THE STATE OF SOUTH CAROLINA
in the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable D. Craig Brown

Case No.: 2019-CP-10-0113

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

VS.

Charleston County School District ……..Respondent.

FINAL BRIEF OF RESPONDENT

Lisa A. Reynolds
SC Bar # 15527
W. Coleman Lawrimore
S.C. Bar # 101180
Anderson Reynolds & Stephens, LLC
37 ½ Broad Street
P.O. Box 87
Charleston, SC 29401
(843) 723-0185 –phone
Attorneys for Respondent

May 28, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF ISSUES ON APPEAL

1. THE LOWER COURT DID NOT ERR IN ITS INTERPRETATION OF THE HONORABLE ROGER M. YOUNG'S ORDER DATED JUNE 1, 2018.

2. THE LOWER COURT DID NOT ERR IN FINDING THAT APPELLANT FAILED TO PROPERLY SERVE THE RESPONDENTS WITH THE SUMMONS AND COMPLAINT.

3. THE LOWER COURT DID NOT ERR BY DISMISSING THE CASE.

STATEMENT OF THE CASE

This action arises out of Appellant's allegations that the minor child, Tyler M., was injured on April 22, 2015 while on the playground at a school within the Charleston County School District. Appellant initially sought recovery for these alleged damages in C/A No.: 2017-CP-10-1970 (hereinafter "Mazyck I") (R. p. 84). In its answer, Respondent moved to dismiss for insufficiency of service of process and failure to effect service within the statute of limitations set forth by the South Carolina Tort Claims Act. (R. p. 90). Mazyck I was dismissed on June 1, 2018 by Order of The Honorable Roger Young, Sr. (R. p. 117).

Appellant again filed suit on January 9, 2019 in the underlying action, i.e. 2019-CP-10-0113 (hereinafter "Mazyck II"), seeking recovery for Tyler M.'s alleged injuries sustained on April 22, 2015. (R. p. 10). The Complaints in Mazyck I and II are nearly-verbatim replicas of the other. Respondent filed and served its Answer on February 8, 2019; this Answer contained Motions to Dismiss pursuant to the application of Rules 12(b)(5) and (6), SCRCP, *Res Judicata*, and Collateral Estoppel. (R. p. 18).

A hearing on Respondent's Motions to Dismiss took place on June 14, 2019 before the Honorable D. Craig Brown. (R. p. 66). The lower court granted Respondent's Motions to Dismiss by way of Form 4 Order on June 19, 2019 (R. p. 2) and subsequently entered a formal Order of

Dismissal on July 3, 2019. (R. p. 5). Appellant filed their notice of Appeal on July 26, 2019. (R. p. 1).

ARGUMENTS

The issue on appeal is whether a party may file a second action in the wake of a prejudicial dismissal. For the reasons set forth below, the trial court properly dismissed this action based upon the plain language of Judge Young's Order. Accordingly, the lower court properly dismissed the near-verbatim Complaint in the underlying action based upon the doctrines of *Res Judicata* and collateral estoppel. Appellant's argument that this Court should *sua sponte* reverse the lower court in order to guard the rights of Tyler M. is not preserved for review.

1. THE LOWER COURT CORRECTLY INTERPRETED JUDGE YOUNG'S ORDER OF DISMISSAL.

On appeal, Appellant asks this Court to find that Judge Young's Order was not based upon the statute of limitations. Appellant asks this Court to do so by inserting provisions of the Tort Claims Act that are not mentioned in Judge Young's Order to counteract the provisions of the Tort Claims Act that are actually enumerated and discussed therein. Further, Appellant asks this Court to find that Judge Young's initial findings calculating the date on which the statute of limitations expired is nothing more than *dicta*.

In construing a judgment, it should be examined and considered in its entirety; if the language employed is plain and unambiguous, there is no room for construction or interpretation and the effect thereof must be declared in the light of the literal meaning of the language used. Stanaland v. Jamison, 275 S.C. 50, 268 S.E.2d 578 (1980) (citing 49 C.J.S. Judgments § 436 (1947)). Hence, in construing a judgment, it should be examined and considered in its entirety. Ex parte TLC Laser Eye Ctrs. (Piedmont/Atlanta), LLC, 404 S.C. 385, 392, 745 S.E.2d 105, 108 (2013).

A party ***must*** file a motion pursuant to Rule 59(e), SCRCP when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review. Elam v. S.C. DOT, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). It is "well-settled law in this State' that a decree from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties and the same subject-matter. Matheson v. McCormac, 187 S.C. 260, 263, 196 S.E. 883, 884 (1938).

The lower court correctly dismissed this action based upon the plain language of Judge Young's Order. In his Order, Judge Young stated:

> "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.** (R. pp. 117 – 118)(emphasis added)."

Having determined that Appellant had until April 22, 2017 to commence an action seeking damages for Appellant's alleged injuries, Judge Young devoted the balance of his Order to determining whether Appellant, in fact, timely commenced the action. Judge Young then turned to the manner in which an action must be commenced and determined:

> "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."** (R. p. 118)(emphasis added).

Judge Young's Order next addressed the contrast between proper service on a governmental subdivision and the manner in which Appellant purported to effect service and determined that Appellant failed to properly commence this action. Based upon Appellant's failure to commence the action within the applicable time period, Judge Young granted Respondent's Motion to Dismiss based upon Rules 12(b)(1), (4), and (5), SCRCP and S.C. Code Ann. § 15-78-10, et seq. (R. p. 121).

The above-referenced calculation of the applicate statute of limitations, which was not the subject of a Rule 59(e), SCRCP motion nor the subject of an appeal, is the law of the case. In their April 18, 2019 Memorandum in Opposition to Defendant's Motion to Dismiss Appellant raised the same argument she asserts in this appeal. (R. p. 115). Appellant clearly raised the issue of the statute of limitations as applied to a minor in Mazyck I.

> "[T]he 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." (R. p. 105).

Judge Young ordered the dismissal of Mazyck I despite Appellant's argument. It is undisputed that Appellant did not file a Rule 59(e), SCRCP nor appeal from the ruling in Mazyck I. Rather, Appellant argued that the proper procedure was to file a subsequent duplicate action rather than appeal from the ruling in Mazyck I in light of their position. (R. p. 78).

Initially, Appellant asks this Court to re-write Judge Young's Order and to ignore language and rulings contained therein. Judge Young's Order must read and considered in its entirety and its terms given their plain and ordinary meaning. In doing so, this Court will note the logical procession of the Order. First, Judge Young determined the date by which Appellant must commence their action. Second, Judge Young determined that Appellant failed to do so. Finally

Judge Young dismissed the action based upon this failure. Based upon the plain language of Judge Young's Order, the Court should find that the Order determined when the Statute of Limitations ran as to Appellant's claims and that the action was not commenced within that time.

Finally, as an additional sustaining ground, the ruling in Mazyck I was to the date on which the statute of limitations ran is the law of this case. That ruling was not the subject of Rule 59(e) motion to address its implications as to the minor child nor was that ruling appealed; as such, it became the law of this case that should be binding in these proceedings.

2. THE LOWER COURT CORRECTLY FOUND THAT THIS MATTER IS BARRED ON *RES JUDICATA* GROUNDS.

Appellant argues that Judge Young did not rule on the Statute of Limitations despite his calculation of the date by which commencement of the action must occur. As above, this argument fails based upon the clear language of Judge Young's Order. Further, Appellant argues that the language and intent of Rule 41(b), SCRCP did not result in a prejudicial dismissal of Mazyck I. Finally, Appellant argues that a ruling on the statute of limitations is not an adjudication on the merits despite several pronouncements to the contrary.

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). Here, Appellant concedes that the first two elements are satisfied. (Appellant's Brief, pg. 8).

"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); see also Shoup v. Bell & Howell Co., 872 F.2d 1178, 1180 (4th Cir. 1989)(finding the plain language of Rule 41(b) indicates that the dismissal of plaintiffs' action on statute of limitations grounds is an adjudication on the merits). Further, "all but certain dismissals enumerated in Rule 41(b) will be considered 'on the merits,' and the Rule does not exempt a dismissal on statute of limitations grounds from its general operation." Shoup v. Bell & Howell Co., 872 F.2d 1178, 1180 (4th Cir. 1989)(quoting with approval PRC Harris, Inc. v. Boeing Company, 700 F.2d 894, 896 (2d Cir. 1983)).

Unless the court in its order for dismissal otherwise specifies, a dismissal ... 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[1]. Rule 41(b), SCRCP. The default standard is that the grant of a motion to dismiss operates as adjudication on the merits, i.e., a dismissal with prejudice. In re Miller, 393 S.C. 248, 262, 713 S.E.2d 253, 260 (2011)(Pleicones, J., concurring)(discussing the application of Rule 41(b)). In ruling on the nearly-identical Federal Rule[2], the Fourth Circuit Court of Appeals has held that a dismissal based upon a ground not enumerated in Rule 41 was an adjudication on the merits where the trial court "did not otherwise specify the dismissal to be

[1] Here, Plaintiff contends that the dismissal of Mazyck I was based upon improper service of process, not lack of jurisdiction, nor improper venue, nor failure to a join a party under Rule 19.
[2] The Comment to Rule 41, SCRCP provides "[t]his Rule 41 is the same as the Federal Rule... Rule 41(b) also makes clear when involuntary dismissal operates as an adjudication on the merits."

"without prejudice," and the Appellants failed to move the court to specify that the judgment was "without prejudice." Payne v. Brake, 439 F.3d 198, 204 (4th Cir. 2006) (citing Shoup v. Bell & Howell Co., 872 F. 2d 1178 (4th Cir. 1989)).

Further, it is clear that a dismissal based upon the statute of limitation is prejudicial through the operation of Rule 41(b). Even assuming, *arguendo*, the dismissal of Mazyck I was not based in whole or in part upon the statute of limitations, the Mazyck I court did not specify the dismissal to be "without prejudice" and it is undisputed that Appellant did not move the Mazyck I court to specify that the dismissal was "without prejudice". In either instance, it is clear that the dismissal of Mazyck I was prejudicial. As such, the lower court did not err in granting Respondent's Motion to Dismiss.

3. THE LOWER COURT CORRECTLY FOUND THAT THIS MATTER IS BARRED BY COLLATERAL ESTOPPEL.

Appellant contends that the lower court erred in applying the doctrine of collateral estoppel because the court in Mazyck I did not rule on the Appellant's causes of action. In support of this theory, Appellant contends the Mazyck I court ruled only on the issue of insufficient service of process and did not dismiss the matter with prejudice. Additionally, Appellant contends that the portion of its Memorandum in Opposition dedicated to the statute of limitations and the portion of Judge Young's Order devoted to calculating the date upon which the statute of limitations ran is without effect. As above, these arguments must fail because the Mazyck I court issued clear rulings on the expiration of the statute of limitations and the dismissal was prejudicial as required under Rule 41(b), SCRCP. Regardless, the lower court was correct in finding that the doctrine of collateral estoppel applied to this matter thus requiring its dismissal.

"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). In order to assert collateral estoppel successfully, the party seeking issue preclusion still must show that the issue was actually litigated and directly determined in the prior action and that the matter of fact directly in issue was necessary to support the first judgment. Beall v. Doe, 281 S.C. 363, 371, 315 S.E.2d 186, 191 (Ct. App. 1984). 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**. Carman v. S.C. Alcoholic Beverage Control Comm'n, 317 S.C. 1, 6, 451 S.E.2d 383, 386 (1994) (quoting Dunlap & Dunlap v. Zimmerman, 188 S.C. 322, 199 S.E. 296 (1938))(emphasis added).

A civil action may only be properly commenced if: (1) the summons and complaint are 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 after filing. Rule 3(a), SCRCP; see also S.C. Code Ann. 15-30-20 (2002). S.C. Code Ann. § 15-3-20 and Rule 3 pellucidly state if the defendant is not served within the limitations period, service must occur within 120 days after the pleadings are filed. Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 377 S.C. 217, 229, 659 S.E.2d 213, 219 (Ct. App. 2008).

As above, Judge Young's Order in Mazyck I begins with a discussion on commencement and a ruling as to the date by which Appellant was required to properly serve respondent "so as to be determined to have commenced this action." (R. pp. 117 - 118). As delineated in Hooper, Rule 3, SCRCP and S.C. Code Ann. § 15-30-20 (1976, as amended), on their face, require consideration of the statute of limitations in order to determine whether an action is properly commenced.

As a determination on commencement requires consideration of the statute of limitations, a ruling on the statute of limitations was, even in a light most favorable to Appellant, a necessary

and inevitable inference to be drawn from Mazyck I as a determination of commencement could not be made without a determination of the statute of limitations. As such, the lower court did not err in finding that Mazyck II must be dismissed based upon application of the doctrine of collateral.

4. APPELLANT'S ARGUMENT REGARDING THE RIGHTS OF THE MINOR CHILD ARE NOT PRESERVED FOR REVIEW.

As a final ground for appeal, despite the applicability of the doctrines of *res judicata* and collateral estoppel to the factual and procedural underpinnings of this case, Appellant contends that the Court should reverse the findings of Mazyck I and II in order to guard the interests of the minor Tyler M. In support of this contention, Appellant cites Joiner v. Rivas, 342 S.C. 102, 536 S.E.2d 372 (200), which addresses the appointment of a guardian *ad litem* in actions for the termination of parental rights. For the reasons that follow, this argument is not preserved for review nor is it applicable to the case at bar.

In order for an issue to be preserved for appellate review, it must have been raised to and ruled upon by the trial judge. State v. Dunbar, 356 S.C. 138, 142, 587 S.E.2d 691, 693 (2003). Issues not raised and ruled upon in the trial court will not be considered on appeal. Id.

Until the filing of Appellant's brief, the record on appeal was devoid of any suggestion that court should overturn Mazyck I and II to guard the interests of the minor. For the first time, on appeal, Appellant suggests that the Court should look past the application of State substantive and procedural law. Despite the absence of this contention in the record, this argument must fail.

The Joiner Court presided over an appeal from the Family Court's Order terminating the Appellant's parental rights based upon a determination that Appellant's drug addiction was unable to change within a reasonable time. Joiner v. Rivas, 342 S.C. 102, 106, 536 S.E.2d 372, 374 (2000). The Court of Appeals vacated this Order because the Family Court erred in failing to provide an independent Guardian *ad Litem* for Appellant. Id. After an extensive analysis of the statutory

scheme governing the termination of parental rights, the Court determined that the applicable statute did not require the appointment of a new guardian ad litem when a child's guardian ad litem brings a petition to terminate the natural parent's parental rights. Id. 342 S.C. at 110, 536 S.E.2d at 376. Accordingly, the Court reversed the Court of Appeals cases requiring strict construction of the statutes. Id.

As an initial matter, the argument that the court should act to preserve the interests of the minor child is not preserved for review. Even assuming, *arguendo*, that the issue is preserved, the authority cited by Appellant is distinguishable from the case at bar. As above, Joiner was concerned with child placement permanency in an adoption action. Further, in the context of this action sounding in negligence, the minor child is not without redress for his potential damages. See Fleming v. Asbill, 326 S.C. 49, 54, 483 S.E.2d 751, 754 (1997) ("If in consequence of the culpable omission or neglect of the guardian ad litem the interests of the infant are sacrificed, the guardian may be punished for his neglect, as well as made to respond to the infant for the damage sustained."); see also Clarendon Holding Co. v. Witherspoon, 258 S.C. 296, 188 S.E.2d 480 (1972); Cumbie v. Cumbie, 245 S.C. 107, 139 S.E.2d 477 (1964); Simpson v. Doggett, 159 S.C. 294, 156 S.E. 771 (1930); Cagle v. Schaefer, 115 S.C. 35, 104 S.E. 321 (1920); cf. Fleming v. Asbill, 326 S.C. 49, 58, 483 S.E.2d 751, 756 (1997) (distinguishing Fleming on other grounds).

As above, the minor child is not without redress for the damages allegedly sustained as a result of the allegations in this matter. Further, Appellant's argument that the Court should act to protect the rights of the minor is not proposed for review. Accordingly, this court should uphold the lower court's dismissal based upon the application of *res judicata* and collateral estoppel.

CONCLUSION

It is clear from the record that Mazyck I was intimately concerned with Appellant's failure to properly commence the action, an inquiry which necessarily entailed a determination on the applicable statute of limitations. This ruling was neither the subject of Rule 59(e), SCRCP Motion nor an appeal. Accordingly, the final ruling in Mazyck I acts as a bar to subsequent litigation based upon the doctrines of *res judicata* and collateral estoppel. Accordingly, the court should affirm the trial court's rulings on those grounds.

ANDERSON REYNOLDS &
STEPHENS, LLC

W. Coleman Lawrimore

Lisa Reynolds
W. Coleman Lawrimore
37 ½ Broad Street
P.O. Box 87
Charleston, SC 29401
(843) 723-0185 –phone
(843) 405-0313 –fax
ATTORNEYS FOR RESPONDENT

May 28, 2020
Charleston, South Carolina