THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM RICHLAND COUNTY

G. Thomas Cooper, Jr., Circuit Court Judge

Civil Action No. 13-CP-40-0301

Basil W. Akbar, #065498, Appellant,

v.

South Carolina Department of Corrections,
Bill Byers, Martha Roof, Debrah Long,
Lisia Johnson, Ann and John Doe, Respondents.

RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC

Appellant has filed a "Petition for Rehearing; and Rehearing En Banc" (hereinafter "Petition") requesting a rehearing on this Court's Opinion filed July 6, 2016. Appellant contends that this Court "overlooked or misapprehended" his arguments and "rush[ed] to conclusion." For the reasons stated herein, Appellant's Petition should be denied.

According to Rule 221(a) of the South Carolina Appellate Court Rules, "[a] petition for rehearing shall be in accordance with Rule 240, and shall state with particularity the points supposed to have been overlooked or misapprehended by the court." "In order to prevail on a petition for rehearing, appellants must demonstrate the Court overlooked or misapprehended

their argument." *Kennedy v. South Carolina Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322 (2001). "The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time." Jean H. Toal, Shahin Vafai & Robert Muckenfuss, *Appellate Practice in South Carolina* 309 (1999) (citing *Arnold v. Carolina Power & Light Co.*, 168 S.C. 163, 167 S.E. 234 (1933)).

Furthermore, Rule 219(a), SCACR states, in pertinent part, "[a] hearing or rehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decision, or (2) when the proceeding involves a question of exceptional importance." "The Court of Appeals has discretion as to whether or not to accept rehearing." *Williamson v. Middleton*, 383 S.C. 490, 494, 681 S.E.2d 867, 869 (2009).

On July 6, 2016, this Court issued an Opinion affirming the Circuit Court's granting of summary judgment to Respondents in this action. It further found that the Circuit Court properly applied the two-year statute of limitations to Appellant's claims and that his claims were barred as he did not file his Complaint until well after the applicable statute of limitations had run.

In his Petition, Appellant argues that this Court overlooked or misapprehended his arguments, namely that (1) the "Circuit Court erred in applying the two-year statute of limitation, because . . . legal claim had not been triggered, until April 28, 2010;" (2) that somehow the lower court erred regarding the "Doctrine of Exhaustion of Administrative Remedies;"[1] (3) the "lower

[1] While this Court ruled that any claims arising from Respondents' alleged failed to timely respond to Appellant's grievances were barred by the two-year statute of limitations, Appellant does not appear to be challenging that decision. Furthermore, this issue is not properly before this Court, as the Circuit Court did not rule upon it. *See Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368

court's decision was not based on evidence in the record;" and (4) that the doctrine of equitable tolling "should have been envoked" because Respondents allegedly delayed Appellant. Appellant's Petition clearly should be denied as the Court properly affirmed the Circuit Court's ruling that the Appellant's claims were barred by the applicable two-year statute of limitations under the South Carolina Tort Claims Act, S.C. CODE ANN. § 15-78-10, *et seq.*

Under the South Carolina Tort Claims Act, S.C. CODE ANN. § 15-78-10 *et seq.*, a claimant must commence an action for damages within two (2) years after the date the loss was or should have been discovered. S.C. CODE ANN. § 15-78-110. According to the statute, "loss" is defined as "bodily injury, disease, death, or damage to tangible property, **including lost wages and economic loss** to the person who suffered the injury, disease, or death, pain and suffering, mental anguish, and any other element of actual damages recoverable in actions for negligence, but does not include the intentional infliction of emotional harm." S.C. CODE ANN. § 15-78-30(f) (emphasis added).

Under the discovery rule, "the statute of limitations does not run from the date of the negligent act, but from the date when the *injury* resulting from the wrongful conduct either is discovered or *may be* discovered by the exercise of reasonable diligence." *McClain v. Jarrard, M.D.*, 354 S.C. 218, 220, 580 S.E. 2d 763, 764 (Ct. App. 2003) (citing *Wilson v. Shannon*, 299 S.C. 512, 513, 386 S.E.2d 257, 258 (Ct. App. 1989)). The date on which discovery should be made is an objective, not subjective question. *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88 (1995). In other words,

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S.C. 342, 628 S.E. 2d 902 (Ct. App. 2006). Even if the Appellant had raised this issue to the trial court, there was never a ruling on those issues. Assuming the Circuit Court had ruled that Appellant properly exhausted his available administrative remedies, such a ruling clearly would not change the ultimate disposition in this action – that all of Appellant's claims were barred by the applicable statute of limitations. Whether or not Appellant properly exhausted his administrative remedies, therefore, is irrelevant to this action.

> whether the particular Appellant actually knew he had a claim is not the test. Rather, courts must decide whether the circumstances of the case would put a person of common knowledge and experience on notice that some right of his has been invaded, or that some claim against another party might exist.

Young, 333 S.C. at 719, 511 S.E.2d at 416. The fact that the injured party does not comprehend the full extent of his injuries is immaterial. *Dean v. Ruscon Corp.*, 321 S.C. 360, 364, 468 S.E.2d 645, 647 (1996). "The statute of limitations is not tolled during the period of time in which a Appellant is merely unaware of the extent of an actionable injury." *Young*, 333 S.C. at 720, 511 S.E.2d at 416.

In applying this reasonable diligence analysis under the discovery rule, the Court has stated, "an injured party must act with some promptness where facts and circumstances of the injury would put a person of common knowledge and experience on notice that some right of his had been invaded or that some claim against another party might exist." *McClain*, 354 S.C. 218, 580 S.E.2d 763. The statute of limitations begins to run from this point and not when advice of counsel is sought or a full-blown theory of recovery is developed. *Johnston v. Bowen*, 313 S.C. 61, 64, 437 S.E.2d 45, 47 (1993).

In the present case, this Court properly affirmed the Circuit Court's finding that Appellant did not file the present lawsuit until January 16, 2013, more than 30 years after any cause of action he may have arising out of his allegations accrued. It also properly found that Appellant was aware his account did not exist more than two years prior to the filing of his Complaint. Appellant contends that a portion of the wages he earned from 1979 through 1981 was withheld by the SCDC in an escrow account. He further contends that the funds contained in this account should have been disbursed to him upon his release on parole in 1981, but that they were not. However, as the Court correctly found, Appellant admitted in his Complaint that he first became aware that the SCDC did not have any records of the 1981 account on February

9, 2009. Additionally, by Appellant's own admission, he clearly knew or should have known about any issue with these alleged funds by October 22, 2008, when Appellant contends that he initiated communication with SCDC about the account, but received no reply. At the very least, therefore, Appellant did not file the present action until more than four (4) years after he inquired about the alleged issues, and almost four years until he was informed that he did not have a "Work Center" funds account. *See Dean*, 321 S.C. at 364, 468 S.E.2d at 647 (finding fact that injured party does not comprehend full extent of his injuries is immaterial); *Johnston*, 313 S.C. at 64, 437 S.E.2d at 47 (statute of limitations begins to run from point when person of common knowledge and experience is on notice that some right of theirs has been invaded or that some claim against another party might exist and not when full-blown theory of recovery is developed). The Court, therefore, did not err in affirming the Circuit Court's decision to grant Respondents' Motion for Summary Judgment and holding Appellant's claims were barred, as Appellant clearly failed to file his action within the applicable statute of limitations.

Additionally, the Court did not err in ruling the Circuit Court properly applied the two-year statute of limitations because Appellant did not submit evidence showing he filed a verified claim or that any alleged claim was properly filed. Appellant argues that on or about May 18, 2011, he filed a verified claim. He contends that because of this, the two-year statute of limitations is not applicable to his claims. Appellant's argument, however, fails.

S.C. CODE ANN. § 15-78-80 provides, in pertinent part,

> The verified claim may be received by the Budget and Control Board or the appropriate agency or political subdivision. If filed, the claim **must be received within one year after the loss was or should have been discovered.**

S.C. CODE ANN. § 15-78-80(d) (emphasis added). Appellant clearly did not file this alleged verified claim within one year after the alleged loss was or should have been discovered. As

previously noted, Appellant contends that a portion of the wages he earned from 1979 through 1981 was withheld by the SCDC in an escrow account and were not disbursed to him upon his release on parole in 1981. He also contends that he initiated correspondence with the SCDC concerning this issue on December 1, 2008, but admits that he was first informed on February 9, 2009 that he did not have this alleged escrow account. It is clear that Appellant did not file an alleged verified claim within one year of discovering the loss alleged in this action. In fact, at the latest, Appellant did not file the alleged verified claim until more than two (2) years after discovering the alleged loss in question.[2] He clearly did not comply with the strict requirements of S.C. CODE ANN. § 15-78-80. *Pollard v. Cty. of Florence*, 314 S.C. 397, 400, 444 S.E.2d 534, 535 (Ct. App. 1994) ("[T]he 'verified claim' procedure must be strictly complied with in order to trigger the three-year limitations period."). The Court, therefore, did not err in finding the Circuit Court properly applied the two-year statute of limitations to Appellant's claims.

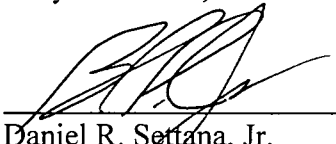
Appellant also argues in his Petition, for the first time in this appeal, that the doctrine of equitable tolling should be applied to his claims. He contends that Respondents delayed the filing of his Complaint due to their "misrepresentation," although he does not specifically set forth any evidence whatsoever to substantiate this argument. Initially, Respondents note that the issue of whether equitable tolling applies in this action is not properly before this Court, as it was never raised to or ruled upon by the Circuit Court or this Court. "It is well settled that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the

[2] Appellant also argues that because he filed a verified claim pursuant to S.C. CODE ANN. § 15-78-80, the three-year statute of limitations is available to him pursuant to S.C. CODE ANN. § 15-78-110. However, because Appellant clearly did not follow the procedure outlines in S.C. CODE ANN. § 15-78-80, he is not entitled to the three-year statute of limitations in S.C. CODE ANN. § 15-78-110. *See Flateau v. Harrelson*, 355 S.C. 197, 208, 584 S.E.2d 413, 418 (Ct. App. 2003) ("In order to trigger the three-year statute of limitations under § 15-78-110, a party must follow the procedure outlined in § 15-78-80.").

trial court to be preserved." *Pye*, 369 S.C. 555, 633 S.E.2d 505. This requirement is "designed to give the trial court a fair opportunity to rule on the issues, and thus provide [an appellate court] with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime*, 368 S.C. 342, 628 S.E. 2d 902. Even if the Appellant had raised the issue of equitable tolling to the trial court, there was never a ruling on that issue. Furthermore, Appellant did not raise equitable tolling as an issue in his prior briefs filed with this Court. Therefore, the issue is not preserved for appellate review. *See State v. Austin*, 306 S.C. 9, 19, 409 S.E.2d 811, 817 (Ct. App. 1991) ("[A]ppellate courts, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked."). Even assuming, *arguendo*, that Appellant had preserved the issue of equitable tolling for appellate review, he has not presented any evidence whatsoever that it would apply to his claims. *See Pelzer v. State*, 378 S.C. 516, 662 S.E.2d 618 (Ct. App. 2008) (noting equitable tolling reserved for extraordinary circumstances and holding it inapplicable where Appellant does not put forth evidence showing wrongdoing on part of Respondents).

WHEREFORE, Respondents respectfully ask this Court to deny Appellant's Petition for Rehearing and Rehearing En Banc.

Respectfully submitted,



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August 19, 2016

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 19, 2016, a copy of the foregoing **RESPONDENTS' RETURN TO APPELLANT'S PETITION FOR REHEARING AND REHEARING EN BANC** was served on the Pro Se Appellant by mailing a copy of same in the United States Mail, via certified mail, return receipt requested, proper postage prepaid, addressed as follows:

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August 19, 2016

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court, South Carolina Court of Appeals
1015 Sumter Street
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Re: Basil Akbar v. SCDC, Bill Byers, Martha Roof, Debrah Long, Lisia Johnson, Ann and John Doe
SC Appeal No.: 2013-002306
Richland Co. Case No: 2013-CP-40-0301
Claim No: 75046
Our File No: 9-372

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of ***Respondents' Return to Appellant's Petition for Rehearing and Rehearing En Banc*** in reference to the above-referenced matter. Please return two (2) clocked-in copies to me via my courier.

By copy of this letter, I am serving the *pro se* Appellant with the same.

Thank you for your assistance. Should you have any questions or concerns, do not hesitate to contact me.

With kindest regards, I am,

Very truly yours,

Brandon P. Jones

BPJ/bmj
Enclosures
cc: Basil Akbar, #65498 (via Certified/Return Receipt Requested)