

STATE OF SOUTH CAROLINA )  
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COUNTY OF HORRY )  
  
Jesse Cook, )  
 )  
Plaintiff, )  
 )  
Vs. )  
 )  
Edward Jenerette, )  
 )  
Defendant. )  
\_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS  
FIFTEENTH JUDICIAL CIRCUIT  
CASE NUMBER 2017-CP-26-08135

ORDER GRANTING PLAINTIFF'S  
MOTION TO RESTORE CASE

**RECEIVED**

JUL 01 2019

**SC Court of Appeals**

THIS MATTER COMES BEFORE THE COURT by way of a Motion to Restore Action filed by the Plaintiff. A hearing was held in this matter on March 6, 2019. The Court grants the Motion for the foregoing reasons:

**FACTUAL AND PROCEDURAL BACKGROUND**

On December 16, 2014, the Plaintiff, Jesse Cook, was injured in an automobile accident near Conway, South Carolina. The Plaintiff was driving North on Highway 501 when the Defendant, Edward Jenerette, failed to yield the right-of-way and collided with Plaintiff's vehicle. The Plaintiff's son, Benjamin Cook, was also injured in the accident.

Around January of 2015, the Plaintiff hired an attorney to represent him and his son for the injuries sustained in this accident. Plaintiff's counsel notified the Defendant's insurance company of his representation. The insurance company admitted liability and the Plaintiff's counsel and the insurance company began negotiations to settle both claims but did not resolve the claims before the impending expiration of the statute of limitations.

On December 12, 2017, Plaintiff's counsel filed a Summons and Complaint for Jesse Cook and a second lawsuit for Benjamin Cook for injuries stemming from the accident. The next day, the Summons and Complaints for both lawsuits were given to the Sherriff's Department to serve

the Defendant. On January 8, 2018, Phillip E. Thompson of the Sherriff's Department signed an Affidavit of Non-Service as they were unable to locate the Defendant. (Exh. A) Plaintiff's counsel was never able to locate the Defendant. (Exh G)

Plaintiff's counsel emailed copies of both lawsuits to the Defendant's insurance company on December 12, 2017. The insurance adjuster confirmed receipt of the lawsuits and stated that the carrier did not know their insured's whereabouts for service. The adjuster requested that Plaintiff's counsel notify him when the lawsuit was served and advised that he was trying to locate the insured as well. The adjuster further stated, "I would like to avoid the issue of default and the possible disclaiming of coverage that typically results." (Exh. B)

The insurance company then continued to negotiate with the Plaintiff's attorney for nine months after the statute of limitations had expired. The insurance company settled Benjamin's lawsuit on July 11, 2018--- approximately seven months after the statute of limitations had expired. (Exh. C) Benjamin's lawsuit was in the same posture as Jesse's lawsuit as the Defendant was not served on either case.

In the email enclosing the \$105,000 release, the insurance adjuster requested that the Plaintiff's attorney file a dismissal of the lawsuit. (Exh. C) The Plaintiff's attorney negotiated the check and returned the release on September 20, 2018. It was on that day that the insurance company advised Plaintiff's counsel that the dismissal did not need to be filed because the adjuster had reviewed the court website and learned that the Form 4 Dismissal had been entered on both lawsuits. (Exh. D)

On September 11, 2018, the Honorable William H. Seals, Jr. signed a Form 4 Order dismissing both cases due to failure to serve the Summons and Complaint. (Exh..E) The insurance carrier then changed its position and refused to negotiate on the Plaintiff's case. (Exh. F)

**ANALYSIS:**

The Plaintiff is entitled to have the case restored to the docket based on excusable neglect and equitable estoppel.

**A. PLAINTIFF IS ENTITLED TO RELIEF FROM THE FORM 4 ORDER DISMISSING THE CASE DUE TO EXCUSABLE NEGLIGENCE.**

A Court may relieve a party from a final order due to mistake, inadvertence, surprise, or excusable neglect if the motion is made within one year of the order<sup>1</sup>. *S.C.R.C.P. 60(b)*. A Plaintiff is entitled to an enlargement of time if the Plaintiff can show excusable neglect and a meritorious claim. *Davis v. Lunceford*, 274 S.C. 576, 580, 266 S.E. 2d 73, 75 (1980). "The power conferred upon courts to relieve parties from judgment taken against them by reason of their mistake, inadvertence, surprise or excusable neglect should be exercised by them in the same liberal spirit in which the Code section was designed--in furtherance of justice and in order that cases may be tried and disposed of upon their merits". *Ex Parte Union Mfg. & Powers Co.*, 81 S.C. 265, 62 S.E. 259, 128 Am. St. Rep., 908. Excusable neglect can exist when a party's counsel suffers illness or strain. See *Gaskins v. California Ins. Co.*, 195 S.C. 376, 11 S.E. 2d 436 (1940); *Jenkins v. Jones*, 208 S.C. 421, 38 S.E.2d 255 (1946).

In *Davis*, the Plaintiff timely served a Summons but failed to serve the Complaint. *Id.* at 578. The Defendant's counsel made a demand for the Complaint, but the Plaintiff failed to serve it on the Defendant. *Id.* Defendant filed a Motion to Dismiss. *Id.* The Court remanded the case to the trial court for it to decide as to whether excusable neglect existed. *Id.* at 580.

In this case, the Plaintiff can show excusable neglect and that he has a meritorious claim.

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<sup>1</sup> An order of dismissal for failure to proceed with the suit is in the nature of a discontinuance of the action and is not an adjudication of the merits. Ordinarily, it does not put an end to the cause of action, but merely terminates the suit itself. An order of dismissal *with prejudice* under the present facts was not justified. *Davis v. Lunceford*, 279 S.C. 503, 507, 309 S.E.2d 791, 793 (Ct. App. 1983) Therefore, the Plaintiff has properly and timely brought this Motion as a Motion to Restore pursuant to Rule 60 by filing it within one year.

The Plaintiff and his son were injured in an automobile accident in which the Defendant was cited by the investigating officer to be at fault. The insurance company admitted liability. Plaintiff's counsel filed two lawsuits at the same time before the expiration of the statute of limitations but did not serve the Defendant within 120 days. The Defendant's insurance company received copies of the complaints, knew the Defendant had not been served and continued to negotiate the claims for many months beyond the statute of limitations.

Plaintiff's counsel communicated and negotiated with the Defendant's insurance company for nine months *after* the statute of limitations expired. Plaintiff's counsel relied on the representations and actions of the insurer and believed that serving the Defendant was unnecessary. These actions induced the Plaintiff not to serve the defendant and caused him to believe that both lawsuits would be settled. The best evidence to support the reasonableness of Plaintiff's reliance on the insurance companies' representations and actions is that the insurance company actually settled Benjamin's lawsuit seven months *after* the Statute of Limitations had expired. It is not unreasonable to believe that the carrier would treat the Plaintiff's case the same way as it did the sons and settle the Plaintiff's lawsuit. This reliance is reasonable and gives support for excusable neglect.

The court has the authority under Rule 60, S.C.R.C.P, to grant relief from a final Order. The Plaintiff has satisfied that burden by establishing that he has a meritorious claim and excusable neglect exists. The reasons set forth are wholly sufficient to justify restoring the case. Accordingly, the Plaintiff is entitled to relief from the Form 4 Order dismissing the case.

**B. PLAINTIFF IS ENTITLED TO RELIEF FROM THE FORM 4 ORDER DISMISSING THE CASE AS THE DEFENDANT IS ESTOPPED FROM CLAIMING THE STATUTE OF LIMITATIONS AS A DEFENSE.**

"In South Carolina, a defendant may be estopped from claiming the statute of limitations

as a defense if some conduct or representation by the defendant has induced the plaintiff to delay in filing suit.” *Hedgepath v. AT&T*, 348 S.C. 340, 360, 559 S.E.2d 327, 338 (Ct. App. 2001); “The conduct may involve inducing Plaintiff either to believe that an amicable adjuster of the claim will be made without suit or to otherwise forbear exercising the right to sue.” *Republic Contr. Corp. v. S.C. Dep't of Highways & Pub. Transp.*, 332 S.C. 197, 211, 503 S.E.2d 761, 768 (Ct. App. 1998).

“Application of equitable estoppel does not require an intentional misrepresentation.” *Hedgepath*, 348 S.C. at 360. “Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel.” *Id.* at 361. “Estoppel by silence” arises “where a person owing another a duty to speak refrains from doing so and thereby leads the other to believe in the existence of an erroneous state of facts.” *Id.* Additionally, “[t]here is no requirement that the person whose silence misleads another have actual knowledge of the true facts if circumstances are such that knowledge is necessarily imputed to him.” *S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993). “[N]egligence will take the place of the intent to deceive when there is a duty to disclose.” *Id.*

This case is distinguishable from *Moates* and *Gadsden*<sup>2</sup>. In this case, the Defendant’s insurance company communicated with Plaintiff’s counsel and negotiated both the Plaintiff’s claim and his son’s claim well beyond the statute of limitations. The carrier’s actions not only implied that it would not require the Plaintiff to serve its insured, it affirmed this belief when it settled the Plaintiff’s son’s case well beyond the statute of limitations.

The Plaintiff’s son’s claim was settled in July of 2018, long after the 120- day deadline for service of the Summons and Complaint. The insurance company did not raise the service issue

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<sup>2</sup> In *Moates vs. Bobb*, 322 S.C. 172 (1996) which cited *Gadsden vs Southern RR*, 262 S.C. 590, 206 S.E.2d 882 (1974), the plaintiffs did not even *begin* settlement negotiations let alone finalize them and did not discuss the applicable statute of limitations; thus, the court found that the defendant was not estopped from asserting the statute of limitations defense.

during negotiations and did not raise it until after the lawsuits had been administratively dismissed. The adjuster continued to negotiate the Plaintiff's claim after it settled the son's claim until September 20, 2018, when they learned that the case was dismissed.


The silence of the insurance company in this case on the issue of service, after it knew that the Defendant had moved and they themselves were unable to locate him, misled the Plaintiff. The insurance companies continued negotiations and settlement of one lawsuit represented to the Plaintiff that service was unnecessary and they would resolve both claims.

Because the insurance company continued to negotiate both claims and settled one lawsuit, it led the Plaintiff to believe that service was unnecessary, and settlement was impending. The Defendant is now estopped from claiming the statute of limitations as a defense.

**CONCLUSION**

The Motion is GRANTED and the Plaintiff is entitled to relief from the Form 4 Order Dismissing this case due to excusable neglect and equitable estoppel. As such, this case shall be restored to the docket and the Plaintiff shall be granted leave to serve the Defendant through publication.

March 6, 2019

  
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Honorable Larry Hyman  
Fifteenth Judicial Circuit