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.

FINAL REPLY BRIEF OF APPELLANT

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Appellant Mazyck submits this Reply to Respondent the School District's brief. Mazyck incorporates the arguments made in her initial Brief and responds here to only a few specific arguments made by the School District.

ARGUMENT

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

The main issue before the Court is the interpretation of Judge Young's order dismissing the 2017 action. Judge Young dismissed the case because he found Mazyck did not properly serve the School District pursuant to Rule 4, SCRCP, and not because he found Mazyck served the complaint outside of the statute of limitations. (Order p. 5). This is true regardless of the references in the order to a statute of limitations.

The School District accuses Mazyck of inserting provisions of the South Carolina Tort Claims Act into Judge Young's order that are not mentioned. (Br. of Resp't p. 2). The final sentence of Judge Young's order states it is granting the 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.***" (R. p. 9) (emphasis added). The use of "et seq." indicates citation to the entire Tort Claims Act and necessarily includes 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. Mazyck does not insert provisions into the order but, rather, interprets the order as written. Regardless, the School District does not argue that the tolling provision does not apply to Tyler M.

The School District argues the law of the case doctrine applies to Judge Young's order because Mazyck did not appeal it. (Br. of Resp't p. 4). This is incorrect. Mazyck did not appeal

Judge Young's order because there was plenty of time left in the applicable statute of limitations to re-file and properly serve the School District. (R. pp. 76-77). "[T]his court has refused to hold parties bound by language in a lower court order that we found was not necessary to the decision of the issues presented." *White's Mill Colony, Inc. v. Williams*, 363 S.C. 117, 123 n.1, 609 S.E.2d 811, 814 n.1 (Ct. App. 2005) (citing *Weil v. Weil*, 299 S.C. 84, 89, 382 S.E.2d 471, 473 (Ct. App. 1989) (refusing to apply the "doctrine of the law of the case" to language found to be "mere dicta, an expression or statement by the court on a matter not necessarily involved in the case nor necessary to a decision thereof")). The statute of limitations references are not necessary to the decision that certified mailed signed for by the mail room clerk is insufficient service of process. The law of the case doctrine is not applicable.

Finally, in the event the Court finds any ambiguity in Judge Young's order, it must be construed in a light most favorable to Mazyck on a motion to dismiss. *Brazell v. Windsor*, 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009). For these reasons and those stated in Mazyck's initial Brief, the Court should find the lower court misinterpreted Judge Young's order and remand for the case to proceed against the School District as pled.

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

The School District's res judicata argument is based on its incorrect interpretation of Judge Young's order as dismissing the prior action based on the statute of limitations. (Br. of Resp't pp. 6-7). The order of dismissal is based on insufficiency of service of process and not on the statute of limitations. If this Court finds the lower court incorrectly interpreted Judge Young's order, it is dispositive of the res judicata issue.

The School District cites numerous sources for the argument that Rule 41(b), SCRCP, applies to a ruling on the statute of limitations, which is not applicable here. Regardless, the School

District fails to respond to Mazyck's argument that Rule 41(b) does not require a judge to write "without prejudice" or "adjudication upon the merits." (Br. of App. p. 9). Judge Young dismissed the prior action because "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." (R. p. 49). He signed the order with knowledge that "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 order did not dismiss the case with prejudice. This Court should reverse the lower court, hold res judicata inapplicable, and allow the action to proceed.

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

The School District's collateral estoppel argument is based on its incorrect interpretation of Judge Young's order. (Br. of Resp't pp. 8-9). If this Court finds the lower court incorrectly interpreted Judge Young's order, it is dispositive of the collateral estoppel issue.

The School District's entire collateral estoppel argument is that the references in the order to the commencement of the action and a statute of limitations were necessary to Judge Young's decision because "determination of commencement could not be made without a determination of the statute of limitations." (Br. of Resp't pp. 8-9). The School District's brief almost ignores Judge Young's ruling on the insufficiency of service of process. However, that ruling cannot be ignored because it is clearly and expressly referenced in the ruling dismissing the action. The final sentence of the order states "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." (R. p. 49). Rules 12(b)(1), (4), and (5) refer to subject matter jurisdiction, insufficiency of process, and insufficiency of service of process, respectively. A decision as to a commencement date or statute of limitations is not necessary to and can be made without a determination of whether service by certified mail signed for by a mail room clerk satisfies Rule 4, SCRCP. *Catawba Indian Nation v. State*, 407 S.C. 526, 536-37, 756 S.E.2d 900, 906 (2014); *Jones v. City of Folly Beach*, 326 S.C. 360, 367, 483 S.E.2d 770, 773-74 (Ct. App. 1997). The lower court erred in applying collateral estoppel.

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

The School District never disputes that the applicable statute of limitations in this case is one year after Tyler M. reaches the age of majority. Yet it urges the Court to ignore the statutory protections for minors. The School District argues this issue is not preserved. Issues regarding minors are an exception to the rules of issue preservation—a recognition of the necessity of protecting minors, like the applicable statute of limitations. *See Altman v. Griffith*, 372 S.C. 388, 396, 642 S.E.2d 619, 623 (Ct. App. 2007) (noting an issue is unpreserved but ruling, "We address the issue, however, because 'procedural rules are subservient to the court's duty to zealously guard the rights of minors.'" (quoting *Joiner ex rel. Rivas v. Rivas*, 342 S.C. 102, 107, 536 S.E.2d 372, 374 (2000))); *Stefan v. Stefan*, 320 S.C. 419, 422, 465 S.E.2d 734, 736 (Ct. App. 1995) "(These issues may not have been properly preserved. However, we address them because the rights of minors are at issue."). The issue of protecting Tyler M.'s minor rights is properly before the Court.

The School District's only other response is an assertion that Tyler M. has redress for his damages by way of suing his mother as guardian ad litem. (Br. of Resp't p. 10). This remedy is nonexistent, unreasonable, and inadequate. The School District cites to *Fleming v. Asbill*, 326 S.C. 49, 483 S.E.2d 751 (1997) as supports for its proposition. (Br. of Resp't p. 10). In *Fleming*, the

Supreme Court held that private persons appointed as guardians ad litem in private custody proceedings are entitled to absolute quasi-judicial immunity. 326 S.C. at 57, 483 S.E.2d at 755-56. This case involves the injured minor's parent who was appointed as the guardian ad litem for the purpose of asserting this action against the School District. (R. p. 17). The suggestion that a complaint filed allegedly outside of the statute of limitations is something for which the parent guardian ad litem is liable is not founded in law or fact.

The Court should protect the rights of minor Tyler M. to have redress for his injuries, especially in a case such as this where there is no dispute that a statute exists to protect him from the running of the statute of limitations.

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.

May 13, 2020

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CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies the Final Brief of Appellant and Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

May 13, 2020

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