THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable D. Craig Brown

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SC Court of Appeals

Appellate Case No. 2019-001235

Dana Mazyck, Guardian Ad Litem for Tyler M., a Minor Child under the age of fourteen (14)... Appellant,

v.

Charleston County School District...Respondent.

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STATEMENT OF ISSUES ON APPEAL

I. Whether the lower court erred in interpreting Judge Young's order as ruling on the merits of the statute of limitations when that ruling was not necessary given the express finding that Mazyck did not properly serve the School District in the prior action?

II. Whether the lower court erred in applying res judicata where there was no prior adjudication of the merits of the causes of action?

III. Whether the lower court erred in applying collateral estoppel where the merits of the causes of action were not litigated in, determined in, or necessary to the prior action?

IV. Whether the Court should reverse to fulfill its duty to guard the rights of minor Tyler M.?

STATEMENT OF THE CASE

This is a negligence action under the South Carolina Tort Claims Act that arises out of injuries suffered by minor Tyler M. on April 22, 2015, while on the playground at an elementary school in the Respondent Charleston County School District ("the School District"). On January 9, 2019, Appellant Dana Mazyck, Guardian Ad Litem for Tyler M., A Minor Child under the Age of fourteen (14) ("Mazyck"), filed a Complaint against the School District. On February 8, 2019, the School District filed an answer, affirmative defenses, and motion to dismiss. (Ans.). Relevant to this appeal, the School District moved to dismiss the Complaint on the doctrines of res judicata and collateral estoppel based on a prior action between the parties. *Id.* at pp. 1-2. On June 11, 2019, Mazyck served a Memorandum in Opposition of Defendant's Motion to Dismiss. (Memo. in Opp.). On June 13, 2019, the School District filed a reply to Mazyck's memorandum. (Reply). On June 14, 2019, the Honorable D. Craig Brown held a hearing on the motion. (Tr.). On June 19, 2019, the lower court filed a Form 4 Order granting the motion. (Form 4 Order). On July 3, 2019, the lower court filed a formal order granting the motion to dismiss with prejudice. (Order). On July 26, 2019, Mazyck filed this appeal.

FACTS

On April 22, 2015, Tyler M., an eleven-year-old in the fourth grade at Jennie Moore Elementary School, fell on or off of playground equipment, hit his head, and lost consciousness. (Cmplt. ¶¶ 4-5). His teacher did not notice him and returned to the classroom, leaving Tyler M. unconscious on the playground. *Id.* at ¶ 8. Another class that came onto the playground found Tyler M. and took him to the nurse's office. *Id.* at ¶ 9. He did not recognize his mother when she arrived at the school. *Id.* at ¶ 10. He received treatment for a concussion, loss of consciousness, and short term memory loss. *Id.* at ¶ 14.

On April 21, 2017, Mazyck filed a complaint in a separate action against the School District. She served it by certified mail on April 24, 2017. (Exh. B. to Def. Reply). It was addressed to the superintendent but signed for by the mail room clerk. (Exh. A to Def. Reply, Order p. 4). The School District moved to dismiss the complaint based on insufficiency of service of process. *Id.* at p. 1. On June 1, 2018, the Honorable Roger Young, Sr., granted the motion to dismiss. He held that the School District "must be served in accordance with Rule 4(d)(6) requiring" personal service. *Id.* at p. 3. "Certified mail does not suffice to effectuate service against the District." *Id.* He also found the actual service by certified mail did not cure the defect because "Plaintiff has not shown compliance with the rules and is not entitled to the presumption" of proper service. *Id.* at p. 4. In conclusion, Judge Young found "that service upon District was not proper in accordance with the South Carolina Rules of Civil Procedure. As such, the Plaintiff has failed to properly serve the Summons and Complaint upon the District, and therefore, service has not been affected upon the District." *Id.* at p. 5.

On January 9, 2019, Mazyck filed this action, relying on the fact that Tyler M.'s minority tolls the statute of limitations. (Cmplt.). She asserted causes of action for negligence, respondeat superior, and negligent supervision. *Id.* On February 8, 2019, the School District filed an answer,

affirmative defenses, and a motion to dismiss. (Ans.). The motion to dismiss asserted that Judge Young's prior order required dismissal under the doctrines of res judicata and collateral estoppel. *Id.* at pp. 1-2. Mazyck filed a memorandum in opposition to the motion. As to res judicata, Mazyck argued the third element of res judicata—adjudication of the issue in the former suit is the same—is not satisfied. (Memo. in Opp. p. 4). "The Plaintiff has the right to cure improper service and has done so in this new filing. As there was not a final judgment rendered on th[e] merits of the cause of action asserted, dismissal does not bar a subsequent action brought before expiration of the statute of limitations" *Id.* As to collateral estoppel, Mazyck argued it does not apply because a dismissal based on service of process without prejudice is not equivalent to litigating a matter. *Id.* at pp. 4-5.

The School District filed a reply memorandum arguing (1) the statute of limitations is an adjudication on the merits, (2) Judge Young must have ruled on the issue because Mazyck's memorandum in opposition included an argument on the tolling of the statute of limitations based on Tyler M.'s minority, and (3) Judge Young's reference to the statute of limitations in the order shows a final determination of the issue. (Def. Reply pp. 3-5).

At the hearing before the lower court in this action, Mazyck explained the prior action

> was dismissed without prejudice. And our position is that the child is a minor. And based on the Tort Claims Act, it gives exceptions for minors. And there is the two years [statute of limitations]; however, lawyers just typically move forward with that for—out of an abundance of caution; however, persons moving under – suffering under disability and being under the age of 18, he is that, gives him that exception.

(Tr. of Hearing pp. 11-12). Mazyck believes Judge Young's order "finds that service was not proper in accordance with the rules" "[a]nd that is why in looking and weighing [her] options", Mazyck chose to refile and re-serve the action within the applicable statute of limitations rather than file an appeal of Judge Young's order. *Id.* at pp. 12-13.

The lower court granted the motion to dismiss based on res judicata and collateral estoppel. (Order p. 2). It interpreted Judge Young's order as dismissing the prior case "based upon the Plaintiff's failure to properly file and serve the matter within the South Carolina Tort Claims Act's [two-year] statute of limitations." *Id.* at p. 3. Based on that interpretation, the lower court found the actions involved the same subject matter and litigated the same issue—the statute of limitations. *Id.* at pp. 4-5. Mazyck timely filed this appeal.

STANDARD OF REVIEW

"[T]he interpretation of a judgment is a question of law for the court. Questions of law are reviewed de novo." *Doe v. Bishop of Charleston*, 407 S.C. 128, 134, 754 S.E.2d 494, 498 (2014) (internal citation omitted). "In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief." *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009).

ARGUMENT

The issue in this appeal is whether minor Tyler M. may, after an order dismissing a prior action based on insufficient service of process, refile the action within the applicable statute of limitations or whether he is barred by res judicata and collateral estoppel. The Court should hold that he properly refiled the action within the applicable statute of limitations. The lower court erred in interpreting Judge Young's order as ruling on the statute of limitations and any such ruling was not necessary given the ruling on service of process. The lower court also erred in applying res judicata and collateral estoppel because it focused on whether the statute of limitations was litigated in the prior action rather than whether the merits of the causes of action were litigated. Alternatively, this Court may reverse by exercising its discretion to avoid the application of

procedural rules to guard the rights of minor Tyler M. to seek relief for his injuries. For any of these reasons, the Court should reverse.

I. THE LOWER COURT INCORRECTLY INTERPRETED JUDGE YOUNG'S ORDER AS RULING BASED ON THE STATUTE OF LIMITATIONS

All of the reasoning and rulings in the lower court's order are based on an incorrect interpretation of Judge Young's order. Judge Young did not dismiss Mazyck's prior action "based upon Plaintiff's failure to properly file and serve the matter within the South Carolina Tort Claims Act's statute of limitations." (Order pp. 1, 3). Rather, he dismissed the action based on the failure to properly serve the School District.

"[J]udgments are to be construed like other written instruments. The determinative factor is the intent of the court, as gathered, not from an isolated part thereof, but from all the parts of the judgment itself." *Doe v. Bishop of Charleston*, 407 S.C. 128, 135, 754 S.E.2d 494, 498 (2014) (internal quotation marks omitted). Considering all of the parts of Judge Young's order, he dismissed the prior action because Mazyck did not properly serve the School District.

Judge Young referenced the Tort Claims Act twice in his order and its statute of limitations once. First, he noted the general two-year statute of limitations in the Tort Claims Act and said that, under that time period, Mazyck "had until August 19, 2017 to properly serve the Defendant in this matter so as to be determined to have commenced this action" within the meaning of S.C. Code Ann. § 15-3-20(B), which states that an action is "commenced" if service is accomplished within 120 days after filing the summons and complaint. (Exh. A to Def. Reply, Order p. 2). He then addressed for almost three pages whether Mazyck properly served the School District. *Id.* at pp. 2-4. In this lengthy discussion, Judge Young held Mazyck did not properly serve the School District because she should have served it by personal service and not certified mail and, further,

there is no presumption of proper service where Mazyck did not comply with the service rules. *Id.* The Order ends with the following:

> The Court finds that service upon District was not proper in accordance with the South Carolina Rules of Civil Procedure. As such, the Plaintiff has failed to properly serve the Summons and Complaint upon the District, and therefore, service has not been affected upon the District.
>
> **IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that:
>
> Based upon the above, Defendant Charleston County School District's Motion to Dismiss based on S.C.R.C.P. 12(b)(1), (4) and (5) and S.C. Code Annotated §15-78-10, et. seq. is
>
> **GRANTED.**

Id. at p. 5. This is the second reference to the Tort Claims Act. It does not specifically reference the statute of limitations. Rather, this general reference to the Tort Claims Act can be read to include S.C. Code Ann. § 15-78-110, which states, "Except as provided for in Section 15-3-40", the statute of limitations for a tort claims action is two years. Section 15-3-40 states for a person "within the age of eighteen years", "the time of disability is not a part of the time limited for the commencement of the action." S.C. Code Ann. § 15-3-40. Therefore, a reasonable interpretation of the Order includes an acknowledgement of the tolling of the statute of limitations until Tyler M. reaches the age of majority. In fact, the School District has never argued that the tolling provision does not apply to Tyler M.

A review of the order shows that Judge Young ruled based on insufficient service of process and not on the statute of limitations. This is logical given that a ruling on insufficient service of process is dispositive, making a ruling on the statute of limitations unnecessary. *See Nash v. Tindall Corp.*, 375 S.C. 36, 40, 650 S.E.2d 81, 83 (Ct. App. 2007) ("Judicial dicta is 'not essential to the decision.'" (quoting *Black's Law Dictionary* 465 (7th ed. 1999))). The manner and method of service—not its timeliness—was the issue before Judge Young.

The lower court noted (and the School District argued) that Mazyck's memorandum to Judge Young included an argument that the statute of limitations had not run as to Tyler M. due to his minority. (Order p. 4; Def. Reply p. 4). This argument is an irrelevant red herring. When a party makes an argument and the Court does not address the argument in its order, the silence is not a ruling. This is especially true where, as here, the ruling was not necessary to the Court's decision. Judge Young found service improper and, upon making that determination, a decision as to the statute of limitations became unnecessary. Judge Young granted the motion to dismiss notwithstanding Mazyck's argument that Tyler M.'s minority tolled the statute of limitations not because Judge Young disagreed with the argument but because, regardless of the accuracy of that argument, it did not change the fact that Mazyck did not properly serve the School District. (Def. Reply p. 4).

The lower court misinterpreted Judge Young's order. Because this interpretation served as a basis for the Court's decisions on res judicata and collateral estoppel, a reversal on this issue is dispositive of the entire appeal. Regardless, and as explained below, there are additional reasons for reversal.

II. THE LOWER COURT ERRED IN FINDING THE MATTER BARRED BY RES JUDICATA

The lower court erred in finding this action barred by res judicata because there was no prior adjudication on the merits and there is no statute of limitations issue in this action. As discussed above, Judge Young did not rule on the statute of limitations. The School District also did not assert that as a defense in this case. The phrase "statute of limitations" does not appear anywhere in its answer. (Ans.). Judge Young's order was also not an adjudication on the merits of the case or any issue in the case aside from the sufficiency of service of process in the prior action. In finding to the contrary, the lower court relied on its incorrect interpretation of Judge

Young's order and on Rule 41(b), SCRCP, and a United States Supreme Court opinion. (Order pp. 3-4). Its reliance was misplaced.

"Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997). "Res judicata or claim preclusion, however, is not always an ironclad bar to a later lawsuit." *Garris v. Governing Bd. of the State Reinsurance Facility*, 333 S.C. 432, 449, 511 S.E.2d 48, 57 (1998). "To establish *res judicata*, three elements must be shown: (1) the identities of the parties is the same as a prior litigation; (2) the subject matter is the same as the prior litigation; and (3) there was a prior adjudication of the issue by a court of competent jurisdiction." *Pye*, 325 S.C. at 432, 480 S.E.2d at 458. The parties are the same and the subject matter is the same in that both actions arise out of Tyler M.'s injuries and seek recovery for those injuries. However, the School District cannot satisfy the third element because the prior action did not adjudicate the merits of the causes of action but only adjudicated the issue of service of process. Service of process may be fixed within the applicable statute of limitations, which does not expire until one year after Tyler M. reaches the age of majority. S.C. Code Ann. § 15-78-110; S.C. Code Ann. § 15-3-40. The lower court incorrectly found "the statute of limitations issue present in both actions was adjudicated on its merits in" the prior action. (Order p. 4). As explained above, the statute of limitations was not adjudicated in the prior action and, in this action, the School District did not even raise the statute of limitations as a defense (presumably because it cannot dispute the plain application of S.C. Code Ann. §§ 15-78-110, 15-3-40).

Relying on Rule 41(b), SCRCP, the lower court held that because Judge Young's order does not say the action is dismissed "without prejudice" than it was dismissed with prejudice as to

the merits. (Order pp. 2-3). This is incorrect. Rule 41(b), SCRCP, states in part "Unless the court in its order for dismissal ***otherwise specifies***, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for failure to join a party under Rule 19, operates as an adjudication upon the merits." (emphasis added). It does not require the Court to write "without prejudice" or "adjudication upon the merits". In his order, Judge Young plainly stated that the basis of dismissal is the finding that "service upon the District was not proper", and "As such, the Plaintiff has failed to properly serve the Summons and Complaint upon the District, and therefore, service has not been affected upon the District." ((Exh. A to Def. Reply, Order p. 5). "Courts generally allow the plaintiff to re-serve the defendant properly without dismissing the action or will dismiss the case without prejudice to bring it again with proper service, so parties may consider the costs and delays to both sides when deciding whether to challenge service if the defect is curable." Moise, Scott, SOUTH CAROLINA LAWYER, July 2016, *Get Out of My Life! Part Two*.

The lower court also incorrectly relied on *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995). (Order pp. 2-3). The court cited to *Plaut* for the proposition that "the rules of finality treat a dismissal on statute of limitations grounds as a judgment on the merits no different than a failure to prove liability or failure to prosecute." *Id.* at p. 2 (citing *Plaut*, 514 U.S. at 228). The res judicata issue in this case has nothing to do with the "finality" of a judgment. The dispute is whether there was a prior adjudication of the issue in the prior action, *i.e.*, whether there was an adjudication on the merits. *Plaut* addressed a statute requiring federal courts to reopen final judgments in private civil actions—an issue that has nothing to do with this case. 514 U.S. at 213. The "rules of finality" are different and serve a different purpose from the doctrines of res judicata and collateral estoppel. *Id.* at 228.

"The primary purposes of the [res judicata] doctrine, commonly known today as claim preclusion, are to bring an end to litigation and prevent a defendant from being forced to defend the same action repeatedly." *Garris*, 333 S.C. at 449, 511 S.E.2d at 57. Neither of those purposes are applicable to this action. The School District has not yet defended this action, and there is no need to end litigation prior to a decision on the merits when there is time remaining in the statute of limitations. This Court should reverse the lower court, hold res judicata inapplicable, and allow this action to proceed.

III. THE LOWER COURT ERRED IN FINDING THE MATTER BARRED BY COLLATERAL ESTOPPEL

The lower court erred in finding this action barred by collateral estoppel because the issue of the merits of the causes of action were not actually litigated in, directly determined in, or necessary to the prior dismissal for insufficient service. As discussed above, Judge Young ruled only on service of process and did not dismiss the action with prejudice.

"Collateral estoppel occurs when a party in a second action seeks to preclude a party from relitigating an issue which was decided in a previous action." *Catawba Indian Nation v. State*, 407 S.C. 526, 536, 756 S.E.2d 900, 906 (2014) (internal quotation marks omitted). "[T]he party asserting collateral estoppel must demonstrate that the issue in the present lawsuit was: (1) actually litigated in the prior action; (2) directly determined in the prior action; and (3) necessary to support the prior judgment." *Id.* at 536-37, 756 S.E.2d at 906 (internal quotation marks omitted).

It is undisputed that the merits of the causes of action were not litigated in the prior action. The lower court avoids this inescapable conclusion by focusing on whether the issue of the statute of limitations was litigated in the prior action. (Order p. 4). As noted above, the School District did not even assert a statute of limitations defense in this action. (Ans.). The lower Court focuses on the wrong issue. Even if the statute of limitations is the correct issue for the collateral estoppel

analysis, the lower court incorrectly found it was litigated in the prior action based on a minority tolling argument in Mazyck's memorandum to Judge Young. (Order pp. 4-5). That a party raised an issue in a case does not mean that it was "***actually*** litigated", "***directly*** determined" or "necessary to" the decision. *Catawba Indian Nation*, 407 S.C. at 536-37, 756 S.E.2d at 906 (emphasis added). Rather, "'the estoppel of a judgment does not extend to matters not expressly adjudicated, and which can be inferred only by argument or construction from the judgment, except where they are necessary and inevitable inferences in the sense that the judgment could not have been rendered as it was without deciding such points.'" *Jones v. City of Folly Beach*, 326 S.C. 360, 367, 483 S.E.2d 770, 773-74 (Ct. App. 1997) (quoting *Carman v. S.C. Alcoholic Beverage Control Comm'n*, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994)). Judge Young's dismissal on insufficient service of process could have been (and was) "rendered as it was without deciding" the statute of limitations. *Jones*, 326 S.C. at 367, 48 S.E.2d at 774. Therefore, that issue is not barred by collateral estoppel.

IV. THE COURT SHOULD REVERSE TO GUARD THE RIGHTS OF MINOR TYLER M.

As an alternative to the arguments above, the Court to should reverse by exercising its discretion to avoid application of the procedural rules of res judicata and collateral estoppel that are subservient to the duty to guard the rights of minor Tyler M. *See Joiner v. Rivas*, 342 S.C. 102, 107, 536 S.E.2d 372, 374 (2000) ("The Court of Appeals properly concluded procedural rules are subservient to the court's duty to zealously guard the rights of minors."). There is no dispute that the applicable statute of limitations in this case is one year after Tyler M. reaches the age of majority. "***Except as provided for in Section 15-3-40***, any action brought pursuant to this [Tort Claims Act] chapter is forever barred unless an action is commenced within two years after the

date the loss was or should have been discovered . . . ." S.C. Code Ann. § 15-78-110 (emphasis added). Section 15-3-40 states:

> If a person entitled to bring . . . an action under Chapter 78 of this title, . . . is at the time the cause of action accrued . . .
>
> (1) within the age of eighteen years . . .
>
> the time of the disability is not a part of the time limited for the commencement of the action, except that the period within which the action must be brought cannot be extended:
>
> (a) more than five years by any such disability, except infancy; nor
>
> (b) in any case longer than one year after the disability ceases.

The causes of action in this case accrued on April 22, 2015, while Tyler M. was under the age of fourteen-years-old. (Cmplt. ¶¶ 1, 4-10). The statute of limitations does not expire until one year after his eighteenth birthday. This action was filed on January 9, 2019, prior to his eighteenth birthday and well within the applicable statute of limitations.

As Tyler M. is a minor, the Court should zealously protect his rights to seek redress for his injuries and allow this case to proceed as filed within the statute of limitations notwithstanding any (disputed) application of the doctrines of res judicata and collateral estoppel.

CONCLUSION

For the reasons stated above and appearing in the Record, the Court should reverse the lower court and remand to allow this action to proceed as timely filed and pled.

December 9, 2019

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THE STATE OF SOUTH CAROLINA
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APPEAL FROM CHARLESTON COUNTY
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The Honorable D. Craig Brown

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v.

Charleston County School District..Respondent.

PROOF OF SERVICE

The undersigned certifies that a copy of *Initial Brief of Appellant* and *Appellant's Designation of Matter for the Record on Appeal* has been served upon counsel for Respondent, by mailing a copy of the same, postage prepaid, in the United States Mail, addressed as shown below this 9th day of December, 2019.

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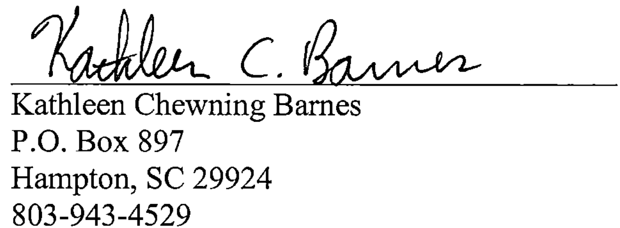

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December 9, 2019

The Honorable Jenny Abbott Kitchings
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Via U.S. Mail

Re: *Dana Mazyck, Guardian ad Litem for Tyler M., a minor child under the age of fourteen (14) v. Charleston County School District*, Appellate Case No. 2019-001235

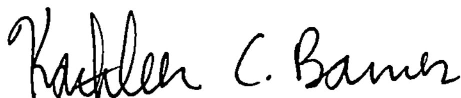
Dear Mrs. Kitchings:

Enclosed for filing please find the original and one copy of (1) *Initial Brief of Appellant*, (2) *Appellant's Designation of Matter for the Record on Appeal*, and (3) *Proof of Service*. Please file the documents and return one file-stamped copy to me in the enclosed self-addressed, stamped envelope. By copy of this letter, I am serving all counsel of record with a copy of the same.

If you have any questions, please do not hesitate to contact me. Thank you.

With kind regards, I am,

BARNES LAW FIRM, LLC



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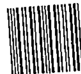

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