THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Hon. Doyet A. Early, Circuit Court Judge

C.A. No.: 2018-CP-40-02425
Appellate Case No. 2019-000648

Jefferson Davis, Jr. .....Appellant,

v.

Ellen Weaver, Chad Connelly, Oran P. Smith, Neil J. Mellen, Howard S. Rich, Rick Reames, Stephen D. Kirkland, Palmetto Promise Institute, Palmetto Family Council, Palmetto Family Action, South Carolinians for Responsible Government, SCRG Foundation, Access Opportunity South Carolina, Friedman Foundation for Educational Choice, Inc., Cato Institute, South Carolina Educational Credit for Exceptional Needs Children Fund, South Carolina Education Oversight Committee, South Carolina Department of Revenue, South Carolina Department of Labor, Licensing and Regulation, First Impressions, Inc. d/b/a/ Richard Quinn & Associates, First Tuesday Strategies, LLC, Bill Wilson, Jason Bedrick, Jim DeMint, Randy Page, Tony Denny, Phillip Cease, Melanie Barton, Doris Cubitt, Susan Thomas, John McCormick, Nate Leupp, Institute of Management Consultants USA & John Doe(s) 1–40 .....Respondents.

INITIAL BRIEF OF APPELLANT

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Appellant

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT JUDGE ERR IN HIS INTERPRETATION OF THE PLAIN LANGUAGE IN THE WRITTEN ORDER OF ANOTHER TRIAL COURT JUDGE?

2. SHOULD PLAINTIFF BE GIVEN AN OPPORTUNITY TO SERVE HIS FIRST AMENDED COMPLAINT AND THE 31 NEWLY NAMED JOHN DOE DEFENDANTS SHOULD NOT HAVE BEEN DISMISSED WITH PREJUDICE?

STATEMENT OF THE CASE

This case is a simple matter of finding what the following Order mean:

> **CONCLUSION**
>
> For the foregoing reasons, Defendants' Motion to Dismiss is granted in part and denied in part.
>
> **IT IS THEREFORE ORDERED** each John Doe referenced in the complaint shall be specifically named and served. This court allows the plaintiff 15 days to appropriately amend the pleadings.
>
> **AND IT IS SO ORDERED.**
>
> s/ The Honorable DeAndrea Gist Benjamin
> Presiding Judge

The Order first instructed Plaintiff / Appellant that "**each John Doe referenced in the complaint shall be specifically named and served.**" Plaintiff did exactly that by naming 31 additional defendants in his timely filed First Amended Complaint.

The Order then, as with all amended complaints, gave a deadline to file his amended pleading by stating "**[t]his court allows the plaintiff 15 days to appropriate amend the**

pleadings." Plaintiff / Appellant did exactly that by timely filing his First Amended Complaint on the final day and started the process of serving defendants pursuant to SCRCP, Rules 3 & 4.

Nowhere however does the Order state that the 31 newly named John Doe defendants must be served within that same 15-day period. Nowhere in the Order is there any discussion for a need to serve the 31 newly named John Doe defendants in an expedited manner. Had the Court intended the 31 newly named John Doe Defendants also be "served" within 15 days, the Court would have said "named and served ***within 15 days***". But, the Court did not give a deadline on service. The court only gave a deadline as to when the First Amended Complaint must be filed, which Plaintiff / Appellant complied with in full, thereafter serving the defendants pursuant to SCRCP, Rules 3 & 4.

It is well established that one trial court judge cannot overrule an Order of another trial court judge. Judge Doyet A. Early interpreted the Order by Judge DeAndrea G. Benjamin to require Plaintiff / Appellant to serve all 31 newly named John Doe defendants within 15 days. As such he felt compelled to dismiss the 31 newly named John Doe defendants and strike the First Amended Complaint.

South Carolina Rules of Civil Procedure, Rules 3 & 4, governs the process and timing of service in this matter and the 31 newly named John Doe defendants should not have been dismissed with prejudice.

STANDARD OF REVIEW

The interpretation of a statute is a question of law to be reviewed by this Court de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). Likewise, the interpretation of the plain language of a lower court's written order would be de novo.

FACTS

On May 3, 2018, Appellant / Plaintiff Davis brought this action alleging nine different causes of action against two named defendants and John Doe(s) 1 – 20.

On June 7, 2018, the named defendants filed a Motion to Dismiss.

On October 1, 2018, a motion hearing was held on the named defendants Motion to Dismiss. The two named defendants' motion to dismiss was granted in part and dismissed in part. Plaintiff was given 15 days to file his first amended complaint.

At the October 1, 2018 motion hearing, Judge DeAndrea G. Benjamin expressed concern about naming the John Does. Along with giving Plaintiff 15 days to file his first amended complaint, Judge Benjamin directed Plaintiff to name the John Doe defendants. There was no discussion at the October 1st hearing as to "when" the newly to be named John Doe defendants were to be physically served. There was no discussion at the October 1st hearing as to any need for an expedited deadline to physically serve the newly to be named John Doe defendants.

On October 29, 2018, the Court issued its Order.

On October 30, 2018, the Court issued an Amended Order clarifying a minor date issue raised by Plaintiff in calculating the necessary date by which his amended complaint would need to filed. Nothing else in the Order was amended.

The Order and Amended Order both stated the following CONCLUSION:

> **CONCLUSION**
>
> For the foregoing reasons, Defendants' Motion to Dismiss is granted in part and denied in part.
>
> **IT IS THEREFORE ORDERED** each John Doe referenced in the complaint shall be specifically named and served. This court allows the plaintiff 15 days to appropriately amend the pleadings.
>
> **AND IT IS SO ORDERED.**
>
> s/ The Honorable DeAndrea Gist Benjamin
> Presiding Judge

On November 19, 2018, Plaintiff timely filed his First Amended Complaint. Plaintiff's First Amended Complaint containing 256 paragraphs (previously only 64 paragraphs) and 31 newly named John Doe defendants (in addition to the original two defendants). Thereafter Plaintiff started serving the defendants pursuant to SCRCP, Rules 3 & 4.

After November 19, 2018, Plaintiff began locating and serving many of the 31 newly named John Doe defendants. Many, if not all, of the 31 newly named John Doe defendants who had either been served or made and appearance in the case, filed their perfunctory Motions to Dismiss. None brought up, ***with the necessary specificity***, that they had not been timely served under Rule 12(b)(5). Like Plaintiff, none of the newly named John Doe defendants appeared to interpret Judge Benjamin's October 29, 2018 Order or October 30, 2018 Amended Order to require that the newly named John Doe defendants be physically served within 15 days.

On February 12, 2019, a motion hearing was held on the numerous Motions to Dismiss filed by several of the newly named John Doe defendants.

At the February 12, 2019 motion hearing, Judge Doyet A. Early entertained a verbal argument from counsel of one of the defendants that the Order and Amended Order of Judge Benjamin required Plaintiff to amend his complaint and physically serve the newly named John Doe defendants within 15 days. It was the proverbial "Hail Mary". Judge Early however accepted the argument and stated from the bench that all the newly named John Doe defendants would be dismissed.

On February 19, 2019, the Court issued its Order dismissing all of the 31 newly named John Doe defendants with prejudice and striking the First Amended Complaint.

On March 6, 2019, Plaintiff filed his Motion (with Memorandum) to Reconsider.

On March 27, 2019, the Court denied Plaintiff's Motion to Reconsider.

On April 16, 2019, Plaintiff timely filed his Notice of Appeal.

ARGUMENTS

I. THE TRIAL COURT JUDGE ERRED IN HIS INTERPRETATION OF THE PLAIN LANGUAGE IN THE WRITTEN ORDER OF ANOTHER TRIAL COURT JUDGE.

As noted above, the plain language and the facts and circumstances surrounding the judicial intent of the Order are clear. Judge Benjamin held an extensive hearing on October 1st, 2018 on a Motion to Dismiss filed by the two initially named defendants. The Court knew the complexity of this case and the extensive number of to be named John Doe defendants. Although nothing in the Order directs Plaintiff / Appellant to serve these newly named defendants within 15 days, it would have been unreasonable of anyone to even expect such was even possible. Plaintiff / Appellant would have asked for more time if under any interpretation of the Order would have caused him to believe the 31 newly named defendants needed to be

physically served within 15 days. The Order was clear, file within 15 days and then serve the defendants in the normal course of this or any litigation. Judge Early simply misinterpreted the plain language of the Order.

The plain language was so clear to those involved, most, if not all, opposing counsel did not even raise insufficiency of service as a defense to the requisite standards of *Unisun Ins. v. Hawkins*, 342 S.C. 537, 537 S.E.2d 559 (S.C. App., 2000). Additionally, Rule 12(h)(1), SCRCP, expressly provides that the defense of insufficiency of service of process is waived "if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course." In *Garner v. Houck*, 312 S.C. 481, 435 S.E.2d 847 (1993), our supreme court held that a party who fails to properly raise the defense of insufficient service of process under Rule 12 waives any issues or defenses regarding service, including a statute of limitations defense.

Aside from the proverbial "Hail Mary" attempt of one lone counsel to even verbally bring up the point at the February 12, 2019 motion hearing, the belief that service must be made within the same 15-days allowed to amend the complaint appeared to be foreign to all involved.

II. PLAINTIFF SHOULD BE GIVEN AN OPPORTUNITY TO SERVE HIS FIRST AMENDED COMPLAINT AS THE 31 NEWLY NAMED JOHN DOE DEFENDANTS SHOULD NOT HAVE BEEN DISMISSED WITH PREJUDICE.

Equity, fairness and justice demand that Plaintiff / Appellant be given his chance to serve his First Amended Complaint. "When a complaint is dismissed under Rule 12(b)(6) for failure to state facts sufficient to constitute a cause of action, the dismissal generally is without prejudice. **The plaintiff in most cases should be given an opportunity to file and serve an amended complaint**. See *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (rules of

civil procedure should be liberally construed to do substantial justice and lower court erred in denying motion to amend complaint where amendment would have stated alternative theory of recovery)." *Spence v. Spence*, 628 S.E.2d 869, 368 S.C. 106 (S.C., 2006), emphasis added.

The court in this case dismissed the First Amended Complaint with prejudice over a perceived service issue. Justice permanently denied based on a misinterpretation.

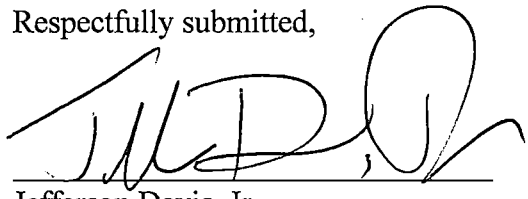
It is standard procedure to provide litigants an appropriate time to serve newly named defendants. SCRCP, Rules 3 & 4. Likewise, in the Federal Court system as well. "If an amended complaint names a new defendant, the 120 days within which to serve the new defendant begins the day after the filing of the amended complaint." *Lindley v. City of Birmingham*, 452 Fed. Appx. 878, 880 (11th Cir. 2011). It is standard and.

"Dismissal of a complaint does not bar a subsequent action brought before expiration of the statute of limitations if the dismissal is based merely on the insufficiency of the complaint. *Sealy v. Dodge*, 289 S.C. 543, 347 S.E.2d 504 (1986); *Hennegan v. Atlantic Coast Line R. Co.*, 211 S.C. 357, 45 S.E.2d 331 (1947). Dismissal of a case precludes relitigation only on matters actually decided in the dismissal. Sealy, 289 S.C. at 544, 347 S.E.2d at 505 (dismissal for improper joinder and lack of capacity to sue precluded only those issues)." *Spence v. Spence*, 628 S.E.2d 869, 368 S.C. 106 (S.C., 2006). In this case dismissal was with prejudice over service. Again justice permanently denied based on a misinterpretation.

CONCLUSION

For the foregoing reasons, Appellant asks this Honorable Court to reverse the judgment of the circuit court order. Plaintiff / Appellant's First Amended Complaint should be reinstated and Plaintiff given an appropriate time certain (of at least 120 additional days) to serve the remaining John Doe defendants.

Respectfully submitted,



Date: September 9, 2019

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Appellant

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PROOF OF SERVICE

I certify that I have served the **INITIAL BRIEF OF APPELLANT** and **APPELLANTS' DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL** on the below named parties at the addresses noted by depositing a copy of it in the United States Mail, postage prepaid, on September 9, 2019.

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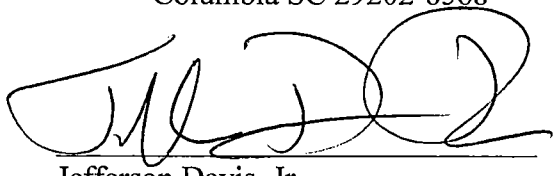

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September 9, 2019

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RE: ***Jefferson Davis Jr, Appellant vs. Ellen Weaver, Et al. Respondents***
Appellate Case No.: 2019-000648
C.A. NO. 2018-CP-40-02425

Dear Ms. Kitchings:

Please find enclosed the following for the above referenced matter.

1. Initial Brief of Appellant
2. Appellants' Designation of Matter to be Included in the Record on Appeal
3. Proof of Service

Thank you for your assistance. If you have any questions, please feel free to email me at *jeff@apogeetax.com* or give me a call at 843-901-8036 (cell).

Sincerely,

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cc: Respondents (*as listed in and included with Proof of Service*)