

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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AUG 11 2015  
SC Court of Appeals

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

FINAL REPLY BRIEF

August 10, 2015

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## REPLY TO RESPONDENT'S STATEMENT OF ISSUES ON APPEAL

Appellant replies to Respondent's Statement of Issues on Appeal as follows:

- I. Appellant properly preserved the arguments identified as Issue I and Issue IV in Appellant's Initial Brief.
  - A. Appellant preserved Issue I.

In the Initial Brief, Appellant stated that the trial court erred in granting Jenkins' motion to dismiss on the basis of the statute of limitations because the determination of that issue required the Court to consider findings of fact which were not evident on the face of the pleadings, which is impermissible in a motion to dismiss under SCRCP 12(b)(6). Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (S.C., 1987). Respondent asserts that this argument was not made at trial and is not preserved for review. In fact, the transcript of the hearing shows that trial counsel for the Plaintiff did object to the court's consideration of evidence outside the pleadings on the basis that only matters alleged in the pleadings could 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, lines 15-19.) On page 2 of the Plaintiff's Motion for Reconsideration, counsel again challenged the court's consideration of evidence outside the pleadings when he noted there "was no evidentiary basis" for the court's finding that Plaintiff was aware of a cause of action against Jenkins on the date of the accident and that the statute of limitations expired on September 12, 2012. (R. p. 64.) However, Plaintiff went on to argue the relation back issues of SCRCP Rule 15(c) because the trial Court had clearly conducted a 15(c) analysis and it was proper for Plaintiff to argue that substitution was valid under Rule 15(c) to preserve his substantive arguments on that issue.

Respondent argues that Appellant did not challenge Judge Lee's finding that Jenkins was not aware of the action until his deposition on October 8, 2013. Appellant maintains that he did challenge this finding when he argued in his Motion for Reconsideration that there was no evidentiary basis for the court's findings of fact. (R. p. 64.) Therefore, the argument is preserved for appellate review.

Respondent argues Appellant did not raise the issues of capacity at the trial court level and that his arguments regarding S.C. Code Ann. Section 15-3-40 which provides for the tolling of the statute of limitations in the event a party is mentally incapacitated should be disregarded. However, Plaintiff's motion for reconsideration notes that plaintiff suffered a severe brain injury (R. p. 63.), and counsel stated at the hearing that the Plaintiff did not learn of John Doe's true identity until eyewitnesses came forward and identified him. (R. p. 82, lines 22-24.) Appellant maintains this argument is preserved for consideration by the appellate court.

B. Appellant preserved Issue IV.

Respondent argues that Appellant did not present the issue of tolling of the statute of limitations to the trial judge and that this argument should be barred. However, Appellant argued at the hearing that John Doe was properly served within the statutory time period and Stacey Jenkins was properly substituted for John Doe. Appellant argued the complaint should properly relate back, in effect tolling the statute of limitations for Jenkins. (R. p. 83, lines 3-8.) Appellant asks the court to consider the argument as preserved for appellate review.

II. The Court erred in determining Judge Dickson's Order was not binding upon Respondent Jenkins.

Judge Dickson's Order found that Jenkins should be substituted for John Doe and that he would not be prejudiced by the substitution. (R. p. 2.) No party appealed that order. In First Union Nat'l. Bank v. S.C. v. Soden, the Court of Appeals held that the failure to challenge a ruling is an abandonment of the issue and an unchallenged ruling, right or wrong, is the law of the case. First Union Nat'l Bank v. S.C. v. Soden, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998). Respondent argues that because Jenkins was not a party, he could not have appealed the ruling. However, once Jenkins was served with the Amended Summons and Complaint, he was a party and could have challenged Judge Dickson's order approving his substitution as a party in his Answer or by motion. Since Jenkins did not raise the defense that he was improperly substituted as a party in his Answer, or by subsequent motion, the defense was waived. See S.C.R.C.P. 12(b)(6). Therefore, the Order issued by Judge Dickson finding that substitution was proper under Rule 15(c) stands, and Jenkins should not have been dismissed as a party without the presentation of further evidence during an appropriate motion hearing or at trial.

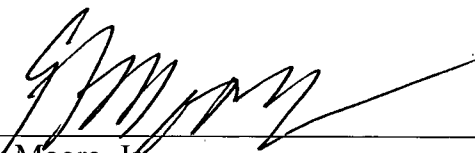
III. The Court erred in finding the Amended Complaint did not relate back to the original filing of the Summons and Complaint.

For the reasons set forth in Appellant's Initial Brief, the Appellant maintains the trial court erred in finding the Amended Complaint did not relate back to the original filing of the Summons and Complaint.

## CONCLUSION

Appellant maintains that the issues identified as Issue I and Issue IV in his Initial Brief are preserved for appellate review because the issues were raised either in the hearing, in the motion for reconsideration, or in the pleadings as discussed above. Appellant asserts Judge Dickson's order was binding upon the Respondent, and Jenkins' failure to challenge the Order in his Answer or by subsequent motion amounts to a waiver of the argument that he was improperly substituted as a party. For the reasons described more fully in Appellant's Initial Brief, the Appellant asserts the substitution of Jenkins as a party was proper and the amendment of the Summons and Complaint should relate back to the filing of the original pleadings under SCRCP 15(c), such that the statute of limitations does not bar the action against Jenkins. Appellant respectfully requests the Court inquire into the issues raised in his Initial Brief and issue an Order finding the trial court erred in its ruling and remanding the case to the trial court for further proceedings.

Respectfully Submitted,



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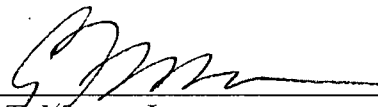
Alex Webb Causey and Stacey Jenkins, .....Defendants.

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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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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