institution of the action, and as such the grant of Jenkins' motion to dismiss was error, since the determination of a motion to dismiss must be limited to examination of the pleadings. Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (S.C., 1987). The intent of the Rules of Civil Procedure and the interests of justice require a liberal application of the rule. Like the president of the corporation in Hughes, Jenkins was present when the event giving rise to the cause of action in this case occurred. He knew at the time of the wreck that if an action was filed, he would likely be named as a Defendant, and he fled the scene of the wreck. To allow Jenkins to avoid being substituted in this case would reward his bad acts in leaving the scene of the accident and would fail to do substantial justice to all parties as required by Rule 8(f) SCRPC.

IV. THE COURT ERRED IN NOT FINDING THAT SERVICE UPON JOHN DOE PURSUANT TO SOUTH CAROLINA CODE SECTION 38-77-180 TOLLED THE STATUTE OF LIMITATIONS FOR JENKINS.

Finally, there is no dispute Defendant John Doe was properly served within the statute of limitations period in the method provided by South Carolina Code section 38-77-180, which requires the summons and complaint be delivered to the clerk of court of the county where the action is filed. Plaintiff acknowledges there is no clear statutory provision authorizing the tolling of the statute of limitations for the actual tortfeasor when service is made upon John Doe, but Plaintiff asserts that the intent of the statute to preserve the Plaintiff's right to recover against the actual wrong-doer, together with the court's liberal reading of Rule 15's relation-back provision and the intent of the Federal Rules, which favor cases being decided on the merits rather than on technicalities, require a finding that proper service upon John Doe tolls service of process upon Jenkins for purposes of Rule 15(c). If the court finds that proper service upon Doe tolls the statute of limitations, Plaintiff should have been able to properly serve Jenkins within 120 days after the amended complaint was filed. If that is the case, the Plaintiff has clearly met all the requirements of Rule 15 and the trial court erred in dismissing Jenkins as a party.


CONCLUSION

For the reasons stated above, the Court erred in granting Jenkins' motion to dismiss. In ruling on a 12(b)(6) motion for dismissal, only the pleadings may be considered. If the pleadings present a cause of action for which the plaintiff may recover, dismissal is improper. An analysis of whether an amended summons and complaint relates back to the original date of filing pursuant to Rule 15(c) necessarily involves questions of fact that cannot be determined solely by an examination of the complaint. In addition, the trial court's ruling that Plaintiff's claim against

Jenkins is barred sets a standard that is impossible to meet when, as here, the Plaintiff brings an action pursuant to South Carolina Code Ann. Section 38-77-180 near or at the end of the limitations period. Despite following the statute's requirements and properly serving John Doe, the Plaintiff who files a John Doe complaint at the end of the statute of limitations and discovers the identity of the true tortfeasor during the litigation process would never be able to file an amended complaint which would relate back to the original pleading. Such an interpretation would nullify the purpose of South Carolina Code section 38-77-180 and Rule 15(c), and that cannot be the intent of the legislature.

Therefore, the case should be remanded to the trial court.

Respectfully submitted,


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THE STATE OF SOUTH CAROLINA
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APPEAL FROM BARNWELL COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

Case No. 2012-CP-06-00326

Henry Lee Carroll, II,Appellant,

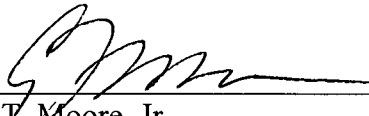
v.

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

AMENDED CERTIFICATE OF COUNSEL

I certify the Appellant's Final Brief and the Appellant's Final Reply Brief comply with
South Carolina Appellate Court Rule 211(b).

September 21, 2015



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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

AMENDED PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant, the Final Reply Brief, and the Certificate of Counsel by depositing a copy of it in the United States mail, postage prepaid on August 11, 2015 addressed to the following attorneys of record.

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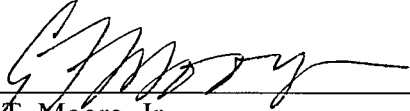
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I certify that I have served the Amended Proof of Service and Amended Certificate of Counsel on the above listed attorneys of record on September 21, 2015.

September 21, 2015



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