

Jun 04 2020

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Appellate Case No. 2018-000289
Unpublished Opinion No. 2020-UP-021
(Rehearing denied March 27, 2020)

Mario Escalante,

Petitioner,

v.

David L. Rodgers and Janice W. Rodgers,
d/b/a Whitehall Express Mart,

Respondents.

**REPLY TO RESPONDENTS’ RETURN TO PETITIONER’S
PETITION FOR WRIT OF CERTIORARI**

Petitioner makes the instant submission in response to Respondents’ Return to Petition for Certiorari. Petitioner adopts and incorporates by reference the Statement of Case and Facts presented in his Petition for Certiorari.

I. ERROR PRESERVATION- THE ISSUE OF RES JUDICATA HAS BEEN PROPERLY PRESERVED FOR APPEAL BY

Since this case has been appealed, Respondent has been contending that the issue of res judicata has not been properly preserved for appeal, allegedly because it was not addressed in Petitioner’s Reply to Respondent’s Motion for Summary Judgment. What Respondent conveniently omitted was the fact that Petitioner questioned the application of res judicata (and estoppel) in his Motion for Reconsideration. (R., p. 298).

In his Motion for Reconsideration, Petitioner alleged that the requisite elements of res judicata (and collateral estoppel) were not met in the State action since negligence was not raised in the Federal court. As such, Petitioner asserts that the issue of Respondents' negligence was never adjudicated with finality.

The purpose of Rule 59(e), SCRCF, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" Arnold v. State, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting Budinich v. Becton Dickinson and Co., 486 U.S. 196, 200, 108 S.Ct. 1717, 100 L.Ed.2d 178 (1988)). As one authority has noted, "Once the issue has been properly raised by a Rule 59(e) motion, it appears that it is preserved and a second motion is not required if the trial court does not specifically rule on the issue so raised." James F. Flanagan, South Carolina Civil Procedure 475 (2d ed. 1996). (Emphasis supplied).

On the issue of the interpretation of the phrase "prior action" or "prior proceeding", Petitioner raised the same as a novel question of law as it related to the doctrine of res judicata. The South Carolina courts routinely applied the doctrine of res judicata in successive actions where judgment was rendered in the first action filed, dismissing the second action. In this particular case, a judgment was made in the second action filed, and the State court applied res judicata on the first action. Petitioner's desire for clarification of the term(s) that defines the doctrine of res judicata, does not deviate from the issue preserved in this case, i.e. whether the State action is barred by res judicata.

II. THE COURT OF APPEALS RULING AFFIRMING RES JUDICATA IS IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Petitioner brought this Petition for Certiorari on the grounds that the decision of the Court of Appeal is in conflict with prior decisions of this Court. (Rule 242 (b)(3) SCACR).

In their Return to the Petition for Writ of Certiorari, Respondents contend that Petitioner, in arguing that res judicata could not be raised for the first time on appeal, alleged an issue that was not properly preserved for appeal. Petitioner submits that the argument was not offered as a separate and distinct ground, but an example of the Court of Appeals' decision that clashed with prior decisions of this Court.

Petitioner maintains that when the State court granted Respondent's Motion for Summary Judgment, said Order ran in conflict with the established rulings of this Court in the cases of Resolution Trust Corp. v. Eagle Lake and Golf Condominiums, 310 S.C. 473, 475, 427 S.E.2d 646, 648 (1993) and Town of Kingstree v. Chapman, 405 S.C. 282, 313 747 S.E.2d 494, 510 (2013).

Town of Kingstree laid down the principle that failure to plead an affirmative defense is a waiver of right to assert it, pursuant to Rule 12. *Ibid.* While in *Resolution Trust Corp.*, this Court emphasized that unpled issues and defenses may not be raised for the first time on a motion for summary judgment. *Resolution Trust Corp., supra.* Despite Respondents having not raised res judicata in their Answer but only in a subsequent motion for summary judgment, which was filed beyond the period for filing responsive pleading, the State court erroneously applied res judicata. The State court should not have allowed Respondents to plead res judicata as they have been deemed to waive such defense.

Petitioner also argues that in affirming the State court's Order, the Court of Appeals disregarded the circumstances of this case that present an exception to the doctrine. An earlier precedent determined that res judicata should not be applied when the party sought to be precluded, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action as a result of the conduct of his adversary or other special circumstances. Pye

v. Ack, 325 S.C. 426.¹

Relying on the principle laid down in *Pye*, Petitioner insists that Respondents' conduct has deprived or limited his opportunity to obtain full and fair adjudication of his claims.

Petitioner points out that Respondents' failure to re-file his Motion to Dismiss in the Federal action, despite Judge Lewis' instructions, is an act of acquiescence and/or consent to the two actions proceeding simultaneously. Petitioner took Respondent's inaction as a withdrawal of their objection to the filing of the two actions, only to be blindsided with a summary judgment motion in the State action.

Respondents implicitly subscribed to both actions proceeding. Respondents inaction prevented Appellant from offering any defense to the Motion to Dismiss, as well as preventing the Federal Court from bringing closure to the matter. Said ruling would have dictated that Petitioner's claim for negligence would have remained alive in State Court *regardless* of whether the Court found, or refused to find, jurisdiction. Due to Respondents' intentional act of disobedience as it related to the Federal Court's order to refile the Motion to Dismiss, Appellant was left without the opportunity to get a full and fair adjudication on the merits of his claims.

Respondents have also engaged in actions that deprived Petitioner of his Constitutional rights to due process, to wit: (1) Petitioner's arrest for alleged stealing a case of beer despite him showing evidence of a receipt for the only case of beer that was recovered; (2) unnecessary motions for continuance delaying the proceedings in the State court; (3) unavailability of crucial evidence such as security footage despite anticipation of a litigation; and, (4) failure by the State court to rule on the spoliation motion by Petitioner. The stark difference in the treatment of the Respondents, who despite having clearly violated the prohibition for selling beer on a Sunday,

¹ This case applied the Restatement (Second) of Judgments § 28 (1982), exception (5)(c).

went unpunished; and Petitioner, who was accused of, and arrested for, stealing beer despite evidence to the contrary, shows the outright failure of South Carolina to provide Petitioner with equal protection of law.

Petitioner argues that the application of res judicata to Petitioner's claim of negligence in the State action was erroneous, as it conflicts with the "identity of claims" test set in the case of Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 35, 512 S.E.2d 106, 109 (1999). In *Plum, Creek*, the test utilized by this court for comparing two causes of action is to determine whether the primary right and duty and the delict or wrong are the same in both actions. *Ibid.* Petitioner argues that they are not the same.

Petitioner avers that in the State action, the primary rights and duties relate to a business transaction: the rights of a customer and the duties of a business proprietor and his agent(s); while, the Federal action arose from the conduct and behavior of the law enforcement officers. In the Federal action, the primary rights and duties are enshrined in the Constitution.

Finally, the Court of Appeals decision conflicts with the "identity of parties" test set in Brooks v. Arthur, 626 F.3d 194, 201 (4th Cir. 2010), which reiterates Restatement (Second) of Judgments §36(2) (1982).

A party appearing in an action in one capacity, individual or representative, is not thereby bound, by or entitled to the benefits of the rules, of res judicata in a subsequent action in which he appears in another capacity.

Petitioner maintains that there is no identity of parties when Respondents were sued in their individual capacity as business owners and employers in the State action, and as State actors, under the "color of law".

To summarize, res judicata cannot operate to bar the negligence cause of action in the State action because it was not raised in the Federal action, and as such was not litigated and adjudicated.

Petitioner believes that certiorari should be granted because: (1) this is the best vehicle to clarify whether the original case filed may be barred subsequent to a judgment in the second action; (2) the Court of Appeals ruling is in conflict with prior decisions of this Court on matters such as identity of parties and identity of claims (i.e. *Plum Creek* and *Brooks* cases respectively, *supra*); (3) the ruling of the Court of Appeals is in conflict with case law on timeliness of raising res judicata as a defense (i.e. *Resolution Trust* and *Town of Kingstree*, *supra*); and, (3) the Court of Appeals ruling is in conflict with case law that precludes the application of res judicata (i.e. *Pye*, *supra*).

CONCLUSION

Based upon the foregoing, Petitioner has properly raised the aforementioned issues for review by this Honorable Court. Petitioner respectfully requests this Honorable Court to grant his petition for certiorari.

Respectfully submitted,

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