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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
MAR 16 2020
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable D. Craig Brown

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.

APPELLANT'S MOTION TO STRIKE THREE OF RESPONDENT'S DESIGNATIONS OF MATTER TO BE INCLUDED IN THE RECORD ON APPEAL AND TO STAY DEADLINES UNTIL THE COURT RULES ON THE MOTION

Dana Mazyck, Guardian Ad Litem for Tyler M., a Minor Child under the age of fourteen (14), ("Appellant") moves this Court for an order striking three of Respondent Charleston County School District's ("Respondent") designations of matter to be included in the record on appeal. Appellant also requests the Court stay the deadlines for filing the record on appeal and final briefs until it rules on the motion to strike. Rule 240, SCACR.

Under Rule 210(c), SCACR, "[t]he Record shall not, however, include matter which was not presented to the lower court or tribunal." The designation of matter to be included in the record on appeal "may only propose to include portions of the transcript, pleadings, orders, exhibits or other materials which may be properly included in the Record on Appeal [See Rule 210(c)]." Rule 209(b), SCACR (alteration in original).

This is an appeal from an order dismissing the action on the basis that a prior action operated as res judicata or collateral estoppel. Respondent designated the following three documents that were filed in the ***prior*** action but were not filed in, given to, or presented to the lower court in ***this*** action:

1. Summons and Complaint filed April 21, 2017 in 2017-CP-10-1970;
2. Charleston County School District's Answer and Motions to Dismiss filed May 23, 2017 in 2017-CP-10-1970;
3. Charleston County School District's Memorandum in Support of Motion to Dismiss filed April 13, 2018 in 2017-CP-10-1970

(Resp't Designation of Matter p. 2, numbers 1, 2, and 4); (Exh. 1, filings in lower court). Prior to filing this motion, Appellant asked Respondent to confirm whether these documents were presented to Judge Brown in this case and, if not, to withdraw the designation. (Exh. 2). Respondent replied only that the documents were public record of which it believes the Court may take judicial notice. *Id.* Appellant disagrees and moves the Court to strike the designations because they were not "presented to the lower court." Rule 210(c), SCACR.

The record in the prior action is not part of the record in this action. Respondent's knowledge of and recognition of this is apparent from the fact that it filed in this case pleadings from the prior action but did not choose to file the pleadings it now designates. (Exh. 3, Def. Reply Memorandum with attachments). Respondent did not deem the documents important enough to file and present to Judge Brown for his review of the issues in this case. They are not properly part of the record in this appeal under the rules and Appellant should not have to print them. All documents in the public record are not automatically available for judicial notice and inclusion as part of the record on appeal. The documents were readily available for Respondent to file in the lower court but it chose not to do so and should not now be permitted to make them part of the record on appeal. Appellant respectfully requests the Court grant the motion.

March 13, 2020

By: Kathleen C. Barnes

Kathleen Chewning Barnes, SC Bar No. 78854
Barnes Law Firm, LLC
P.O. Box 897
Hampton, SC 29924
803-943-4529

Tiffany R. Spann-Wilder, SC Bar No. 15913
Post Office Box 70488
North Charleston, SC 29415
843-266-7792
Attorneys for Appellant

EXHIBIT 1

Julie J. Armstrong
Charleston County Clerk of Court

Charleston County
Circuit Court Case Details
Public Index

Switch View

Dana Mazyck , plaintiff, et al VS Charleston County School District

Case Number:	2019CP1000113	Court Agency:	Common Pleas	Filed Date:	01/09/2019
Case Type:	Common Pleas	Case Sub Type:	Personal Injury 350	File Type:	Jury
Status:	Disposed	Assigned Judge:	Clerk Of Court C P, G S, And Family Court		
Disposition:	Ended by Non Jury	Disposition Date:	06/19/2019	Disposition Judge:	Brown, D Craig
Original Source Doc:		Original Case #:			
Judgment Number:		Court Roster:			

Case Parties | Judgments | Tax Map Information | Associated Cases | Actions | Financials

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Mazyck, Dana	ADR/Alternative Dispute Resolution (Workflow)	Action		08/07/2019-15:39	06/19/2019-15:39	
	Plaintiff's Notice of Appealing Order from Judge Brown, srv	Filing		07/26/2019-14:00		
	Order Granting CCSD's Motion to Dismiss w/ Prejudice, srv	Order		07/03/2019-16:19		
	Order-Defnts Motion to Dismiss is Granted	Order		06/19/2019-09:14		
	Plaintiff's Memo in Opposition to Motion to Dismiss, crt/srv	Filing		06/14/2019-10:42	06/19/2019-10:42	
Charleston County School District	Repy to Plff's Memo in Opposition to Motion/Dismiss, srv	Filing		06/13/2019-08:51	06/19/2019-08:51	
Spann-Wilder, Tiffany R.	6/10/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		05/20/2019-14:34	06/19/2019-14:34	
Reynolds, Lisa A.	6/10/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		05/20/2019-14:34	06/19/2019-14:34	
Drazan, Thomas Francis	6/10/2019_MOTION_Roster/Notice of Motions Roster Publication	Action		05/20/2019-14:34	06/19/2019-14:34	
Reynolds, Lisa A.	Defnt Answer & Motion/Dismiss & Crt/Srv	Motion		02/08/2019-11:10	06/14/2019-11:10	
	Affidavit Of Service & Accpt/Srv	Filing		01/14/2019-16:07	06/19/2019-16:07	
Mazyck, Dana	Order/Order Filing Fee	Filing		01/09/2019-15:43	06/19/2019-15:43	
Mazyck, Dana	Summons & Complaint	Filing		01/09/2019-15:37	06/19/2019-15:37	
Mazyck, Dana	Order Appointing Dana Mazyck as GAL	Order		01/09/2019-09:17	06/19/2019-09:17	
Mazyck, Dana	Petition For Appointment of GAL	Filing		01/09/2018-09:17	06/19/2019-09:17	

EXHIBIT 2

Kathleen Barnes

From: Kathleen Barnes
Sent: Thursday, March 12, 2020 10:42 AM
To: Lisa Reynolds; Cole Lawrimore
Cc: Tiffany R. Spann-Wilder (tiffany@spannwilderlaw.com); Katy Lawrimore
Subject: RE: Mazyck v. CCSD - Record on Appeal

Lisa,

Thank you for your response. After reading it, I still do not think the documents are properly included in the record on appeal. They may be public record, but public record documents in general are not available to be included in a record on appeal. It is limited to documents actually filed in the lower court or given to the lower court. Your email does not state that any of the three documents we referenced were filed in this action or given to the lower court. I know the complaint was referenced at the hearing on the motion and we do not take issue with any statements in your brief about it but disagree that those are documents that should be included and printed in the record on appeal when they were not even given to the lower court.

We plan to file our reply brief tomorrow morning and will file with it a motion to strike the designation of those three documents unless we hear from you that those designations are withdrawn.

Thank you,

Kathleen

From: Lisa Reynolds <lreynolds@arslawsc.com>
Sent: Thursday, March 12, 2020 10:11 AM
To: Kathleen Barnes <kbarnes@barneslawfirmsc.com>; Cole Lawrimore <clawrimore@arslawsc.com>
Cc: Tiffany R. Spann-Wilder (tiffany@spannwilderlaw.com) <tiffany@spannwilderlaw.com>; Katy Lawrimore <klawrimore@arslawsc.com>
Subject: RE: Mazyck v. CCSD - Record on Appeal

Dear Kathleen:

I hope that this email finds you doing well. I have taken a look at the initial briefs and designation of matters to be included on the record on appeal in this matter. I believe that these are matters of public record relied upon and cited by both parties and that the court can take judicial notice of them. They are certainly something that the lower court was familiar and relied upon with when he issued his order.

Thank you in advance for your attention to this matter. With kindest regards, I am

Sincerely,
Lisa Reynolds

From: Kathleen Barnes <kbarnes@barneslawfirmsc.com>
Sent: Monday, March 9, 2020 1:47 PM
To: Lisa Reynolds <lreynolds@arslawsc.com>; Cole Lawrimore <clawrimore@arslawsc.com>
Cc: Tiffany R. Spann-Wilder (tiffany@spannwilderlaw.com) <tiffany@spannwilderlaw.com>
Subject: Mazyck v. CCSD - Record on Appeal

Lisa and Cole,

I hope you are doing well. I received your Initial Brief and Designation of Matter for the Record on Appeal. There are three items in your designation of matter that I have a question about. They are numbers (1) Summons and Complaint filed April 21, 2017 in 2017 action, (2) CCSD's Answer and Motions to Dismiss filed May 23, 2017 in 2017 action, and (4) CCSD's memo in support of motion to dismiss filed April 13, 2018 in 2017 action.

I do not see that any of these were filed with or given to the Court in the 2019 action that is on appeal. Under Rule 210(c), SCACR, the record on appeal "shall not, however, include matter which was not presented to the lower court or tribunal." Please let me know if I missed that those documents were presented to Judge Brown and, if they were not, if you agree to amend your designation of matter to remove them.

Thank you,

Kathleen

BARNES
LAW FIRM | LLC

Kathleen Chewning Barnes | Barnes Law Firm, LLC
Post Office Box 897 | 13 Mulberry Street East | Hampton, SC 29924
Phone: 803-943-4529 | Email: kbarnes@barneslawfirmsc.com

EXHIBIT 3

2019-CP-10-113

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF CHARLESTON	)	CASE NO: 2019-CP-10-0113
	)	
Dana Mazyck, Guardian Ad Litem For Tyler M., A Minor Child Under The Age Of (14),	)	
	)	**DEFENDANT'S REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION TO DISMISS**
Plaintiffs,	)	
vs.	)	
	)	
Charleston County School District,	)	
	)	
Defendant,	)	

FILED
2019 JUN 13 PM 3:07
JULIE J. ARMSTRONG
CLERK OF COURT
BY

TO: PLAINTIFFS AND THEIR COUNSEL TIFFANY R. SPANN-WILDER, ESQUIRE

COMES NOW the Defendant, Charleston County School District (hereinafter "District") and respectfully submits their Reply To Plaintiff's Memorandum In Opposition Of Defendant's Motion To Dismiss on the grounds of *Res* Judicata, Collateral Estoppel, and Rule 12(b)(5) and (6), SCRCP.

BACKGROUND FACTS

Plaintiff brought this action under the South Carolina Tort Claims Act for damages allegedly sustained as a result of a fall which occurred on April 22, 2015 on the playground at Jennie Moore Elementary School, Whipple Road, Charleston County, South Carolina. Plaintiff alleges that the minor child, Tyler M., either fell on or off the playground equipment.

PROCEDURAL HISTORY

Plaintiff's Complaint in the instant matter, captioned above, is a nearly-verbatim replica of Plaintiff's Complaint in C/A 2017-CP-10-1970 (hereinafter Mazyck I). District filed a Motion to Dismiss Mazyck I on the grounds that Plaintiff failed to properly file and serve Mazyck I within the applicable statute of limitations. Judge Young dismissed Mazyck I for Plaintiff's

failure to properly file and serve the Summons and Complaint in Mazyck I within the Statute of Limitations set forth in the South Carolina Tort Claims in S.C. Code Ann. § 17-18-10, *et. seq.* by virtue of the Order Granting District's Motion to Dismiss (attached hereto as "Exhibit A"). Plaintiff neither moved the Court to alter or amend this Order, nor appealed from the same.

Plaintiff filed the instant matter on January 9, 2019, nearly six months after the dismissal of Mazyck I. The instant matter involves identical parties and nearly-verbatim[1] allegations as set forth above. On February 8, 2019, District filed its Answer and Motions to Dismiss the instant matter on the grounds set forth above.

APPLICABLE LAW

Under the doctrine of res judicata, "[a] litigant is barred from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 34, 512 S.E.2d 106, 109 (1999). To establish res judicata, the defendant must prove the following three elements: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. Riedman Corp. v. Greenville Steel Structures, Inc., 308 S.C. 467, 419 S.E.2d 217 (1992). Res judicata precludes parties from subsequently relitigating issues actually litigated and those that might have been litigated in a prior action. S.C. Dep't of Soc. Servs. v. Basnight, 346 S.C. 241, 249, 551 S.E.2d 274, 278 (Ct. App. 2001).

Collateral estoppel or issue preclusion prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action. Shelton v. Oscar Mayer Foods Corp., 325 S.C. 248, 251, 481 S.E.2d 706, 707 (1997).

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[1] The lone distinction is the use of T.M. throughout in the instant matter versus use of Tyler M. throughout in C/A No. 2017-CP-10-1970 as the identifier for the minor child.

Per the United States Supreme Court, **the rules of finality**, both statutory and judge made, **treat a dismissal on statute-of-limitations grounds** the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: **as a judgment on the merits**. Plaut v. Spendthrift Farm, 514 U.S. 211, 228, 115 S. Ct. 1447, 1457 (1995)(emphasis added). It is also of significance that Rule 41, SCRCP "is the same as the Federal Rule...." See Note to Rule 41, SCRCP. Further, "[A] dismissal under [Rule 41(b), SCRCP] 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." Rule 41(b), SCRCP.

It is appropriate to dismiss untimely claims under Rule 12(b)(6) when they are brought after the expiration of the statute of limitations. See Clearwater Trust v. Bunting, 367 S.C. 340, 353, 626 S.E.2d 334, 340 (2006). Also, Rule 12(b)(5) is the proper vehicle for challenging both "the mode of delivery or the *lack of delivery* of the summons and complaint." Unisun Ins. v. Hawkins, 342 S.C. 537, 543, 537 S.E.2d 559, 562 (Ct. App. 2000).

ARGUMENT

I. THIS ACTION MUST BE DISMISSED UNDER THE DOCTRINE OF *RES JUDICATA*.

As above, in order to prevail on *res judicata*, the party asserting the defense must prove (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit.

There is no dispute that the parties to this action are the same parties to Mazyck I. There is, likewise, no dispute that the subject matter in this case is identical to that of Mazyck I. The parties disagree as to the third element; Plaintiff asserts that the District is not "able to show that there was an adjudication on the merits," of Mazyck I.

As above, Judge Young dismissed Mazyck I based on Plaintiff's failure to institute Mazyck I within the statute of limitations set forth in the South Carolina Tort Claims Act. Judge Young noted on page 2 of his Order that:

> "Plaintiff had two (2) years, until April 22, 2017, in which to commence this action.... The Plaintiff filed a Summons and Complaint [in Mazyck I] against the Defendant in this matter on or about April 21, 2017. As such, and in accordance with the S.C. Code Ann. § 15-3-20, the Plaintiff had until August 19, 2017 to properly serve the Defendant in this matter so as to be determined to have commenced this action."

As Plaintiff failed to institute Mazyck I within the statute of limitations, Judge Young granted the District's Motion to Dismiss pursuant to Rules 12(b)(1), (4), and (5) as well as the South Carolina Tort Claims Act. Judge Young ordered the dismissal of Mazyck I in spite of Plaintiff's argument contained in its April 18, 2018 Memorandum in Opposition of Defendant's Motion to Dismiss (attached hereto as "Exhibit B") that:

> "the Tort Claims Act's limitations have exceptions, for person [sic] laboring under a disability and the injured party here Tyler M. is a minor, currently age 14 and so technically this action could have brought [sic] within two (2) years past his 18th birthday. There is no statute of limitations issue in this claim." (Plaintiff's Memorandum at page 5).

As above, the United States Supreme Court has ruled that a dismissal based upon statute of limitations grounds is a judgment on the merits. Application of Rule 41(b), SCRCP, which is "the same as the Federal Rule," provides that all orders of dismissal "operate as an adjudication on the merits" other than those which: 1) say otherwise; or 2) are based upon lack of jurisdiction, improper venue, or failure to join a party under Rule 19. There is no inference, much less a direct statement, that Judge Young's order dismissing Mazyck I was anything other than an adjudication on the merits. Further, on its face, the Order was based upon and made reference to Plaintiff's failure to commence Mazyck I within the statute of limitations.

In light of these things, the District is entitled to the dismissal of this action under the doctrine of *res judicata*. The common identity of the parties to this action, the subject matter hereof, and those of Mazyck I is not the subject of legitimate debate. Further, in the context of the identical Rule 41, Fed. R. Civ. P., the United States Supreme Court has ruled that a dismissal based upon the statute of limitations is a judgment on the merits. As such, the instant matter must be dismissed.

II. THIS ACTION MUST BE DISMISSED UNDER THE COLLATERAL ESTOPPEL DOCTRINE.

As above, collateral estoppel prevents a party from relitigating in a subsequent suit an issue actually and necessarily litigated and determined in a prior action. The 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. Carolina Renewal, Inc. v. S.C. DOT, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009). "Collateral estoppel applies to specific issues, regardless of whether the claims in the first and subsequent suits are the same." Judy v. Judy, 383 S.C. 1, 7, 677 S.E.2d 213, 217 (Ct. App. 2009).

As above, a dismissal based upon the statute of limitations is a judgment on the merits. As shown in "Exhibit B," the issue of the statute of limitations was both raised by Plaintiff and ruled upon by the Court in Mazyck I, thus satisfying the first element of collateral estoppel. As to the requirement that an issue be directly determined in the prior action, Judge Young's reference to the statute of limitations in the Order dismissing Mazyck I is *prima facie* evidence that the issue has been directly determined. Finally, the reliance upon the expiration of the statute of limitations in the dismissal of Mazyck I indicates the extent to which the issue supported Judge Young's conclusion.

Plaintiff takes the position that "Collateral estoppel prevents litigation of matters which have been taken to valid final judgment. This is simply not the case here. A dismissal based on service of process without prejudice does not equate to an entire [sic] having been litigated." (Plaintiff's Memorandum at pages 4 – 5). This argument must fail in light of the Supreme Court precedent, above. Additionally, an application of Rule 41, SCRCP to the Order dismissing Mazyck I can only yield the conclusion that said dismissal was "an adjudication upon the merits."

CONCLUSION

It is clear that Mazyck I was dismissed based upon Plaintiffs failure to commence the action within the Statute of Limitations. The Order of Dismissal in Mazyck I was both prejudicial and an adjudication upon the merits. As such, this action must be dismissed under the doctrines of *res judicata* and collateral estoppel.

ANDERSON REYNOLDS & STEPHENS, LLC

Lisa Reynolds
W. Coleman Lawrimore
37 ½ Broad Street
P.O. Box 87
Charleston, SC 29401
(843) 723-0185 –phone
(843) 405-0313 –fax
lreynolds@arslawsc.com
clawrimore@arslawsc.com

June 13, 2019
Charleston, South Carolina

2017 CP 10 1970

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON	)	CASE NO: 217-CP-10-1970
Dana Mazyck, Guardian Ad Litem For Tyler M., A Minor Child Under The Age Of (14),	)	**ORDER GRANTING CHARLESTON COUNTY SCHOOL DISTRICT'S MOTION TO DISMISS**
Plaintiffs,	)	
vs.	)	
Charleston County School District,	)	
Defendant.	)	

FILED
2018 JUN -1 PM 1:06
JULIE J. ARMSTRONG
CLERK OF COURT

This matter came before the Court on Wednesday, April 18, 2018 pursuant to Charleston County School District's (hereinafter "District") Motion to Dismiss for insufficiency of process and insufficiency of service of process within the statute of limitations period of two years as set forth in S.C.R.C.P. 12(b)(1), (4) and (5) and S.C. Code Annotated §15-78-10, et. seq. (South Carolina Tort Claims Act) for Plaintiffs' failure to properly file and serve their Complaint against the Charleston County School District.

Background Facts

Plaintiff brought this action under the South Carolina Tort Claims Act for damages allegedly sustained as a result of a fall which occurred on April 22, 2015 on the playground at Jennie Moore Elementary School, Whipple Road, Charleston County, South Carolina. Plaintiffs allege that on April 22, 2015, the minor child was playing with other children when "through this interaction fell on or off the playground equipment, hitting his head" and suffering injuries.

Law/Analysis

The South Carolina Tort Claims Act is the exclusive remedy for claims and actions brought against governmental entities. S.C. Code Ann. §§ 15-38-65, 15-78-10, 15-78-40. The South Carolina Tort Claims Act provides a two year statute of limitations period for actions

against a governmental entity unless the Plaintiff files a verified claim within the first year following the alleged incident thereby extending the statute of limitations an additional year. In this matter, the Plaintiff did not file a verified claim and therefore, in accordance with S.C. Code Ann. § 15-78-110, the Plaintiff had two (2) years, until April 22, 2017, in which to commence this action.

S.C. Code Ann. § 15-3-20 states in relevant part, "Any civil action is commenced when the Summons and Complaint are filed with the Clerk of Court if actual service is accomplished within one hundred and twenty (120) days after filing." The Plaintiff filed a Summons and Complaint against the Defendant in this matter on or about April 21, 2017. As such, and in accordance with the S.C. Code Ann. § 15-3-20, the Plaintiff had until August 19, 2017 to properly serve the Defendant in this matter so as to be determined to have commenced this action.

The Charleston County School District is a governmental subdivision of the State of South Carolina and therefore the requirements for proper service of a Summons and Complaint upon the District is contained in S.C.R.C.P. 4(d)(6). S.C.R.C.P. 4(d)(6) requires that the Summons and Complaint shall be served together and when being served upon a governmental subdivision that service shall be made "...by delivering a copy of the summons and complaint to the chief executive officer or clerk thereof, or by serving the summons and complaint in the manner prescribed by statute for the service of summons and complaint or any like process upon any such defendant." In the case at bar there is no relevant statute which prescribes process for "any like . . . defendant."

Here, Plaintiffs mailed a copy of the Summons and Complaint via certified mail to Dr. Gerrita Postlewait, Superintendent. The District asserts that pursuant to Rule 4(d)(6) of the South

Carolina Rules of Civil Procedure the Plaintiff was required to serve the Summons and Complaint upon the District by personally serving the chief effective officer thereof. The Plaintiff argues that service by certified mail is acceptable upon the District. The Court agrees with District.

It is noted that Rule 4(d)(8) of the South Carolina Rule of Civil Procedure only allows service by certified mail, restricted delivery upon defendants who are found to be of any class referred to in paragraph (1) or (3) of Rule 4(d). This restriction provides for such service only upon individuals, partnerships, or corporations. The District is not found within any class referred to in paragraphs (1) or (3) of S.C. R. Civ. P. 4(d). Therefore, Rule 4(d)(8) is not applicable to the District. The acceptable methods of service upon the District must be determined by a reading of Rule 4(d)(6) of the South Carolina Rules of Civil Procedure. The Charleston County School District must be served in accordance with Rule 4(d)(6) requiring the "delivering a copy of the summons and complaint to the chief executive officer or clerk thereof." While Rule 4(d)(6) does not define delivery the section utilizes the same language as Rule 4(d)(5) which draws a clear distinction between the requirement to effectuate service by both "sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia" and "delivering a copy of the summons and complaint to such officer or agency." This distinction in Rule 4(d)(5) leads to the determination that "delivering" is tantamount to personal service and certified mail does not suffice to effectuate service against the District.

While this Court finds that personal service is required, in further analyzing Plaintiff's argument that the District was amenable to service of process of certified mail, such service was not obtained in this matter. The purpose and intent of the South Carolina Rules of Civil

Procedure regarding service of process are two fold and require substantial compliance with the Rules to put the District on notice and to confer personal jurisdiction. Richard v. P.V., 383 S.C. 610 (2009); McClurg v. Deaton, 380 S.C. 563 (Ct. App. 2009); BB&T v. Taylor, 369 S.C. 548 (2006); Moore v. Simpson, 322 S.C. 518, 473 S.E.2d 64 (Ct. App. 1996); Roche v. Young Bros., 318 S.C. 207, 455 S.E.2d 897 (1995). When the Plaintiff shows compliance with the rules there is a presumption of proper service and the burden shifts to the Defendant to demonstrate that the service of process was signed by an unauthorized person. Roberson v. Southern Finance of SC, Inc., 365 S.C. 6, 615 S.E.2d 112 (2005); Roche v. Young Bros., 318 S.C. 207, 455 S.E.2d 897 (1995). "When service of process is accomplished by certified mail under Rule 4(d)(8), the defendant and not the plaintiff, must prove the receipt was signed by an authorized person." Roche v. Young Bros., 318 S.C. 207, 455 S.E.2d 897 (1995). The Plaintiff has not shown compliance with the rules and is not entitled to the presumption; however, even giving the Plaintiff the benefit of presumption still finds the Plaintiff's attempts at service improper.

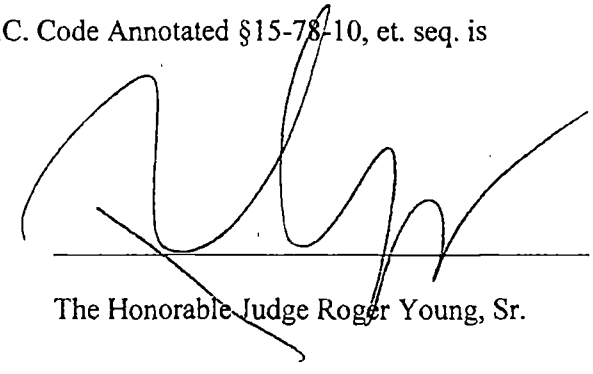
The return receipt for the mailing was signed by E. Rhoades. Testimony and evidence was offered that "E. Rhoades" is Eugene Rhoades, an employee of Ricoh. Mr. Rhoades is not an employee of Charleston County School District and is not authorized to accept service on behalf of the District, nor is of the character of a clerk for the executive officer described in South Carolina Rule of Civil Procedure 4(d)(6). The Plaintiff alleges that since E. Rhoades signed for the certified mail, apparently Mr. Rhodes was allowed to accept certified mail and therefore to accept service. The Court finds this argument to be without merit. Plaintiff fails to recognize the distinction between the authority to sign for certified mail and the authority to sign for service of process. The Plaintiff presented no evidence that E. Rhoades was allowed to accept service on behalf of the District and provided no evidence that the District manifested E. Rhoades was its

agent or apparent agent in any way. Additionally, apparent authority must be relied upon at the time service is made. The Plaintiff did not direct this mailing to E. Rhoades and was not aware of E Rhoades until the green card was returned.

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, ADJUGED, AND DECREEED 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**.



The Honorable Judge Roger Young, Sr.

6/1, 2018
Charleston, South Carolina

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	
	CASE NO.: 2017-CP-10-1970
Dana Mazyck, Guardian ad Litem for Tyler M., a minor child under the age of fourteen (14),	
Plaintiff,	**PLAINTIFF'S MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION TO DISMISS**
vs.	
Charleston County School District, Defendant.	

TO: THIS HONORABLE COURT AND LISA REYNOLDS, ESQ. AND THOMAS F. DRAZAN, ESQ., ATTORNEYS FOR THE DEFENDANTS:

MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION TO DISMISS

This matter arises from an incident which Plaintiff Tyler M was injured at Jennie Moore Elementary School on April 22, 2015 at approximately 2:15 p.m. Plaintiff filed a complaint on April 21, 2017 alleging negligence of the abovementioned Defendant. Defendant filed an answer on May 23, 2017 asking the Court to Dismiss the Complaint pursuant to South Carolina Rules of Civil Procedure 12(b)(1), (4) and (5) alleging improper service on the Defendant as set forth in S.C.R.C.P 4. Plaintiff submits this memorandum in opposition of Defendant's Motion to Dismiss and submits that Defendant's Motion to Dismiss should be denied.

RELEVANT FACTS

On or about April 22, 2015, the minor child was properly enrolled as a fourth (4^{th}) grader at Jennie Moore Elementary School when it was housed at 942 Whipple Road, Mt. Pleasant, SC, County of Charleston and was left at the school by his mother for the instructional day under the direction of his teacher, Ms. Judi Popowich. At about 2:15 PM on April 22, 2015, Plaintiff

TYLER M. was with his class on the playground under the care and supervision of Ms. Judi Popowich and while playing with the other children through this interaction fell on or off the playground equipment, hitting his head and rendering him unconscious for some period of time. It is Plaintiff's position that the Defendant failed to provide an adequate and proper fall zone (area under and around the playground equipment where a child might fall), as such a fall zone would have protected and cushioned several feet from the equipment on all sides. During Plaintiff **TYLER M.'s** period of unconsciousness, unaware of his injury and need for assistance, Ms. Judi Popowich took the other students in her class from the playground and returned to her classroom, leaving Plaintiff alone and unattended on the playground. Another class entered the playground and Plaintiff **TYLER M.** was discovered on the playground and taken to the school nurse's office. Plaintiff **DANA MAZYCK** was called to the school and when she arrived to pick up Plaintiff **TYLER M.,** the child was visibly shaken and unable to recognize her as his mother.

LAW/ANALYSIS

I. Plaintiff's Summons and Complaint were properly served pursuant to Rule 4 of the South Carolina Rules of Civil Procedure.

Defendant Charleston County School District (CCSD) alleges that Plaintiff failed to properly file and serve Defendant as set forth in S.C.R.C.P 4 and that this Court should dismiss the complaint pursuant to Rule 12(b)(1), (4) and (5) of the South Carolina Rules of Civil Procedure. Rule 4(d)(6) of the S.C.R.C.P proscribes the procedure for perfecting service upon a governmental entity. Pursuant to this rule, service is made "Upon a municipal corporation, county or other governmental or political subdivision subject to suit, by delivering a copy of the summons and complaint to the chief executive officer or clerk thereof, or by serving the

summons and complaint in the manner prescribed by statute for the service of summons and complaint or any like process upon any such defendant." S.C.R.C.P 4(d)(6).

Further, Rule 4(d)(6) is proper because per S.C. Code Ann. § 15-78-30 of the South Carolina Tort Claims Act, subsection h states that "Political subdivision" means the counties, municipalities, school districts, regional transportation authority, and special purpose districts of the State and any agency, governmental health care facility, department, or subdivision thereof. CCSD is a school district which falls under the definition "political subdivision". In an effort to strictly comply with Rule 4, Plaintiff served by certified mail and restricted delivery, a copy of the summons and complaint on the Superintendent of CCSD on April 21, 2017. The same was signed for by E. Rhodes on April 24, 2017. (See Exhibit A). Defendant argues that the signature listed as "E. Rhodes" is a Eugene Rhoades (the full name is not disclosed on the card and the last name does not contain an "a") and is not and never has been employee of CCSD. They further state that "E. Rhodes a/k/a E. Rhoades" is an employee of Ricoh and not authorized to accept service on behalf of the District.

The certified, return-receipt mailing was sent to Dr. Gerrita Postlewait, Superintendent of CCSD at 75 Calhoun Street, Charleston, SC 29401. Not only was this mailing certified but it was also sent "restricted delivery".(Exhibit A). Plaintiff had no reason to know that the person who signed a certified mail return receipt was not an employee of CCSD and therefore could not act as an agent of the Superintendent, for whom delivery was restricted to. In accepting Plaintiff's Summons and Complaint on behalf of the Superintendent, "E. Rhodes a/k/a E. Rhoades" affirmatively represented that he was an agent of the same. It is peculiar that the Defendant asserts that "E. Rhodes a/k/a E. Rhoades" is not an employee of CCSD, and are able to identify him fully by name and note his actual employer. By way of personal experience at the District

Office, the Superintendent and District Staff are behind a locked door and one must be granted access after being admitted into the area. In order for "E. Rhodes a/k/a E. Rhoades" to have signed for this mailing he would have to be behind these secured doors. By virtue of signing the return receipt for the Superintendent, "E. Rhodes a/k/a E. Rhoades" demonstrated implied authority to accept service on behalf of the School District and Plaintiff relied upon this authority. Even other CCSD employees who do not work at the District Office are not permitted to go into the secured area without establishing their destination within the building so it is highly improbable that a postal worker was given access to someone not permitted to receive mail on behalf of the Superintendent. Plaintiff would have no way of knowing that the Defendant would have arbitrary persons in the secure access areas singing for documents and yet still having access to the proper people to provide the document such that Defendants were able to respond to the same. The United States Postal Service procedures allow for someone other than the addressee to sign for certified mail, even where the same is marked "restricted delivery" if the signatory is an agent of the addressee. (See Exhibit B). It seems highly unlikely that a postal carrier would have just allowed an arbitrary person passing along the corridors or the District office to sign for mail, especially a piece classified for "restricted delivery". The Superintendent serves as the chief executive officer for CCSD and as such, service was proper.

II. Plaintiff's Summons and Complaint were properly filed and served within the statute of limitations period as set forth in S.C.R.C.P. 12(b)(1), (4) and (5) and S.C. Code Ann. § 15-78-110 of the South Carolina Tort Claims Act.

Defendant alleges that Plaintiff did not properly serve the Defendant within the statute of limitations period as set forth in S.C.R.C.P 12(b)(1), (4) and (5) and S.C. Code Ann. § 15-78-110 of the South Carolina Tort Claims Act. The Plaintiff properly served the Defendant within the

statute of limitations period. Generally, personal injury claims shall be filed within three (3) years of the date of loss. However, the Tort Claims Act states that Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is "commenced" within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered. S.C. Code Ann. § 15-78-110. However, the act itself does not define "commenced." Therefore, since there is no special statutory definition, the term "commenced" is governed by the Rules of Civil Procedure. S.C.R.C.P 3(a) provides that "A civil action is commenced when the summons and complaint are filed with the clerk of court: (1) not served within the statute of limitations in any manner prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days of filing."

The injury or date of loss in this case was April 22, 2015. The summons and complaint were filed on April 21, 2017 which is within the statute, thus giving Plaintiff 120 days to serve the same. Service was accepted and signed for on April 24, 2017, three days after filing within the one hundred and twenty day window. With the summons and complaint being served within one hundred and twenty days of filing, the action was "commenced" on April 21, 2017, when it was filed. Additionally, the Tort Claims Act's limitations have exceptions, for person laboring under a disability and the injured party here Tyler M. is a minor, currently age 14 and so technically this action could have brought within two (2) years past his 18th birthday. There is no statute of limitation issue in this claim. Therefore, Defendant's Motion to Dismiss pursuant to the statute of limitations should be denied.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable D. Craig Brown

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.

PROOF OF SERVICE

The undersigned certifies that a copy of *Initial Reply Brief of Appellant* and *Appellant's Motion to Strike Three of Respondent's Designations of Matter to be Included in the Record on Appeal and to Stay Deadlines until the Court Rules on the Motion* have 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 13th day of March, 2020.

Lisa Reynolds
Thomas F. Drazan
ANDERSON REYNOLDS & STEPHENS, LLC
37 ½ Broad Street
P.O. Box 87
Charleston, SC 29401

March 13, 2020

Kathleen C. Barnes

Kathleen Chewning Barnes
P.O. Box 897
Hampton, SC 29924

B A R N E S

LAW FIRM | LLC

Kathleen C. Barnes
Admitted: Georgia | South Carolina

RECEIVED
MAR 16 2020
SC Court of Appeals

March 13, 2020

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
Columbia, SC 29211

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 Reply Brief of Appellant*, (2) *Appellant's Motion to Strike Three of Respondent's Designations of Matter to be Included in the Record on Appeal and to Stay Deadlines until the Court Rules on the Motion* and (3) *Proof of Service*. Also enclosed is a check for the motion filing fee. 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

Kathleen C. Barnes

Kathleen C. Barnes

cc: Lisa Reynolds
Thomas F. Drazan

BARNES
LAW FIRM | LLC
P.O. Box 897 | 13 Mulberry Street East
Hampton, SC 29924

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211