

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM KERSHAW COUNTY

Court of Common Pleas

**RECEIVED**

**May 21 2020**

**SC Court of Appeals**

Honorable Robert E. Hood, Presiding Judge, Fifth Judicial Circuit

Appellate Case No. 2019-000624

Dottie R. Bell ..... Appellant,

v.

John C. Bentley..... Respondent.

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FINAL BRIEF OF RESPONDENT JOHN C. BENTLEY

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**STATEMENT OF THE ISSUES ON APPEAL**

- I. ARE JUDGE BENJAMIN'S RULINGS PROPERLY BEFORE THE COURT ON APPEAL?
  
- II. DID THE TRIAL JUDGE ERR IN DENYING PLAINTIFF'S MOTION FOR SUBSTITUTION?

## STATEMENT OF THE CASE

On December 16, 2016, Appellant Dottie Bell filed a Summons and Complaint with the Kershaw County Court of Common Pleas against Respondent, John C. Bentley, seeking damages for alleged injuries she sustained as a result of a motor vehicle accident that occurred on February 20, 2014. (R. pp. 10 – 15) Appellant’s Motion for Service By Publication was granted on January 23, 2017. A notice was published in the Chronicle-Independent newspaper on three dates in February 2017. (R. p. 23) On April 18, 2017, counsel for Progressive Insurance Company filed an Answer on behalf of Respondent, an insured driver through a policy of insurance held by Peter McCoy. (R. p. 16) Counsel also filed a Motion to Intervene because Respondent could not be found. (R. p. 16)

At mediation on January 25, 2018, Appellant revealed that Peter McCoy was a local veterinarian and was deceased. (R. p. 50, line 25 – p. 51, line 11) Armed with this information, counsel for Respondent made inquiries to family members she suspected may know Dr. McCoy and his family. (R. p. 38, lines 13 – 21; p. 50, line 25 – p. 51, line 24) Counsel contacted Dr. McCoy’s son, who confirmed that both Dr. McCoy and Respondent were deceased. (R. p. 51, lines 17 – 24) Additionally, he stated Respondent worked for Dr. McCoy in his veterinary office before Dr. McCoy, himself, passed. Counsel for Respondent informed Appellant of this information prior to leaving the mediation. Later the same day, counsel for Respondent provided Appellant written confirmation that Respondent died in July 2016 – prior to the filing of the subject suit. (R. p. 51, line 25 – p. 52, line 4) The following day, counsel for Respondent further informed Appellant that Respondent died on July 26, 2016, without an estate or next of kin. (R. p. 52, lines 5 – 6; p. 54, line 23 – p. 55, line 4; pp. 59 – 63)

One hundred eighty-two (182) days later, on July 26, 2018, Appellant petitioned the Probate Court seeking appointment of a special administrator for purposes of this lawsuit. (R. p. 27) The petition was granted, and a special administrator was appointed on August 14, 2018. (R. p. 1).

Two hundred twenty-eight days (228) after learning of Respondent's death, Appellant filed a Motion to Substitute pursuant to Rule 17(a) of the South Carolina Rules of Civil Procedure asking the trial court to substitute the appointed special administrator of Respondent's estate as the real party in interest. (R. p. 30) A hearing was held on October 15, 2018, before The Honorable Deandrea Benjamin. (R. pp. 35 – 41) Judge Benjamin ruled that Appellant had failed to serve the Summons and Complaint on the special administrator and denied the Motion. (R. p. 3) Appellant did not file a Motion to Reconsider or a Notice of Appeal following the denial of that Motion. (R. p. 48, line 17 – p. 49, line 4) Appellant served the special administrator four days later on October 19, 2018. (R. p. 34)

Appellant waited until December 5, 2018 – forty-seven (47) days after she achieved service and three-hundred fourteen (314) days after learning of Respondent's death – to refile her Motion to Substitute. (R. p. 32) At the February 12, 2019, hearing before The Honorable Robert E. Hood, counsel for Respondent argued Appellant did not substitute the parties within a reasonable time. (R. pp. 45 – 57) Judge Hood agreed and denied Appellant's Motion to Substitute. (R. pp. 6 – 9) The Order identified the following relevant findings: that Appellant had actual knowledge of Respondent's death as of January 25, 2018; Appellant did not have a special administrator appointed until August 14, 2018; Appellant did not file her original Motion to Substitute until September 10, 2018; and that the September 10, 2018 Motion was denied and Appellant failed to properly serve the special administrator. Judge Hood additionally found that:

Rule 25(a)(1), SCRCP, is substantially similar to that of the Federal rule, which requires substitution within ninety (90) days, and that courts in South Carolina have found a “reasonable time” to range from ninety (90) to one-hundred twenty (120) days. Based on these factual and legal findings, Judge Hood found that, based on the totality of the circumstances, Appellant failed to seek substitution within a reasonable amount of time. The order denying Appellant’s Motion to Substitute was filed on February 28, 2019. (R. pp. 6 – 9)

Appellant filed a Rule 59(e), SCRCP, Motion for Reconsideration on March 6, 2019, which was denied on April 11, 2019. (Appendix p. 5; p. 15)

This appeal follows.

### **ARGUMENT**

#### **I. JUDGE BENJAMIN’S RULINGS ARE NOT PROPERLY BEFORE THE COURT ON APPEAL.**

Appellant improperly seeks appellate review of Judge Benjamin’s Order. She appears to argue she was entitled to substitution based on Judge Benjamin’s statements during the February 13, 2019, hearing. This sort of “relation back” type argument is inappropriate for this appeal.

Significantly, Judge Benjamin’s order *denied* Appellant’s Motion to Substitute on grounds that she failed to serve the special administrator, as required. Judge Benjamin instructed Appellant that she could refile her Motion after achieving service. Appellant failed to request a continuance until service was achieved as opposed to denied, failed to file a Rule 59(e), SCRCP, Motion to Alter or Amend, or file a Notice of Appeal following the denial. In this regard, Appellant is correct in stating that Judge Benjamin’s final order is the law of the case. *See Bone v. United States Food Serv.*, 399 S.C. 566, 576, 733 S.E.2d 200, 205 (2012) (“The law of the case doctrine applies where a party does not challenge an issue on appeal when there has been an opportunity to do so.”); *see also Ulmer v. Ulmer*, 369 S.C. 486, 632 S.E.2d 858 (2006) (stating as a general rule, an

unchallenged ruling, right or wrong, is the law of the case.). Appellant has therefore abandoned her right to seek appellate review of Judge Benjamin's Order and it is not the appropriate subject of this appeal.

In the alternative, Respondent argues Appellant's appeal is untimely filed and should be dismissed. As stated above, instead of requesting a continuance of the first Motion for Substitution, filing a Motion to Alter or Amend, or filing a Notice of Appeal from its denial, Appellant refiled the exact same motion a month and a half later. Our appellate courts have repeatedly recognized notices of appeal are untimely if filed following successive motions requesting identical relief. *See e.g., Elam v. S.C. DOT*, 361 S.C. 9, 19, 602 S.E.2d 772, 777 (2004) (holding appeal time barred where appellant filed successive Rule 59(e) motions instead of a notice of appeal); *id.* (citing as persuasive *Sears v. Sears*, 85 Ill. 2d 253 (Ill. 1981) finding successive written post-trial motion which repeats what was raised or could have been raised in first written motion is not authorized by rules and does not extend time for appeal; losing litigant is not entitled to return to trial court indefinitely hoping for change of heart or a more sympathetic judge, or string out arguments one at a time over months because "there must be finality, a time when the case in the trial court is really over and the loser must appeal or give up."); *id.* (citing as persuasive *Kaufman v. Oregonian Pub. Co.*, 195 Ore. 164 (Or. 1952) holding in case involving successive written motions, a party may not extend time for appeal from an order denying a motion for reinstatement of action by filing a second, substantively identical motion with a different judge).

Appellant's entire appeal is framed in terms of one issue on appeal relating to Judge Benjamin's hearing and Order. To the extent this Court finds Appellant is bound by this single issue, Respondent seeks dismissal of this appeal for the above-stated reasons.

**II. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN DENYING APPELLANT’S MOTION TO SUBSTITUTE UPON DETERMINING THAT SHE FAILED TO SEEK SUBSTITUTION OF A REAL PARTY IN INTEREST WITHIN A REASONABLE AMOUNT OF TIME AS REQUIRED.**

Should the Court find it appropriate to review this case despite Appellant’s failure to properly frame the issues, Respondent argues the issue before the Court is more appropriately whether Judge Hood properly denied Appellant’s unreasonably delayed Motion for Substitution filed on December 5, 2018. For the following reasons, this Court should affirm his ruling.

STANDARD OF REVIEW<sup>1</sup>

A decision to grant or deny a motion to substitute a party lies within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *See Bryant v. Waste Mgmt., Inc.*, 342 S.C. 159, 165, 536 S.E.2d 380, 383 (Ct. App. 2000) (“A trial court has the sound discretion to substitute parties when some act has affected the capacity of a named party to be sued, and its decision will not be reversed on appeal absent a showing of an abuse of discretion.”).

An abuse of discretion occurs when the trial court’s ruling is either controlled by an error of law or based on a factual conclusion unsupported by the evidence. *See Ledford v. Pennsylvania Life Ins. Co.*, 267 S.C. 671, 675, 230 S.E.2d 900, 902 (1976). This Court must uphold the trial court’s ruling when it “is in agreement with a discretionary ruling or is only mildly in disagreement.” *Rish v. Rish*, 296 S.C. 14, 15, 370 S.E.2d 102, 103 (Ct. App. 1988).

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<sup>1</sup> Appellant incorrectly contends the standard of review in this case is *de novo* because it involves a question of statutory interpretation. Appellant appears to argue that Judge Hood erred in his interpretation of Rule 25(a)(1), SCRCF. However, Judge Hood was not required to interpret the Rule, but to apply the rule to the facts and circumstances in this case. For these reasons, Respondent has set forth an independent standard of review for the Court’s consideration.

## LAW

Both Rule 17 and Rule 25 give the trial court discretion to dismiss an action if a real party in interest has not been substituted within a reasonable amount of time. “Every action shall be prosecuted in the name of the real party in interest.” Rule 17(a), SCRCP. “No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest *until a reasonable time has been allowed*, after objection, for . . . substitution[] of the real party in interest.” Rule 17(a), SCRCP (emphasis added). “The burden of compliance with Rule 17(a) and its real party in interest requirement falls to the plaintiff.” *Fisher v. Huckabee*, 422 S.C. 234, 239, 811 S.E.2d 739, 741 (2018).

In the event a party dies, “the court may order substitution of the proper parties.” Rule 25(a)(1), SCRCP.

The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided by Rule 4 for the service of summons. *If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party.*

*Id.* (emphasis added).

The official Note to Rule 25 indicates it is “substantially the same as Federal Rule 25(a)(1)” except that South Carolina’s rule “substitutes ‘a reasonable time’” where the federal rule requires filing a motion for substitution within ninety (90) days after notice of death. This Court has held that the plain language of Rule 25 “specifically provides for the dismissal of a deceased party where substitution of the proper parties does not occur within a reasonable amount of time.” *Hillman v. Pinion*, 347 S.C. 253, 258, 554 S.E.2d 427, 430 (Ct. App. 2001).

A. Judge Hood's Ruling Is Not Controlled By An Error Of Law

Appellant argues Judge Hood committed multiple errors of law in determining she did not timely seek substitution. As an initial matter, she argues Judge Hood improperly heard argument from Respondent's counsel discussing the Motion's untimeliness. Additionally, Appellant argues Judge Hood erred in concluding that the South Carolina Rule "directly mirrors" the Federal Rule and incorrectly found "a 'reasonable time' ranges from 90 to 120 days." (App. Br. pp. 11 – 12) Each argument shall be discussed in turn.

i. Respondent's timeliness argument was not waived.

Appellant maintains Respondent's timeliness objection to the Motion for Substitution was waived because it was not raised during Judge Benjamin's October 15, 2018 hearing. As a result, Appellant argues, Judge Hood erred in hearing Respondent's argument during his February 13, 2019 hearing. (App. Br. pp. 6 – 7)

As an initial matter, Respondent contends Appellant's argument in this regard is conclusory and unsupported by a single citation to authority. As a result, it is abandoned and should not be addressed by this Court. *See In the Matter of the Care and Treatment of McCracken*, 346 S.C. 87, 551 S.E.2d 235 (2001) (holding an issue is deemed abandoned if the argument in the brief is not supported by authority or is only conclusory); *Pack v. S.C. Dept. of Transp.*, 381 S.C. 526, 673 S.E.2d 461 (Ct. App. 2009) (Appellant cited no legal authority to support her argument); *S.C. Dept. of Soc. Servs. v. Mother*, 375 S.C. 276, 651 S.E.2d 622 (Ct. App. 2007) (Argument without citation of authority to support claim is conclusory); *Hunt v. S.C. Forestry Commn.*, 358 S.C. 564, 595 S.E.2d 846 (Ct. App. 2004) (Issues raised in a brief but not supported by authority are deemed abandoned and will not be considered on appeal.).

On the merits, Respondent was not required to raise the timeliness argument during the initial hearing before Judge Benjamin. Appellant failed to serve the special administrator, thereby failing to fulfill a condition precedent for moving for substitution. The issue of substitution was not ripe for determination by Judge Benjamin until Appellant served the special administrator. *See Spivey v. Carolina Crawler*, 367 S.C. 154, 160, 624 S.E.2d 435, 438 (Ct. App. 2005) (“A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.”) (citing *Lennon v. S.C. Coastal Council*, 330 S.C. 414, 415, 498 S.E.2d 906, 906 (Ct. App. 1998) (holding “a threshold inquiry for any court is a determination of justiciability”)). Therefore, no arguments as to timeliness were required where Appellant had not yet achieved effective service. *See Shearer v. De Shon*, 240 S.C. 472, 484, 126 S.E.2d 514, 520 (1962) (“Ordinarily, one cannot complain of an error which his own conduct has induced.”).

Therefore, Respondent was entitled to argue the untimeliness of Appellant’s unreasonably delayed Motion for Substitution before Judge Hood, and he did not commit error in hearing and considering the argument.

- ii. Judge Hood did not err in finding “a reasonable time” pursuant to case law ranges from ninety (90) to one-hundred twenty (120) days.

Appellant’s arguments that Judge Hood erred in concluding that South Carolina’s Rule 25(a)(1) “directly mirrors” the Federal Rule and incorrectly found “a ‘reasonable time’ ranges from 90 to 120 days” are unfounded.

It appears, first, that Appellant takes exception to Judge Hood’s finding in paragraph 11 that Rule 25(a)(1) footnotes indicate “the rule *mirrors* the Federal Rules” which notes substitution must be made within ninety days. While perhaps a poor substitute for the footnote’s actual

language that our state’s rule “is *substantially* the same” as the federal rule, it is clear from the reading of the entire Order that Judge Hood understood the state’s “reasonable time” requirement.

In paragraph 10 Judge Hood identified the state’s requirement for substitution “within a reasonable amount of time after such knowledge of the death is obtained.” In paragraph 12, Judge Hood discussed prior courts’ determinations on “a reasonable amount of time.” In the final paragraph, Judge Hood identified Appellant’s failure to substitute “within a reasonable amount of time based upon the totality of the circumstances and facts.” Because Judge Hood clearly applied the “reasonable time” standard to the facts of this case, his usage of the word “mirrors” is immaterial. Therefore, Appellant’s reliance on the Judge’s choice of words in paragraph 11 is unavailing as a ground for reversal.

Appellant next argues that Judge Hood erred in relying on *Panhorst v. Panhorst*, 301 S.C. 100, 390 S.E.2d 376 (Ct. App. 1990) and *Pressley v. Blackwell*, 2005 S.C. App. Unpub. LEXIS 231 because neither case “deals with Rule 25 and does not stand for the proposition which the Order is proffering.” (App. Br. pp. 12 – 13) Appellant is correct; neither of the cited cases discuss the application of Rule 25. Respondent did not cite these cases, nor did Judge Hood rely on them, for such a proposition. Nevertheless, these cases are appropriate sources for reviewing the appellate court’s previous interpretations of what constitutes “a reasonable time.”

Our appellate courts have not yet examined what constitutes “a reasonable time” in the context of the trial court’s denial of a motion to substitute. However, this State’s jurisprudence is instructive in ascertaining what has traditionally been identified as “a reasonable time” in other procedural settings. This method of determining the law’s guidelines is what jurisprudence is based upon. *See, e.g., McDaniel v. United States Fid. & Guar. Co.*, 324 S.C. 639, 642, 478 S.E.2d 868, 870 (Ct. App. 1996) (finding issue of whether Rule 60(b)(4) motion was filed within a

reasonable time requires review of other appellate court decisions discussing the “reasonable time” requirement; whether the motion was made within a reasonable time was a matter addressed to the trial judge’s sound discretion); *State v. Goodson*, 140 S.C. 357, 362, 138 S.E.2d 816, 818 (1927) (defining a “reasonable time” as the time in which an ordinary man, in like circumstances, would have cooled off for purposes of determining whether to charge voluntary manslaughter); *Morehead v. Doe*, 324 S.C. 559, 561, 479 S.E.2d 817, 818 (Ct. App. 1996) (Where insurance policy required automobile accident to be reported within “a reasonable time,” court found eight months unreasonable based upon facts and circumstances); *Farmer v. Sellers*, 89 S.C. 492, 497, 72 S.E. 224, 226 (1911) (discussing out-of-state case law to determine what constitutes “a reasonable time” to execute and return a search warrant). It was not error, therefore, for Judge Hood to look to case law discussing actions required during “a reasonable time” for guidance.

Appellant misconstrues paragraph 12 of Judge Hood’s Order as being the sole basis and “bright line rule” for substitution of parties under Rule 25. Indeed, Appellant’s contention that Judge Hood “concludes that as a matter of law, substitution must be made within 90 days” is a gross misstatement of the Order. (App. Br. p.11) Paragraph 12 summarizes findings by two cases indicating, at best, he found them persuasive. It is instructive that the final paragraph of the Order does not say, “plaintiff’s motion is denied because it was not filed within 90 days.” Instead, the Judge’s Order identifies the bases of his decision as, “the totality of the circumstances and facts, the Rules of Civil Procedure, and the case law.”

#### B. Judge Hood’s Conclusions Are Supported By The Evidence

Judge Hood’s ruling that Appellant failed to substitute the special administrator within a reasonable amount of time is supported by the facts. The Complaint was filed two months shy of the running of the statute of limitations. Upon petition to the court for an order allowing service

by publication, Appellant had not considered or attempted to discover whether Respondent was deceased or the real party in interest.

The record confirms that counsel for Respondent immediately notified Appellant upon learning Respondent was deceased without family or an estate. As of the date of receiving notice – January 25, 2018 – Appellant had a duty to substitute a real party in interest within a reasonable amount of time. It was not until after the hearing before Judge Hood on February 13, 2019, that Appellant attempted to provide the court with documentation excusing her delay. Even with this documentation, it was reasonable for Judge Hood to find undue delay.

Appellant waited six days to request a Statement of Death from DHEC, and there is no evidence of follow up until seventy-six (76) days later on April 17, 2018, and an additional twenty-nine (29) days later, on May 16, 2018.<sup>2</sup> It is notable, also, that Appellant waited another twenty-seven (27) days to file her Motion to Substitute after the probate court appointed the special administrator on August 14, 2018. Finally, after Judge Benjamin denied Appellant’s motion and instructed her to serve the special administrator, Appellant waited another forty-seven (47) days after having achieved service to refile her Motion to Substitute on December 5, 2018.<sup>3</sup>

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<sup>2</sup> Appellant frequently states the Probate Court will not appoint a special administrator unless provided a Statement of Death from DHEC. However, in practice, the probate court commonly appoints a special administrator with a letter confirming death by the coroner. Once appointed, the special administrator can obtain and provide the court an official death certificate. Upon information and belief, this could have been accomplished as early as April 2018, when the coroner called Appellant to confirm Respondent’s death.

<sup>3</sup> Additionally, Appellant failed to provide notice to the special administrator of the Motion or hearing on the Motion to Substitute as required by Rule 25(a)(1), SCRCF. “The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided by Rule 4 for the service of summons.” Rule 25(a)(1), SCRCF. The Notice of Electronic Filing for the August and December 2018 Motions to Substitute reflect that the special administrator was not served with notice of hearing. Appendix pp. 1 – 4. There is no evidence the special administrator was properly served with the notices by any other means.

In sum, the record reflects that three-hundred fourteen (314) days passed after notice of Respondent’s death before Appellant properly sought substitution of a real party in interest on a case that had been pending for just shy of two years. A finding of undue delay under these circumstances is not an abuse of discretion by the trial court. *See Shah v. Richland Mem’l Hosp.*, 350 S.C. 139, 147, 564 S.E.2d 681, 685 (Ct. App. 2002) (citing undue delay as a proper reason to deny leave to amend).

Finally, Appellant argues Judge Hood erred because she did, in fact, file the Motion to Substitute within ninety (90) days of “confirming” Respondent’s death.<sup>4</sup> (App. Br. pp. 13 – 14) The rule requires substitution of a party upon *notice* by counsel for the deceased party. Rule 25(a)(1), SCRPC (“If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party. Counsel of record for such deceased party shall give notice to all other parties of the death of such party as soon as practicable after obtaining such knowledge . . .”). The Rule says nothing of a party’s “confirmation” of death. Appellant had notice from counsel of Respondent’s death as of January 25, 2018. At that point, it was incumbent on the Plaintiff to have moved for a substitution of parties “within a reasonable time” or face dismissal of her action. Rule 25(a)(1), SCRPC; *see also Hillman v. Pinion*, 347 S.C. 253, 258, 554 S.E.2d 427, 430 (Ct. App. 2001) (stating Rule 25 “specifically provides for the dismissal of a deceased party where substitution of the proper parties does not occur within a reasonable amount of time”).

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<sup>4</sup> Appellant posed this issue on appeal in a manner that appears to seek a factual finding by this Court. *See* App. Br. p. 1, ¶ c. Because the question of whether Appellant sought substitution within a reasonable time is a question of fact, the appellate court is bound by the trial court’s factual findings. The question is not what conclusion the appellate court would have reached had it been the fact-finder, but whether the facts as found by the trial court have evidence to support them.

Judge Hood had discretion to contemplate the reasonableness of the Motion's timing, and his finding that the timing was unreasonable under the circumstances is supported by law and the facts. Therefore, this Court should affirm Judge Hood's ruling.

**CONCLUSION**

For the reasons stated above, this Court should affirm the trial judge's ruling.

Respectfully submitted.

The 21<sup>st</sup> Day of May, 2020.

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CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that Respondent’s Final Brief complies with Rule 211(b), SCACR.

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