THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

RECEIVED
JUL 11 2019
SC Court of Appeals

Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No.: 2019-000327

South Carolina Law Enforcement Division, ...Respondent,

v.

Brandon Reed ....Appellant.

INITIAL BRIEF OF APPELLANT

P. Andrew Anderson
Kristina M. Anderson
ANDERSON & ANDERSON, LLP
211 York Street, NE
Aiken, South Carolina 29801
(803) 648-6000
Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

STANDARD OF REVIEW 4

ARGUMENT 4

I. THE FAMILY COURT HAD BOTH SUBJECT MATTER AND PERSONAL JURISDICTION TO ISSUE THE ORDER 4

II. SLED'S DECLARATORY JUDGMENT ACTION LACKS ANY JUSTICIABLE CONTROVERSY AND IS AN INAPPROPRIATE USE OF THE ACT 7

III. SLED'S ACTION IS BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL AND THE FAMILY COURT ORDER IS THE LAW OF THE CASE 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980) 10

Bakala v. Bakala, 352 S.C.612, 576 S.E.2d 156 (2003) 7

Charleston Lumber v. Miller Housing, 338 S.C. 171, 525 S.E.2d 869 (2000). 6

Clifford Thompson v. State of SC, 415 S.C. 560, 785 S.E.2d 189 (2016) 8

Cooper Tire & Rubber Co. v. Perry, 261 S.C.538, 201 S.E.2d 245 (1973) 7, 11

Erickson v. Jones Street, 368 S.C. 444, 629 S.E.2d 653 (2006) 6

Equivest Financial LLC v. Ravenel, 422 S.C. 499, 812 S.E.2d 438 (2018) 10

In re Morrison, 321 S.C. 371, 468 S.E.2d 651 (1996) 7

Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (2009) 6, 7

Nationwide Mutual Fire Ins. Co. v. Walls, Ct. App. OP No.: 5653, June 5, 2019. . . . 4

Power v. McNair, 255 S.C. 150, 177 S.E.2d 551 (1970) 8

Rodarte v. University of SC, 419 S.C. 592, 799 S.E.2d 912 (2017) 4

Summerville v. City of North Charleston, 378 S.C. 107, 662 S.E.2d 40 (2008) 4

Sunset Cay LLC v. Folly Beach, 357 SC 414, 593 SE2d 462 (2004) 8

Tourism Exp. Rev. Com. v. City of MB, 403 S.C. 76, 742 S.E.2d 371 (2013) 8

Watkins v. Hodge, 232 S.C. 245, 101 S.E. 2d 657 (1958) 7

Zeigler v. Dorchester County, S.Ct. of S.C., OP No.: 27885, May 8, 2019 4

Statutes

S.C. Code Ann. § 15-53-10 8

S.C. Code Ann. § 15-53-20 8

S.C. Code Ann. § 23-3-10, *et. seq.* 9

S.C. Code Ann. § 63-3-510 5

S.C. Code Ann. §63-3-530 5

Court Rules

Fed. R. Civ.P. 54(a) 10

STATEMENT OF ISSUE ON APPEAL

THE TRIAL COURT ERRED IN FINDING THAT THE FAMILY COURT ORDER IS VOID FOR LACK OF JURISDICTION WHEN THE MATTER WAS HEARD BY CONSENT AS A MOTION BEFORE THE COURT OF ORIGINAL JURISDICTION AND THE STATE PARTICIPATED IN THE HEARING AND IN THE ISSUANCE OF THE ORDER AND THE ORDER WAS NOT LATER APPEALED AND AT THIS POINT CONSTITUTES THE LAW OF THE CASE.

STATEMENT OF THE CASE

This appeal arises from a Declaratory Judgment action filed by SLED in the Court of Common Pleas in Aiken, South Carolina on March 22, 2018. SLED in the underlying action sought to declare *void ab initio* a Family Court Order issued on April 22, 2017. The Family Court Order was issued with both Appellant and the State of South Carolina participating. SLED was aware of the proceeding and independently took no action.

The Aiken County Family Court adjudicated then Defendant Reed delinquent in 1994 for a single count of criminal sexual conduct with a minor. Reed was eleven (11) years of age at the time of the offense and twelve (12) when he entered a plea in *In the Interest of Brandon Anthony Reed, Case No.: 1994-JU-02-396.* At the time of Reed's plea, there was no Sex Offender Registry (SOR) requirement for minors. Two years later, in 1996 the SOR was amended to encompass not only criminal convictions in general sessions, but also delinquent adjudications as to minors in family court and Reed was placed on the registry.

Some twenty-three (23) years later, Reed, through undersigned counsel, filed a Motion for Removal from the SOR. (Motion). The Motion was filed on February 15, 2017, in the court of original jurisdiction, the Aiken County Family Court. Additionally,

this Motion and the subsequent actions in the matter were coordinated with the Aiken County Solicitor's Office, who was involved on behalf of the State throughout the process. (Hearing Notice). A hearing was held before the Family Court in the matter on March 7, 2017. Reed appeared with Counsel and his mother at the time of the hearing. The Aiken County Solicitor's Office was also present and actively participated. Extensive evidence was presented regarding Reed and his treatment and life in the twenty-three (23) years since the charge. This information included a polygraph examination administered by the Aiken County Sheriff's Office's full-time polygrapher showing that Reed had not re-offended since the 1994 incident. Additionally, reports of psychological evaluations were presented regarding Reed's treatment and state of mind. (Motion Transcript). Based upon the evidence presented, the Family Court decided that Reed should be removed from the SOR registry he was placed on at the age of twelve (12). The Order of Removal from the SOR was entered by the Aiken County Family Court on April 21, 2017. (Order). The State in no way opposed or voiced objection to this Motion or the removal Order.

Prior to the entry of the Order in question, during March and April 2017, counsel for Defendant had phone conversations and email exchanges with SLED and forwarded SLED a copy of the draft Order for input. (Emails). After the Order's entry, SLED sent a letter on May 25, 2017, to the court reporter ordering a copy of the transcript of the hearing that was held in Defendant's case to remove him from the SOR. (Transcript Order). But no reconsideration or notice of appeal was filed.

Thereafter, SLED filed a Petition for Original Jurisdiction to the South Carolina Supreme Court on September 1, 2017. (Petition). SLED sought original jurisdiction of

the State Supreme Court to declare void four (4) orders regarding removal of individuals from the SOR. The Reed Order of April 2017 was one of the Orders challenged. Counsel for Reed filed a Return on behalf of Defendant. (Return). SLED's Petition for Original Jurisdiction was denied by the South Carolina Supreme Court by Order dated December 14, 2017. (Order).

SLED then filed this declaratory judgment action with the Court on March 22, 2018. (Complaint). Appellant responded and moved for dismissal/summary judgment. (Answer, Motion, Memorandum). The Court heard argument on the matter and issued an Order declaring the Family Court Order void for lack of subject matter jurisdiction on November 11, 2018. (Transcript, Order). Appellant filed a Motion for Reconsideration and the Court denied the Motion by form order on January 23, 2019. (Motion, Memorandum, Form Order). Appellant filed the Notice of Appeal on February 22, 2019.

Procedural History by Date

1994 SC Act 497	- General Assembly enacts SOR (it applies only to adult offenders)
September 14, 1994	- Reed was adjudicated delinquent on single count of csc/minor
1996 SC ACT 444	- SOR amended to cover all offenders, regardless of age
February 15, 2017	- Reed Motion for Removal from SOR Filed
February 15, 2017	- Request for hearing filed in Reed case, State of South Carolina Represented by Aiken County Solicitor's Office
February 24, 2017	- Hearing Notice issued to Reed and State
March 7, 2017	- Hearing held on Motion/Attorneys for Reed and State present
March/April, 2017	- Phone and email exchanges with SLED
April 21, 2017	- Order entered that removes Reed from the SOR

May 25, 2017 - Attorney General's Office orders Reed hearing transcript

September 1, 2017 - Attorney General/SLED files Petition for Original Jurisdiction with South Carolina Supreme Court to declare Reed Order void

December 14, 2017 - South Carolina Supreme Court Denies SLED's Petition

March 22, 2018 - Attorney General/SLED Files Complaint for Declaratory Judgment declaring Reed April 2017 Order *void ab initio*

November 9, 2018 - Court issues Order declaring void the Order of April 21, 2017

November 19, 2018 - Defendant files Motion for Reconsideration

January 23, 2019 - Court issues Order denying Motion for Reconsideration

February 22, 2019 - Notice of Appeal timely filed

STANDARD OF REVIEW

"A suit for declaratory judgment is neither legal nor equitable, but is determined by the nature of the underlying issue." Nationwide Mutual Fire Insurance Company v. Walls, Court of Appeals SC, OP No.: 5653, June 5, 2019. "Whether reviewing a grant of summary judgment or a judgment on the pleadings, we apply the same legal standards as the trial court." Zeigler v. Dorchester County, Sup. Court SC, OP No.: 27885, May 8, 2019. Rodarte v. University of SC, 419 S.C. 592, 600, 799 S.E.2d 912 (2017). "We review questions of law *de novo*." Summerville v. city of North Charleston, 378 S.C. 107, 110, 662 S.E.2d 40, 41(2008).

ARGUMENT

I. THE FAMILY COURT HAD BOTH SUBJECT MATTER AND PERSONAL JURISDICTION TO ISSUE THE ORDER

The trial Court's Orders are based upon a determination that the Family Court Order of April 2017 was void when signed and that the Family Court lacked subject

matter jurisdiction to hear the motion that was filed because Appellant was over the age of 21 at the time. In support of this determination, the lower Court cite's S.C. Code Ann. § 63-3-510(B) which states that *"whenever the court has acquired the jurisdiction of any child under seventeen years of age, jurisdiction continues so long as, in the judgment of the court, it may be necessary to retain jurisdiction for the correction or education of the child, but jurisdiction shall terminate when the child attains the age of twenty-one years."* (Order).

Specific to the jurisdiction of the Family Court, S.C. Code Ann. § 63-3-530 states in relevant part: (A) The family court has exclusive jurisdiction: (25) *to modify or vacate any order issued by the court.* The Family Court always retains the exclusive jurisdiction to modify or vacate the orders issued by the Family Court. This jurisdiction is without limitation or expiration and is independent of § 63-3-510(B). Family Courts routinely sign Orders related to cases before it regarding juvenile offenders even after those offenders reach the age of 21. Most obvious, is the Family Court's execution of Expungement Orders related to juvenile offenses that qualify. There is no time limit for the execution of orders to expunge the then-juvenile now-adult's criminal record. Additionally, the Family Court, as the Court of original jurisdiction, would have exclusive jurisdiction to modify or vacate no contact orders issued by the Court in a juvenile matter, even after the defendant is an adult. No other court would have the power to modify the prior Family Court order. In the present case, the matter before the Family Court was handled by way of a motion, not the filing of a new action. (Motion). Any motion filed in this matter would by necessity carry the Family Court case number from 1994. There was no objection to the Family Court hearing the motion and issuing a ruling.

The Family Court Order of April 2017 was entered after a motion and a hearing with the active participation of the prosecuting entity, the State of South Carolina. Appellant sat for a polygraph by the polygrapher for the Sheriff's Department. (Transcript). Throughout the time the Family Court considered the Motion and the draft Order, SLED was aware of the pending motion and was supplied with a draft of the proposed Order prior to entry. Neither SLED, nor the State on its behalf, raised any objection to the Family Court issuing the April 2017 Order. In fact the transcript of the proceeding before the Family Court clearly depicts that the State of South Carolina did not oppose either the Court hearing the motion or Appellant Reed's removal from the registry. (Transcript). After entry of the April Order, Appellant was removed from the SOR. Even though SLED timely ordered the transcript of the proceeding, there was no motion for reconsideration filed and no direct appeal taken. In September 2017, approximately five months after the April Order was entered, SLED filed a Petition for Original Jurisdiction with the Supreme Court. (Petition). That Petition was denied in December 2017. (Order). SLED chose the method by which it intended to seek review or appeal of the April 2017 Order and that method was unsuccessful.

The State of South Carolina did not object in anyway to the entry of the April 2017 Order. Instead it chose to participate and acquiesce to the entry of the Order. An unappealed ruling, right or wrong, is the law of the case and requires affirmance. Erickson v. Jones Street, 368 S.C. 444, 481, 629 S.E.2d 653 (2006) (where a defendant who chose for tactical or other reasons to acquiesce in a trial then waives any later objection), Charleston Lumber v. Miller Housing, 338 S.C. 171, 175, 525 S.E.2d 869 (2000). Similarly, in Judy v. Martin where the subject matter jurisdiction of a magistrate

was disputed AFTER an entered order:

> Under the law of the case doctrine, a party is precluded from relitigating, after an appeal, matters that were either not raised on appeal, but should have been, or raised on appeal but expressly rejected by the appellate court. C.J.S. Appeal & Error § 991 (2008); see also Bakala v. Bakala, 352 S.C.612, 576 S.E.2d 156 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become the law of the case); In re Morrison, 321 S.C. 371n.2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); Cooper Tire & Rubber Co. V. Perry et.al., 261 S.C. 538, 201 S.E.2d 245 (1973) (holding that where a ruling on a demurrer to complaint is not appealed from it becomes the law of the case); Watkins v. Hodge, 232 S.C. 245, 247-248, 101 S.E. 2d 657, 658 (1958) (refusing to consider jurisdictional matter of underlying case where issue had been ruled upon and not challenged on appeal).

381 S.C. 455, 457, 674 S.E.2d 151, (2009).

The State of South Carolina participated in the entry of the April 2017 Order and then SLED chose to challenge it by filing a petition for original jurisdiction, which was unsuccessful. The April 2017 Order of the Family Court became the law of this case and should be affirmed.

II. SLED'S DECLARATORY JUDGMENT ACTION LACKS ANY JUSTICIABLE CONTROVERSY AND IS AN IMPROPER USE OF THE ACT

SLED did not seek a declaratory judgment from the Circuit Court to determine its rights or obligations under any law or statute or to answer any pending questions between the parties. When the lower Court's November 2018 and January 2019 Orders were entered declaring that the April 2017 Order is void, that Family Court Order had been the 'law of the case' for more than a year and a half. At that point and since all time for reconsideration or appeal had lapsed, Defendant/Appellant had long since been off the SOR and made decisions in his life based on the fact that he was no longer on the

registry, like his housing and his employment. SLED waited almost a year to even file the underlying cause of action for declaratory judgment. SLED attempts to use the Declaratory Judgment Act, S.C. Code Ann.§ 15-53-10, *et. seq.*, as a second way to attack the April 2017 Order of the Family Court and bypass time limitations in place for motions for relief or appeal that could have been filed at the time the April 2017 Order was entered, but were not.

The Declaratory Judgment Act and the law surrounding it clearly require that there be a '*justiciable issue*' between the parties for resolution or clarification. S.C. Code Ann. § 15-53-20 states: "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations . . .." Here there is no question for determination between the parties. The only issue presented is the collateral attack of the April 2017 Order. "To state a cause of action under the Declaratory Judgment Act, a party must demonstrate a justiciable controversy." Sunset Cay LLC v. Folly Beach, 357 SC 414, 423, 593 SE2d 462, 466 (2004). "A justiciable controversy is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute or difference of a contingent, hypothetical or abstract character." Clifford Thompson v. State of South Carolina, 415 S.C. 560, 565, 785 S.E.2d 189 (2016), *quoting* Power v. McNair, 255 S.C. 150, 154, 177 S.E.2d 551, 553 (1970).

"The Uniform Declaratory Judgment Act is not an independent grant of jurisdiction. Further it is fundamental that the Declaratory Judgment Act does not eliminate the case or controversy requirement. The existence of an actual controversy is essential to jurisdiction to render declaratory judgment." Tourism Expenditure Review Committee v. City of Myrtle Beach, 403 S.C. 76, 81-82, 742 S.E.2d 371 (2013).

The Declaratory Judgment Act was intended to provide clarification and guidance to those who in good faith have issues pending between them for resolution. This matter finds the State of South Carolina, now through its law enforcement division, SLED, deciding that after it clearly participated in the removal of Appellant from the SOR that it wants the removal set aside and Appellant placed back on the SOR. The only matter in controversy appears to be the State/SLED seeking to set aside an Order which was issued with its active participation and acquiescence. The State/SLED has already missed any direct appeal opportunity so the only avenue left to challenge the State's own conduct/participation is via a declaratory judgment. This second bite at the appellate apple is not a proper use of the Declaratory Judgment Act. SLED'S cause of action for declaratory judgment should have been dismissed by the lower Court and the April 2017 Order should stand as the law of this case.

III. SLED'S ACTION IS BARRED BY RES JUDICATA AND COLLATERAL ESTOPPEL AND THE FAMILY COURT ORDER IS THE LAW OF THE CASE

SLED's attempt to use the Declaratory Judgment Act in this manner is also barred by the doctrines of *res judicata* and collateral estoppel. SLED is not now nor has it ever been an entity independent of the State of South Carolina, S.C. Code § 23-3-10, *et. seq.* There is clearly no requirement in the SOR that mandates that SLED be named individually as a party in any matter which may result in the addition or removal of individuals to/from the registry. The State of South Carolina was represented and actively participated throughout the underlying matter, the outcome of which SLED now seeks to set aside. (Transcript). SLED itself was independently aware of the pending Family

Court Motion on behalf of Appellant. SLED independently received calls and emails regarding the same. SLED ordered the transcript after the hearing in the underlying matter. (Transcript order). The State/SLED failed to file any motion for relief or any direct appeal regarding the Order that it now challenges through declaratory judgment.

The State of South Carolina was actively involved and participated in Appellant's removal from the SOR. Appellant was removed from the sex offender registry in April 2017 and allowing the State/SLED to change its position and require that the Order they themselves had input in be struck down subjects Appellant to substantial prejudice. The April 2017 Family Court Order, which went unchallenged in anyway, is now the law of the case. "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." Allen v. McCurry, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980). "In order for *res judicata* to apply the parties, or their privies, and subject matter must be identical and the prior suit adjudicated the issue." Equivest Financial LLC v. Ravenel, 422 S.C. 499, 812 S.E.2d 438 (2018). "A 'judgment on the merits' as that phrase is used in conventional statement of *res judicata* doctrine, is not necessarily a judgment based upon a trial of contested facts." Allen. "Fed.R.Civ.P. 54(a) defines 'judgment' as it is used in 'these rules to include a decree and any order from which an appeal lies." Id. The State of South Carolina appeared and was actively involved in the Motion filed to remove Appellant from the SOR. SLED's declaratory judgment action is barred by the doctrines of *res judicata* and collateral estoppel in that the claims and/or issues presented have already been litigated or could have already been litigated in a prior matter. "Where a ruling on

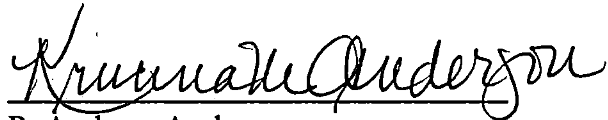
demurrer to complaint was not appealed from, it became the law of the case." Cooper Tire & Rubber Co. v. Perry, 261 S.C.538, 542, 201 S.E.2d 245, 247 (1973).

CONCLUSION

The Aiken County Family Court was the court of original jurisdiction in this matter and its jurisdiction over the 2017 Motion was never questioned by the State of South Carolina, who actively participated in the motion, the hearing, and the entry of the April 2017 Order. SLED was clearly aware that this Motion for Removal had been filed in the Family Court and that the State's interests and SLED's interest was being represented by the Aiken County Solicitor's Office. SLED took no action individually or through the State to stop entry of the Order for Removal. After entry of the Order on April 21, 2017, the Attorney General's Office sent a letter to the court reporter ordering the transcript in the matter. But no motion or direct appeal was ever filed. Months later, SLED sought Original Jurisdiction of the Supreme Court to declare the Order void, but that Petition was denied by Supreme Court Order dated December 14, 2017. SLED had elected its avenue for review and it was unsuccessful.

The State/SLED should not be able to actively participate in a legal matter through hearing and entry of an Order and then wait almost a year to voice jurisdictional objections. SLED should be barred by *res judicata* and collateral estoppel from re-litigating these issues now and SLED's attempt to use the declaratory judgment act as a method of collateral attack/appeal should be denied. At the time the underlying declaratory judgment matter was filed, the April 2017 Family Court Order was the law of the case and should be upheld.

Respectfully Submitted this 8th day of July, 2019.



P. Andrew Anderson
Kristina M. Anderson
ANDERSON & ANDERSON, LLP
211 York Street, NE
Aiken, South Carolina 29801
(803) 648-6000
Attorneys for Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

RECEIVED
JUL 11 2019
SC Court of Appeals

Walton J. McLeod, IV, Circuit Court Judge

Appellate Case No.: 2019-000327

South Carolina Law Enforcement Division, ...Respondent,

v.

Brandon Reed ....Appellant.

PROOF OF SERVICE

I certify that I served the Initial Brief of Appellant on the attorneys/parties hereinafter named on the date indicated below via U.S. Mail:

Harley Littlejohn Kirkland, Esquire
Assistant Attorney General
Post Office Box 11549
Columbia, South Carolina 29211

July 8th, 2019.

P. Andrew Anderson
Kristina M. Anderson
ANDERSON & ANDERSON, LLP
211 York Street, NE
Aiken, South Carolina 29801
(803) 648-6000
Attorneys for Appellant

p. andrew anderson
kristina m. anderson*
*Licensed in SC & GA

anderson and anderson LLP
trial attorneys and counselors at law

July 8, 2019

S.C. Court of Appeals
Attn: Jenny Abbott Kitchings, Clerk
P.O. Box 11629
Columbia, South Carolina 29211

RECEIVED
JUL 11 2019
SC Court of Appeals

RE: *SLED v. Brandon Reed*
Appellate Case No.: 2019-000327

Dear Ms. Kitchings:

Enclosed for filing please find Appellant's Initial Brief and Designation of Matter to be Included in the Record on Appeal. I am also enclosing Certificates of Service for both these documents.

Very truly yours,

Kristina M. Anderson

KMA/twm
Enclosures

cc: Harley Littlejohn Kirkland, Esquire (w/enclosures)

211 york street, ne \ aiken, south carolina 29801 \ phone 803.648.6000 \ fax 803.648.0888

RECEIVED
JUL 11 2019
SC Court of Appeals

anderson & anderson
211 york street, ne
aiken, south carolina 29801

S.C. Court of Appeals
Attn: Jenny Abbott Kitchings, Clerk
P.O. Box 11629
Columbia, South Carolina 29211