

THE STATE OF SOUTH CAROLINA

In the Supreme Court

APPEAL FROM RICHLAND COUNTY

G. Thomas Cooper, Jr., Circuit Court Judge

Civil Action No. 13-CP-40-0301

RECEIVED

APR 12 2017

S.C. SUPREME COURT

Basil W. Akbar, #065498,

Petitioner,

v.

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

Respondents.

RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI

Basil W. Akbar, #065498
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STATEMENT OF THE CASE

Petitioner Basil W. Akbar, #310671 (“Petitioner”), proceeding *pro se*, filed his Summons and Complaint in the Richland County Court of Common Pleas on or about January 16, 2013. He named as Defendants, the South Carolina Department of Corrections, Bill Byars, Martha Roof, Debrah Long, Lisia Johnson, and Ann and John Doe.

On February 27, 2013, Respondents filed a Motion to Dismiss, as well as a Motion to Strike Petitioner’s claims for punitive damages under S.C. CODE ANN. § 15-78-120(b). On March 13, 2013, Respondents filed their Answer.

After Respondents filed their Answer, Petitioner filed a number of motions, including a Motion to Compel (July 3, 2013). On July 22, 2013, Respondents filed a Motion for Summary Judgment, with supporting affidavits and documents. Also on July 22, 2013, and after providing responses to all of Appellant’s discovery requests, Respondents filed a Motion for Protective Order and to Stay Discovery. Respondents filed additional affidavits in support of their Motion for Summary Judgment on July 23, 2013. Respondents also filed a Memorandum in Support of their Motion to Dismiss and Motion for Summary Judgment on July 31, 2013.

A hearing on the above-referenced Motions was held before the Honorable G. Thomas Cooper, Jr. on August 7, 2013. By Order of the Honorable G. Thomas Cooper, Jr., signed and filed September 26, 2013, (1) Respondents’ Motion to Dismiss and Motion for Summary Judgment were granted; (2) all of Petitioner’s requests for damages were dismissed and stricken from his Complaint; (3) all other pending Motions were denied as moot; and (4) the action was dismissed with prejudice.¹

¹ The Order of the Honorable G. Thomas Cooper, Jr. also found that “Plaintiff’s Complaint fails to state a cause of action against all Defendants upon which relief can be granted and fails to state facts sufficient to constitute a cause of action.”

Petitioner filed a Motion to Alter/Amend the Judgment under Rule 59(e), SCRCP, on or about October 15, 2013. By Order of the Honorable G. Thomas Cooper, Jr., signed December 9, 2013 and filed December 10, 2013, Petitioner's Motion to Alter/Amend the Judgment was denied.

Petitioner filed his first Notice of Appeal on or about October 21, 2013 while his Rule 59(e) Motion was pending. On November 20, 2013, Respondents filed their Motion to Dismiss Petitioner's Notice of Appeal. On or about December 23, 2013, Petitioner filed his Second Notice of Appeal. By Order of this Court filed January 2, 2014, Petitioner's first Notice of Appeal was dismissed without prejudice. On February 11, 2014, this Court filed an Order reinstating Petitioner's second (or amended) Notice of Appeal.

After various motions and briefs by the parties, the Court of Appeals issued a per curiam Opinion on July 6, 2016.² *See* Opinion NO. 2016-UP-348. The Court of Appeals affirmed the Circuit Court's granting of summary judgment to Respondents based upon the fact that Petitioner's claims were barred by the applicable two-year statute of limitations. *Id.* The Court of Appeals found that the Circuit Court properly applied the two-year statute of limitations to Petitioner'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. *Id.*

On or about July 12, 2016, Petitioner filed a Petition for Rehearing with the Court of Appeals. In his Petition, Petitioner argued that the Court of Appeals 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)

² Petitioner argues, for some unknown reason, that the Court of Appeals' per curiam Opinion was issued by a "divided panel," but that "[t]he majority held that Summary Judgment was proper because [Petitioner's] claims was barred by the two-years statute of limitation . . ."

that somehow the lower court erred regarding the “Doctrine of Exhaustion of Administrative Remedies;”³ (3) the “lower court’s decision was not based on evidence in the record;” and (4) that the doctrine of equitable tolling “should have been invoked” because Respondents allegedly delayed Petitioner. On December 2, 2016, the Court of Appeals issued an Order denying Petitioner’s Petition for Rehearing.

On or about December 29, 2016, Petitioner filed a Petition for Writ of Certiorari. After failing to initially comply with the Court’s filing requirements, this matter was dismissed by Order dated January 31, 2017. Petitioner subsequently moved to reinstate the matter. On March 14, 2017, the Court issued an Order granting Petitioner’s Motion and reinstating this matter. In his Petition, Petitioner appears to be presenting three questions for review: (1) whether the Court of Appeals erred in affirming the Circuit Court’s ruling that his claims were barred by the two-year statute of limitations; (2) whether the Court of Appeals erred in ruling his claims related to requests and/or grievances were barred by the two-year statute of limitations; and (3) whether the Court of Appeals erred in allegedly denying his discovery requests.

ARGUMENT

Initially, Respondents note that Petitioner again has failed to comply with the specific requirements of Rule 242, SCACR, with respect to his Petition and Appendix, and therefore, his

³ While the Court of Appeals ruled that any claims arising from Respondents’ alleged failed to timely respond to Petitioner’s grievances were barred by the two-year statute of limitations, Petitioner did not challenge that decision. Regardless, that issue is not properly preserved for appellate review, 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 S.C. 342, 628 S.E. 2d 902 (Ct. App. 2006). Even if the Petitioner had raised this issue to the trial court, there was never a ruling on those issues. Assuming the Circuit Court had ruled that Petitioner properly exhausted his available administrative remedies, such a ruling clearly would not change the ultimate disposition in this action – that all of Petitioner’s claims are barred by the applicable statute of limitations. Whether or not Petitioner properly exhausted his administrative remedies, therefore, is irrelevant to this action.

Petition should be denied. Rule 242, SCACR, sets forth specific and strict requirements related to a Petition for Writ of Certiorari to the South Carolina Supreme Court. This includes requirements for the content of the Petition and the Appendix, among other things. *See* Rules 242(d) and (e), SCACR. According to subsection (d), a Petition shall include “[o]nly those questions raised in the Court of Appeals and in the petition for rehearing . . .” Rule 242(d)(2), SCACR. Additionally, “[t]he argument on each question shall include citation of authority and specific reference to pertinent portions of the Record on Appeal. Failure of a petitioner to present with accuracy, brevity, and clarity the information and arguments that are essential to a ready and adequate understanding of the points requiring consideration ***will be sufficient reason for denying the petition.***” Rule 242(d)(4), SCACR (emphasis added). Per subsection (e), an Appendix must accompany the Petition and must include, among other things, “[a] copy of the Record on Appeal and brief(s) . . . [a] copy of the decision of the Court of Appeals on which certiorari is sought . . .”, and “[a] copy of the petition for rehearing or reinstatement filed in the Court of Appeals and the Court’s ruling on that petition.” Rule 242(e)(1), (3), and (4), SCACR.

In this matter, Petitioner has not filed or served counsel with a copy of the full Record on Appeal in this matter. He did not include all documents in the Record on Appeal, which were piecemeal and voluminous. And, while Petitioner included a copy of his Final Brief in the Court of Appeals, no other briefs were included as part of the purported Appendix. Second, Petitioner did not include a copy of the decision of the Court of Appeals on which certiorari is being sought. Third, while Petitioner included a copy of his Petition for Rehearing, he did not include a copy of the Court of Appeals’ ruling on that Petition. Further, and most importantly, Petitioner’s Petition for Writ of Certiorari does not include any citations to pertinent portions of

the Record on Appeal, or even the Appendix. Instead, Petitioner leaves blank spaces after citing alleged “Exhibit(s).”

Based on the above, and Petitioner’s clear and utter lack of compliance with the strict requirements of Rule 242, SCACR, there is sufficient reason for denying the Petition, and Respondents respectfully request that the Petition be so denied.

I. The Court of Appeals properly affirmed the Circuit Court’s ruling that Respondents were entitled to Summary Judgment because Appellant’s claims are barred by the 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,

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 v. South Carolina Dep't of Corr., 333 S.C. 714, 719, 511 S.E.2d 413, 416 (Ct. App. 1999). 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, the Court of Appeals properly affirmed the Circuit Court’s finding that Petitioner 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.⁴ It also properly found that Petitioner was aware his account did not exist more than two years prior to the filing of his Complaint. Petitioner contends that a portion of the wages he earned from 1979 through 1981

⁴ Petitioner argues, for the first time in his Petition, that he initially filed his action against Respondents in September 2012. Because this issue was not raised to or ruled upon by the Circuit Court, it is not preserved for appellate review. *See Pye*, 369 S.C. 555, 633 S.E.2d 505; *Queen’s Grant II Horizontal Prop. Regime*, 368 S.C. 342, 628 S.E. 2d 902. Nevertheless, Petitioner’s allegation is incorrect. He filed his action against Respondents, for the first time, on or about January 16, 2013. Upon information and belief, Petitioner is referencing a separate action against completely different and unrelated parties.

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 of Appeals correctly found, Petitioner admitted in his Complaint that he first became aware that the SCDC did not have any records of the 1981 account on or before February 9, 2009. Petitioner also admitted this fact in his Final Brief filed with the Court of Appeals.⁵ Additionally, by Petitioner's own admission in Circuit Court pleadings, he clearly knew or should have known about any issue with these alleged funds by October 22, 2008, when he previously contended that he initiated communication with SCDC about the account, but received no reply. At the very least, therefore, Petitioner 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 of Appeals, therefore, did not err in affirming the Circuit Court's decision to grant Respondents' Motion for Summary Judgment and holding Petitioner's claims were barred, as Petitioner clearly failed to

⁵ In the Appendix filed with this Court, Petitioner includes his Final Brief, but conveniently, and for the first time, added a handwritten note that reads, "April 20, 2010 . . . February 9, 2009 is scrivener's error." Notwithstanding this new change, Petitioner later alleges a new date of discovery in his Petition – April 28, 2010.

file his action within the applicable statute of limitations under the South Carolina Tort Claims Act.⁶

The Court of Appeals also did not err in ruling the Circuit Court properly applied the two-year statute of limitations because Petitioner did not submit evidence showing he filed a verified claim or that any alleged claim was properly filed. Petitioner 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. His 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). Notwithstanding the fact that there is no evidence in the record with this Court supporting Petitioner's contention that he filed a verified claim in this matter, Petitioner has only alleged that his verified claim was filed on May 18, 2011, clearly beyond one year after the alleged loss was or should have been discovered by Petitioner's own admission, whether in February 2009 or April 2010. As previously noted, Petitioner contends that a portion of the wages he earned from 1979 through 1981 was withheld

⁶ Petitioner contends, for the first time in his Petition for Writ of Certiorari, that his admission that he first became aware the SCDC did not have any records of the 1981 account on February 9, 2009, was actually a "scrivener's error." Instead, Petitioner now backtracks, claiming the correct date upon which he first became aware of the issue was April 28, 2010. *But see supra* note 5 and accompanying text. This point, however, was not raised to or ruled upon by the Circuit Court, and certainly was not raised to or ruled upon by the Court of Appeals. Therefore, it is not preserved for appellate review. *See Pye*, 369 S.C. 555, 633 S.E.2d 505; *Queen's Grant II Horizontal Prop. Regime*, 368 S.C. 342, 628 S.E. 2d 902; *see also* Rule 242(d)(2), SCACR ("Only those questions raised in the Court of Appeals and in the petition for rehearing shall be included in the petition for writ or certiorari as a question presented to the Supreme Court."). Regardless, this point of contention is of no consequence to the ultimate determination that Petitioner's claims are barred by the two-year statute of limitations, as both April 20, 2010 and April 28, 2010 still are more than two years prior to the date upon which he first filed this action.

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 Petitioner did not file an alleged verified claim within one year of discovering the loss alleged in this action. 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.”); *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.”). The Court of Appeals, therefore, did not err in finding the Circuit Court properly applied the two-year statute of limitations to Petitioner’s claims.

Petitioner also appears to argue that the doctrine of equitable tolling should be applied to his claims and that the Court of Appeals erred in not applying this doctrine to his claims. However, he does not specifically set forth any argument concerning this doctrine in his Petition, simply referencing it in a heading. 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 the Court of Appeals. “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 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 Petitioner had raised the issue of equitable tolling to the trial court or the Court of Appeals, or

subsequently included it in his Petition, there was never a ruling on that issue. Furthermore, Petitioner did not raise equitable tolling as an issue in his prior briefs filed with the Court of Appeals. 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 Petitioner 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). Therefore, the Court of Appeals did not err by not applying the doctrine of equitable tolling to Petitioner’s claims.

II. The Court of Appeals properly ruled that any claims arising from Respondents’ alleged failure to timely respond to Petitioner’s requests or grievances were barred by the two-year statute of limitations.

Petitioner argues the Court of Appeals erred in ruling that any claims related to alleged failure to timely respond to his requests and/or grievances were barred by the applicable two-year statute of limitations. It appears this is Petitioner’s attempt to confuse the issues properly before this Court. The issue of exhaustion of administrative remedies is irrelevant to this action. Furthermore, even if this issue was relevant to this action, such a ruling clearly would not change the ultimate disposition in this action – that Petitioner’s claims clearly are barred by the applicable two-year statute of limitations. These alleged grievances were filed in 2009 and 2010; Petitioner first filed his action on or about January 16, 2013. Therefore, any potential claims related to his requests and/or grievances clearly would be barred. The Court of Appeals, therefore, did not err in its ruling.

III. The Court of Appeals properly affirmed the Circuit Court’s denial of Petitioner’s Motion to Compel as moot.

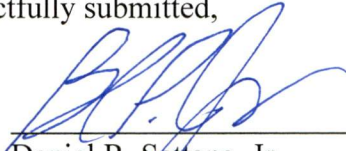
It is clear that the Court of Appeals properly affirmed the Circuit Court’s denial of Petitioner’s Motion to Compel as moot because summary judgment was properly granted on the basis that Petitioner’s claims were barred by the statute of limitations. *See Dunn v. Dunn*, 298 S.C. 499, 502, 381 S.E.2d 734, 735 (1989) (stating that “trial court judge’s ruling on discovery matters will not be reversed on appeal absent a clear abuse of discretion.”). Despite the fact that Petitioner raises this as a question to be presented in his Petition, there is no substantive discussion concerning this issue in his Petition. Therefore, Petitioner appears to have abandoned this issue. Nevertheless, any discovery sought by Petitioner could not have led to any different result in the Circuit Court’s decision to grant Respondents’ Motion to Dismiss and Motion for Summary Judgment or the Court of Appeals’ decision to affirm the Circuit Court. Therefore, the Circuit Court did not abuse its discretion in denying Petitioner’s Motion to Compel, the Court of Appeals properly affirmed the Circuit Court’s ruling, and there is no need for this Court to address this issue. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding appellate court need not address remaining issue when disposition of prior issue is dispositive); *see also Carney v. Assurance Co.*, 177 Fed. App’x 282 (4th Cir. 2006) (finding no abuse of discretion in district court’s denial of motion to compel discovery as moot where discovery sought could not have led to any different result).

CONCLUSION

“A writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons.” Rule 242(b), SCACR. Clearly, Petitioner has not set forth any special or important reasons why his Petition for Writ of

Certiorari should be granted in this matter. Consequently, Respondents respectfully ask this Court to deny Petitioner's Petition.

Respectfully submitted,



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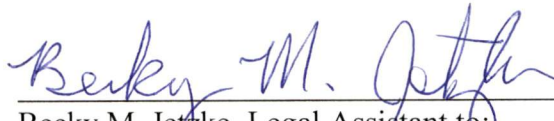
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PROOF OF SERVICE

The undersigned hereby certifies that on April 12, 2017, a copy of the foregoing RESPONDENTS' RETURN TO PETITION FOR WRIT OF CERTIORARI 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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