

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM HORRY COUNTY

Court of Common Pleas

Larry B. Hyman, Jr., Circuit Court Judge

Case No. 2017-CP-26-08135
Appellate Case No.: 2019-001076

Jesse Cook,

Respondent,

v.

Edward Jenerette,

Appellant.

INITIAL BRIEF OF RESPONDENT

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SC Court of Appeals

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COUNTER-STATEMENT OF ISSUES ON APPEAL

- I. Whether this action was validly commenced where appellant's insurer conducted itself as though a valid action existed by consummating the settlement of the companion case and by requesting that respondent's counsel obtain a dismissal of that action with prejudice?
- II. Whether the circuit court judge abused his discretion in restoring this matter to the trial docket where it found that appellant should be equitably estopped from asserting the statute of limitations as a defense to its restoration?

STATEMENT OF THE CASE

This case arose from a motor vehicular accident that occurred on December 16, 2014, wherein the Respondent, Jesse Cook, and his son, Benjamin, were seriously injured. The at-fault driver was the Appellant, Edward Jenerette. Less than one month thereafter, on January 14, 2015, Respondent's counsel, Scott Bellamy, sent a letter of representation on behalf of both Jesse and Benjamin Cook to Appellant's insurer, Traveler's Insurance Company ("Travelers"), which it received on January 14, 2015. Correspondence was exchanged between Attorney Bellamy and the adjuster, and on December 12, 2017, settlement not having been achieved, a civil action was filed in Horry County on behalf of the Cooks against Appellant, with copies being sent to his insurance carrier. The next day, Respondent's counsel provided the summons and complaint to the Horry County Sheriff's Office to serve the Appellant.

Service was never perfected on Appellant, an affidavit of non-service being executed on January 8, 2018. However, Respondent's counsel continued to negotiate with the adjuster for Travelers. On July 11, 2018, the case involving Benjamin Cook was settled for \$105,000. The injuries for Jesse Cook being more severe, Respondent's counsel and the adjuster focused on resolving that matter. Thereafter, on September 20, 2018, the adjuster informed personnel in Respondent's counsel's office that he had learned the civil action had been administratively dismissed by the Honorable William H. Seals, Jr. on September 11, 2018.

On November 28, 2018, Respondent's counsel filed a motion to restore this action pursuant to Rule 60(b)(1), SCRPC, based on mistake, inadvertence, or excusable neglect as well as the theory of estoppel. Following a hearing, the Honorable Larry Hyman issued an order restoring the case which was filed on May 6, 2019. By order dated June 25, 2019, Judge Hyman denied Appellant's motion for reconsideration. This appeal followed.

STANDARD OF REVIEW

This action is an appeal of the circuit court's decision to grant a motion to restore based on Rule 60(b), SCRPC. Generally, "Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." *Raby Const., L.L.P. v. Orr*, 358 S.C. 10, 17, 594 S.E.2d 478, 482 (2004). Further, "Relief under Rule 60(b)(1), SCRPC, lies within the sound discretion of the circuit court and will not be reversed on appeal absent an abuse of discretion." *RRR, Inc. v. Toggas*, 378 S.C. 174, 181, 662 S.E.2d 438, 441 (Ct. App. 2008), *affirmed*, 381 S.C. 490, 674 S.E.2d 170 (2009). An abuse of discretion occurs when the circuit court's decision is controlled by an error of law or when based on factual conclusions, is without evidentiary support. *Arthur v. Sexton Dental Clinic*, 368 S.C. 326, 333, 628 S.E.2d 894, 898 (Ct. App. 2006).

However, equitable estoppel in an action at law is tried as an equitable issue. *Gaymon v. Richland Mem'l Hosp.*, 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997). Accordingly, this Court may make factual findings according to its own view of the preponderance of the evidence. *Moates v. Bobb*, 322 S.C. 172, 175, 470 S.E.2d 402, 403 (Ct. App. 1996) ("In reviewing the trial court's decision, this court may make findings of fact according to its own view of the preponderance of the evidence.").

ARGUMENT¹

I.

Appellant's argument that this action was never validly commenced must fail because Appellant's insurer clearly conducted itself as though an action had been filed by consummating a settlement of the companion case and requesting Respondent's counsel to secure a dismissal with prejudice.

Appellant contends this action was never "commenced" and did not constitute a viable civil action. This creative yet nonsensical argument should be rejected by this Court.

The facts clearly establish that Respondent's counsel filed this action on behalf of both Jesse Cook and his son, Benjamin, on December 12, 2017, several days prior to the running of the statute of limitations. Although service was never perfected on the Appellant, Edward Jenerette, the suit papers were transmitted to the adjuster for Appellant's carrier, Travelers. Indeed, the adjuster and Respondent's counsel began communicating with one another and attempting to negotiate a settlement on both cases within a month after the accident occurred. (Ziegler Affidavit). When no settlement had been reached and mindful of the statute of limitations, Respondent's counsel filed this lawsuit several days before the statute of limitations ran in December of 2017. The adjuster was keenly aware that it might be difficult to effect service on its insured, sending an email to personnel at Respondent's counsel's office shortly after suit had been filed, asking to be notified if service was effected on Jenerette. Significantly, in that email, the adjuster stated: "I would like to avoid the issue of default and the possible disclaiming of coverage that typically results." (Exh. B). Clearly, this was an acknowledgement that a proper civil action had been begun and that the insurer wanted to avoid the issue of its

¹ Respondent does not abandon the argument asserted in his motion to dismiss that the appeal of a motion to restore is not a final judgement and hence not appealable. *Shields v. Martin Marietta Corp.*, 303 S.C. 469, 470, 402 S.E.2d 482, 483 (1991) ("The decision on a motion to restore the case to the active docket is not a final judgment and is interlocutory and, therefore, not immediately appealable."). Therefore, this appeal should be dismissed.

insured being in default. Despite the lack of service on its insured, the carrier continued to negotiate a settlement on his behalf, and in July of 2018, over ninety days after expiration of the statute of limitations, the parties reached a settlement of the son's personal injury action. (Exh. C).

Unbeknownst to either side, the Honorable William H. Seals, Jr., as Chief Administrative Judge for the Fifteenth Judicial Circuit, issued an order on September 11, 2018, dismissing this action for lack of service. (Exh. E). The adjuster for Appellant's insurer only discovered the dismissal in conjunction with checking the file regarding consummating the settlement of the son's action. It is clear from the message the adjuster sent to Respondent's counsel that until he received notice of the Form 4 dismissal, he thought a viable civil action existed. His email stated: "Since the statute of limitations is no longer tolled by an active lawsuit, it seems that he [Respondent] has no legal avenue for recovery." (Exh. F).

It is thus disingenuous for Appellant to now assert that no civil action was ever begun under Rule 3, SCRCF. Quite obviously, the adjuster believed a valid civil action existed when he authorized a six-figure settlement for Respondent's son just a few months before the action was administratively dismissed, so Appellant should not be heard now to assert that a civil action was never commenced. This argument flies in the face of the actions of the insurer, on behalf of its insured, in negotiating and concluding a settlement of the companion case. When the parties reached a settlement as to that claim in July of 2018—seven months after the statute of limitations had run—the adjuster requested that Respondent's counsel "immediately file a Dismissal with prejudice with regards to the lawsuit referenced above." (Exh. C). Obviously, the insurer's insistence that Respondent's counsel dismiss the suit with prejudice clearly suggests that a civil action had been commenced.

Next, Appellant attempts to recharacterize the motion filed by Respondent, asserting that Respondent was required to file a Rule 59, SCRCF, motion rather than the Rule 60 motion actually filed. Respondent elected to file a motion to restore based on Rule 60, not a motion to reconsider based on Rule 59, and it is not Appellant's prerogative to change the motion made by Respondent. Moreover, this argument undercuts Appellant's principal argument that no civil action was ever filed here. If indeed a Rule 59 motion was required because, as Appellant asserts, Judge Seals' dismissal constituted a "judgement" defined by Rule 54(a), SCRCF, then inferentially a civil action HAD to have been commenced because otherwise, there would have been nothing to dismiss. Finally, taken to its logical end, Appellant's position would mean that no one could ever file a Rule 60(b) motion if he or she did not first file a Rule 59 motion. This defies logic, as Respondent did not request the circuit court to amend the administrative dismissal, he sought to set it completely aside. Further, neither party even received notice of the administrative dismissal, so it would have been virtually impossible to have filed a Rule 59(e) motion within ten days.

Respondent duly filed a civil action in this case, was involved in extensive negotiations with Appellant's insurer, and in fact, settled the companion action for six figures several months AFTER the statute of limitation had run. Appellant's attempt to distract this Court from the main issue in this case—whether Respondent was entitled to have this matter restored because of his excusable neglect in effecting service based on the conduct of the Appellant's insurer—should be rejected.

II.

The circuit court's order should be affirmed because this action was dismissed administratively for failure to effect service on the Appellant and the circuit court did not abuse its discretion in finding that Appellant should be equitably estopped from asserting the statute of limitations as a defense to its restoration.

Appellant argues the order under appeal should be reversed because the circuit court, in restoring this action, did not specify the excusable neglect it relied upon. This is incorrect.

Here, the order under appeal clearly found that "the [Respondent] can show excusable neglect and that he has a meritorious claim." (Order at 3). Specifically, the circuit court judge found that actions by the Appellant's insurer induced Respondent to believe that serving the Appellant was not necessary:

The best evidence to support the reasonableness of [Respondent's] reliance on the insurance companies' (sic) 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 [Respondent's] case the same way as it did the sons (sic) and settle the [Respondent's] lawsuit.

(*Id.* at 4). Moreover, the circuit court held: "The carrier's actions not only implied that it would *not* require the [Respondent] to serve its insured, it affirmed this belief when it settled the [Respondent's] son's case well beyond the statute of limitations." (*Id.* at 5). Therefore, the circuit court did in fact specify the precise conduct of Appellant's insurer which induced Respondent's counsel not to follow through with serving Appellant by publication.

The circuit court was clearly cognizant of the limitation period set forth in section 15-3-530(5), but it correctly agreed with Respondent that Appellant was estopped from asserting the statute of limitations as a defense to this matter. The issue of whether a defendant is estopped from claiming the statute of limitations is ordinarily a question of fact. *Gaymon v. Richland Mem'l Hosp.*, 327 S.C. 66, 68, 488 S.E.2d 332, 333 (1997).

Under South Carolina jurisprudence, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that would trigger the statute was induced by the defendant's conduct. *Wiggins v. Edwards*, 314 S.C. 126, 130, 442 S.E.2d 169, 171 (1994). This inducement may take one of two forms, to wit, either an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary. *Vines v. Self Mem'l Hosp.*, 314 S.C. 305, 308, 443 S.E.2d 909, 911 (1994). Conduct that suggests a lawsuit is unnecessary arises when the defendant induces the plaintiff to believe "an amicable adjustment of the claim will be made without suit or to forbear exercising the right to sue." *Kleckley v. Nw. Nat. Cas. Co.*, 338 S.C. 131, 137, 526 S.E.2d 218, 220 (2000).

Respondent readily acknowledges the case law is uniform that the fact settlement negotiations have been undertaken is no bar to the defendant's assertion of the statute of limitations. *See Gadsen v. Southern Railway*, 262 S.C. 590, 591, 206 S.E.2d 882, 882 (1974) ("A fair summary of the record reveals nothing more nor less than the fact that negotiations for a settlement were undertaken but never finalized."); *Moates v. Bobb*, 322 S.C. 172, 175, 470 S.E.2d 402, 403 (Ct. App. 1996). Here, however, in the companion suit, settlement negotiations were not just undertaken but were *finalized*—thus clearly demonstrating that "an amicable adjustment of the claim [could] be made without suit." *Republic Contracting Corp. v. S.C. Dep't of Highways & Pub. Transp.*, 332 S.C. 197, 211, 503 S.E.2d 761, 768 (Ct. App. 1998). It is this fact, enunciated by the circuit court, which sets this case apart from those which hold negotiations alone are not sufficient. The companion lawsuit, involving the same defendant, the same adjuster, and the same counsel for the plaintiffs, was actually settled seven months after the running of the statute of limitations. (Exh. C).

The circuit court correctly found this to be “the best evidence” of the reasonableness of Respondent’s counsel’s reliance on the Appellant’s insurer’s actions and representations and the very fact which distinguished this case from *Moates* and *Gadsen*. The circuit court properly noted that in *Moates*, the plaintiffs did not even *begin* settlement negotiations, let alone finalize them. 322 S.C. at 175, 470 S.E.2d at 403. Moreover, in *Gadsen*, there was absolutely no showing of any conduct on the part of the defendant to warrant a finding of estoppel. 262 S.C. at 592, 206 S.E.2d at 883.

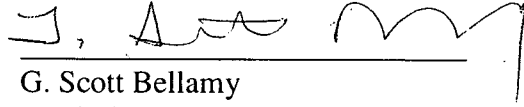
The circuit court, in restoring this case based upon Respondent’s excusable neglect in not effecting service by publication, made specific findings concerning the conduct by Appellant’s insurer which constituted estoppel, and clearly distinguished the facts presented here from the cases which hold that mere negotiations are insufficient to warrant a finding of estoppel. The court's order should be affirmed.

CONCLUSION

For the foregoing reasons, Respondent’s requests that this appeal be dismissed as interlocutory, or, in the alternative, that the order restoring this case to the trial docket be affirmed.

Respectfully submitted,

December 3, 2019



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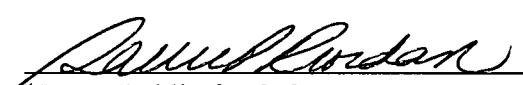
The undersigned, an employee of Hearn & Hearn, P.A. and over the age of eighteen (18) years, hereby certifies that (s)he served a copy of Initial Brief of Respondent by United States first-class mail, postage prepaid, deposited in the U.S. Mail and addressed to: Mr. Matthew H. Tyler, Aiken, Bridges, Elliott, Tyler & Saleeby, P.A., 181 E. Evans Street, Suite 409, Florence, SC 29506.

This 4th day of December, 2019.

HEARN & HEARN, P.A.

By: 

Sworn to before me this 4th day
of December, 2019.


Notary Public for S.C.

My commission expires: 4.5.20

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December 4, 2019

Mr. Matthew H. Tyler
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RE: Jesse Cooke v. Edward Jenerette
Appellate Case No. 2019-001076

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Dear Matt:

As you know, I have been associated by Scott Bellamy to assist him on the above-referenced appeal. Enclosed is a copy of the Initial Brief of Respondent as well as a Proof of Service.

Sincerely yours,



George M. Hearn
GMH/kk
Enclosures

cc: The Honorable Jenny Abbott Kitchings
Mr. G. Scott Bellamy

Hearn & Hearn, P.A.

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December 4, 2019

The Honorable Jenny Abbott Kitchings
Clerk, S.C. Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RE: Jesse Cooke v. Edward Jenerette
Appellate Case No. 2019-001076

Dear Ms. Kitchings:

Enclosed are a copy of the Initial Brief of Respondent and the original Proof of Service of the Brief on Appellant's attorney, Matthew H. Tyler.

Sincerely yours,



George M. Hearn
GMH/kk

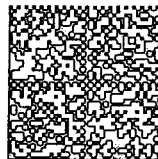
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cc: Mr. Matthew H. Tyler
Mr. G. Scott Bellamy

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