THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Tanya A. Gee, Circuit Court Judge

Case No. 2015-CP-40-3381

Terry Douglas Campbell, ... Appellant,

v.

The State of South Carolina, Director of South Carolina Department of Corrections, Bryan Stirling, Warden Bernard McKie, Officers Lt. McLaughlin and Aubrey Pounds..... Respondents.

INITIAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

This case arises out of Appellant's trip and fall while he was an inmate at Kirkland Correctional Institution on March 4, 2013. (Complaint, pp. 1-2). On February 6, 2015, Appellant filed documents titled "Summons and Complaint" and "Motion to Proceed *In Forma Pauperis*" in the Supreme Court of South Carolina. (Motion to Alter or Amend, p. 9). These documents were dismissed by the Supreme Court by an Order dated April 8, 2015. (Motion to Alter or Amend, pp. 9-10). Appellant filed documents titled "Complaint" and "Motion for Leave to Proceed *In Forma Pauperis*," again in the Supreme Court, on May 2, 2015 and May 5, 2015, respectively. (Motion to Alter or Amend, p. 13). These documents were again dismissed by the Supreme Court by an Order dated May 20, 2015. (Motion to Alter or Amend, pp. 13-14).[1]

As evidenced by the filing stamp, the first Complaint filed in this action (hereinafter the "Complaint") was filed in the Richland County Court of Common Pleas on June 8, 2015. (Complaint, p. 1). On July 28, 2015, Respondents moved to dismiss the Complaint on various grounds, including the expiration of the statute of limitations, failure to properly serve the Summons and Complaint, and employee immunity under the South Carolina Tort Claims Act. (Notice of Motion and Motion to Dismiss).

[1] The February and May 2015 filings in the Supreme Court will be collectively referred to as the "Supreme Court filings."

A hearing on Respondents' motion to dismiss was held on November 5, 2015. (Order, p. 1). By Order dated November 16, 2015, the late Circuit Court Judge Tanya A. Gee granted Respondents' motion to dismiss on the basis that the Complaint was filed more than two years after the injury. (Order, pp. 1-2).[2]

Appellant sent a motion to alter or amend (hereinafter the "Rule 59(e) motion") the Order dismissing this action, which was dated November 14, 2015.[3] The Rule 59(e) motion asserted, for the first time, that the Complaint should relate back to the date of the Supreme Court filing. Judge Gee denied the Rule 59(e) motion by Form 4 Order dated November 23, 2015. (Form 4, p. 1).

Appellant mailed a Notice of Appeal on January 2, 2016, which was received on January 7, 2016.

[2] Because the statute of limitations issue was dispositive of the entire action, Judge Gee did not reach Respondents' other issues.

[3] It does not appear that the Rule 59(e) motion was ever filed, as no clerk's stamp appears on the document.

ARGUMENTS

I. The sole issue on appeal is not preserved for appellate review.

The sole issue on appeal as stated by Appellant is "Did the Trial Court Err in Failing to Relate Back to Original Pleading." However, this issue has not been preserved for appellate review.

The Supreme Court has explained that issue preservation rules are intended "to give the trial court a fair opportunity to rule on the issues, and thus provide the Court with a platform for meaningful appellate review." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 696 (2014). For this reason, "an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Id.* Likewise, "a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not." *Id.*

At the hearing on the motion to dismiss, Appellant never cited to or referenced Rule 15, SCRCP. Although there was a discussion with Judge Gee as to the Supreme Court filings, Appellant failed to identify for the lower court or Respondents the manner in which these filings were supposed to have any bearing on the matter then before the court. (Tr., pp. 7-8). For the first time in the Rule 59(e) motion, Appellant asserted that the Complaint should relate back to the date of the first Supreme Court filing under Rule 15(c), SCRCP.

Because Appellant raised the relation-back under Rule 15(c) for the first time in his Rule 59(e) motion, this Court should refuse to entertain this issue. *See Stevens & Wilkinson, supra.*

II. The Circuit Court correctly ruled that the statute of limitations expired before Appellant instituted the instant action.

The Circuit Court ruled, and Appellant does not challenge on appeal, that the Respondents are all governmental entities, or employees of governmental entities affirmatively alleged to have been acting within the scope of their official duties. (Order, p. 1). Therefore, this matter is controlled by the provisions of the South Carolina Tort Claims Act, which provides the exclusive remedy for any tort committed by an employee of a governmental entity. S.C. Code Ann. § 15-78-70(a).

The Tort Claims Act has a two-year statute of limitations found in S.C. Code Ann. § 15-78-110. That section provides that "any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered . . . ." S.C. Code Ann. § 15-78-110.

The Circuit Court ruled that, according to the Complaint, Appellant's loss occurred on the date of his fall, March 4, 2013. Because the Complaint was not

filed until June 8, 2015, the Circuit Court ruled that the action was barred by the two year statue of limitations provided by the Tort Claims Act.[4]

Appellant's only issue on appeal is that the Circuit Court erred in failing to relate back the date of the Complaint to the date of the first Supreme Court filing. Even if this issue is properly preserved for appellate review, Appellant's contentions relative to that issue lack merit. Appellant's entire argument on appeal is premised on the idea that the Complaint should relate back to the date of the first Supreme Court filing. This premise is faulty for three distinct reasons.

A. No action was commenced by Appellant's filing in the Supreme Court.

The Tort Claims Act requires an action to be "commenced" within two years of the date that the loss was or should have been discovered. S.C. Code Ann. § 15-78-110. The South Carolina Rules of Civil Procedure provide a simple test for determining when an action has been "commenced." Rule 3(a), SCRCP specifies that:

> A civil action is commenced when the summons and complaint are filed with the clerk of court if:
>
> (1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or

[4] It was appropriate for the Circuit Court to dismiss on this ground because the allegations in the Complaint demonstrated the existence of the defense. *See Spence v. Spence*, 368 S.C. 106, 123, 628 S.E.2d 869, 878 (2006). Appellant does not contend otherwise on appeal.

> (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

Neither of the two requirements for commencing a civil action were met in this case. Even if it were proper to consider the date of Appellant's first Supreme Court filing, February 6, 2015, as the operative date, his contentions fail because he neither served the Supreme Court filings within the statute of limitations nor within 120 days of their filing.

The only information presented to the Circuit Court relative to service came in Appellant's Rule 59(e) motion. There, he asserted that he served his "Summons and Complaint" on Respondents on August 11, 2015.[5] (Motion to Alter or Amend, p. 16). Appellant does not contend that service of any document was effected prior to this date.[6] August 11, 2015 was neither within the statute of limitations, which expired March 4, 2015, nor within 120 days of the first Supreme Court filing, which expired on June 6, 2015. Therefore, no action was "commenced" within the statute of limitations period.

This Court recently decided *Doe v. City of Duncan*, 417 S.C. 277, 789 S.E.2d 602 (Ct. App. 2016), which has facts that are similar to the instant case. In *Doe*, which also arose under the Tort Claims Act, the plaintiff filed a complaint in

[5] This apparently refers to the Complaint, not the Supreme Court filings. Appellant does not contend that the Supreme Court filings were ever served on Respondents.
[6] Respondents maintain that this was not effective service under Rule 4, SCRCP.

2008, but never properly served it. *Id.* at 280, 789 S.E.2d at 604. Over four years later, during which time the statute of limitations expired, the plaintiff attempted to file a purported amended complaint. *Id.* This Court ruled that no action was commenced by the 2008 filing because that complaint was not served within the statute of limitations or within the 120-day time period under Rule 3(a), SCRCP. *Id.* at 286, 789 S.E.2d at 606. *See also Mims v. Babcock Ctr., Inc.*, 399 S.C. 341, 349, 732 S.E.2d 395, 399 (2012) (Pleicones, J., dissenting) ("Nothing in our Rules or statutes recognizes an amended pleading where no other pleading has been served. This is especially so when the pleading relates to an action which has not even been commenced.").

Under the reasoning in *Doe*, because no service was effected either within the statute of limitations or within 120 days of the first Supreme Court filing, the first Supreme Court filing did not amount to "commencing an action." Therefore, Appellant failed to commence an action within two years, and this matter is barred by the statute of limitations.

B. Appellant's Complaint was an Original Complaint, not an Amended Complaint.

As discussed above, no action was commenced by way of Appellant's Supreme Court filings. Even if an action was commenced, it was dismissed by the

Supreme Court. Therefore, there was no extant action or complaint to which the Complaint could act as an amendment.

In *Doe v. City of Duncan, supra*, this Court also addressed the effect of failing to properly serve a complaint as it relates to Rule 15. As mentioned, the *Doe* panel ruled that plaintiff's failure to serve the complaint within the prescriptions of Rule 3 meant that no action was commenced within the meaning of that rule. *Doe*, 417 S.C. at 286, 789 S.E.2d at 606. As relevant here, the Court ruled "as a result of Doe's failure to commence a civil action [under Rule 3], no suit existed in which an amended complaint could be filed." *Id.* at 286, 789 S.E.2d at 607. Because there was no suit in which an amended complaint could be filed, the purported amended complaint was a nullity. *Id.*

Again, the reasoning in *Doe* applies here. Because Appellant never served the first Supreme Court filing, it did not commence an action. Thus, there was no existing action in which an amended complaint could be filed. Appellant's filing on June 8, 2016 (the Complaint) therefore could not amount to an "amended complaint," and Rule 15, SCRCP never came into play.

C. Even if Appellant's Complaint can be considered an Amended Complaint, it cannot relate back to the Supreme Court filings.

Even if this Court were to disagree with the above contentions and decide that Appellant's first Supreme Court filing commenced an action and that the

Complaint filed in the Court of Common Pleas could constitute an amendment to that pleading sufficient to trigger Rule 15, Appellant's action would still be barred because the Complaint cannot "relate back" to a pleading filed in another court.

Rule 15(c) provides that "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading."

Assuming for the sake of argument that the first Supreme Court filing could constitute the "original pleading" and the Complaint could constitute the "amended pleading," Appellant still does not get the benefit of Rule 15(c). First, Appellant never presented the first Supreme Court filing to the Circuit Court, and therefore, Judge Gee would have had no way to determine if the claim asserted in the "amended pleading" arose out of the same "conduct, transaction or occurrence" set forth in the "original pleading." *See, e.g., Jackson v. Doe*, 342 S.C. 552, 558, 537 S.E.2d 567, 570 (Ct. App. 2000) ("Rule 15(c) requires: (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."). Nor does this Court fare any better, as the substance of the first Supreme Court filing remains unknown. Because neither the Circuit Court nor this Court has the benefit of the putative "original complaint," Appellant cannot establish the requisites of Rule 15(c).

In any event, Appellant's contention that the Complaint can relate back to the date of the first Supreme Court filing lacks merit. Not only does Appellant cite no authority for the idea that a pleading filed in one court can relate back to the date of a pleading filed in another court, the weight of available authority is to the contrary.

For instance, in *Smith v. Husband*, the court ruled that Rule 15(c), Fed. R. Civ. P., does not "does not contemplate a relation back to a prior dismissed case." *Smith v. Husband*, 376 F. Supp. 2d 603, 614 (E.D. Va. 2005).[7] The court was unable to find any precedent "for relating a subsequent complaint back to a prior complaint in a separate, though related, action that was dismissed because of the plaintiff's error." *Id.*

Likewise, in *Monrouzeau v. Asociacion del Maestro*, the court ruled that "[a]sserting new allegations in an original complaint filed in [the subsequent] forum may not trigger the relation-back effect upon a prior proceeding commenced

[7] There are no South Carolina cases on point. *See Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991) ("Since our Rules of Procedure are based on the Federal Rules, where there is no South Carolina law, we look to the construction placed on the Federal Rules of Civil Procedure.").

in another court." *Monrouzeau v. Asociacion del Maestro*, 354 F. Supp. 2d 115, 118 (D.P.R. 2005), *aff'd sub nom. Monrouzeau v. Asociacion Del Hosp. Del Maestro, Inc.*, 153 Fed. App'x 7 (1st Cir. 2005). *See also, e.g., Bailey v. Northern Ind. Public Serv. Co.*, 910 F.2d 406, 413 (7th Cir. 1990) (relation back only applies to amended complaint in same action as original timely pleading and may not relate back to earlier or separate action); *O'Donnell v. Vencor Inc.*, 466 F.3d 1104, 1111 (9th Cir. 2006) ("O'Donnell's second complaint does not 'relate back' to her first complaint because her second complaint was not an 'amendment' to her first complaint, but rather a separate filing."); *Rayo v. State of N.Y.*, 882 F. Supp. 37, 40 (N.D.N.Y. 1995) ("As for plaintiff's relation back argument, it is also rejected. The relation back doctrine has application only in instances where an original pleading is amended. If such an amendment satisfies the requirements of Rule 15(c), the amended pleading 'relates back' to the original pleading for statute of limitations purposes. The amendment does not, however, relate back to any prior proceedings which are not part of the action in question.") (internal citations omitted).

Because Appellant failed to meet the substance of Rule 15(c), SCRCP, and because there is no authority for permitting a subsequent complaint to relate back to the date of a previous complaint filed in a different forum, Appellant's arguments on appeal must fail.

CONCLUSION

Based on the foregoing discussion and analysis, Respondents respectfully request that this Court affirm the Order of the Circuit Court Judge Tanya Gee dismissing this action.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: _____

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November 7, 2016

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In The Court of Appeals

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Tanya A. Gee, Circuit Court Judge

Case No. 2015-CP-40-3381

Terry Douglas Campbell, ... Appellant,

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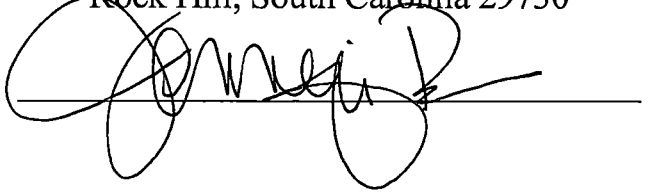
The State of South Carolina, Director of South Carolina Department of Corrections, Bryan Stirling, Warden Bernard McKie, Officers Lt. McLaughlin and Aubrey Pounds..... Respondents.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., counsel for the Respondents, does hereby certify that service of the **Initial Brief of Respondents** and **Respondents' Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon the pro se Appellant by placing copies in the United States Mail, first class postage prepaid, at the below listed address clearly indicated on said envelope this the 7th day of November 2016:

Terry Douglas Campbell, #281286
Catawba Pre-Release
1030 Milling Road
Rock Hill, South Carolina 29730



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November 7, 2016

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
Post Office Box 11629
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RE: Terry Douglas Campbell v. The State of South Carolina; Director of South Carolina Department of Corrections, Bryan Stirling; Warden Bernard McKie; Officers Lt. McLaughlin and Aubrey Pounds
Court of Appeals Number: 2016-000066
Civil Action Number: 2015-CP-40-3381
Claim Number: 09897
Our File Number: 103.9744

Dear Ms. Kitchings:

Please find enclosed for filing the originals and one copy each of the **Initial Brief of Respondents** and **Respondents' Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. Please file the originals and return a clocked-in copy of each document to me in the enclosed envelope. By copy of this letter, I am serving copies on the *pro se* Appellant.

Thank you for your assistance in this matter.

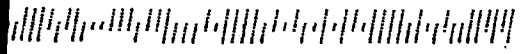
Sincerely,

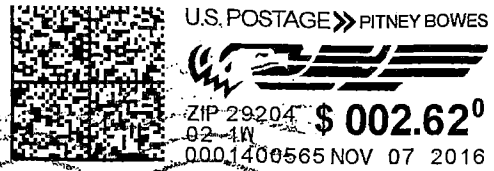
DAVIDSON & LINDEMANN, P.A.

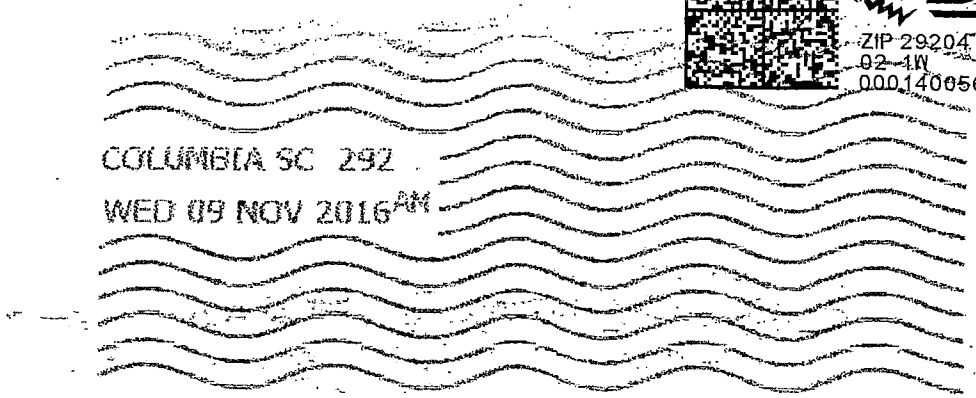
Steven R. Spreeuwers

SRS/jmb
Enclosures

cc: Terry Douglas Campbell, #281286 *(w/ Enclosures)*







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