Hawkins & Jedziniak, LLC

1225 South Church Street
Greenville, South Carolina 29605
Telephone: (864) 275-8142
Facsimile: (864) 752-0911
josh@hjllcsc.com
helena@hjllcsc.com

July 10, 2020
-via certified U.S. MAIL and electronic filing -
Jenny Abbot Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: *Mary Kimbrell v. Walmart Stores, Inc., Claims Management, Inc., and Josh Johnson*
Appellate Case No.: 2020-000668

Dear Ms. Kitchings:

Please find enclosed for filing Appellant's Initial Brief and Designation of Matter in the above-mentioned case, along with a Proof of Service of the same.

With this mailing, we are serving counsel for the respondents and copying the South Carolina Court Administration.

Sincerely,

Monica Brody
Paralegal to
Joshua T. Hawkins
Helena L. Jedziniak
Hawkins and Jedziniak, LLC
Attorneys for Appellant

Enclosures

Copies (with Proof of Service):

Randi Lynn Roberts
GaffneyLewis, LLC
3700 Forest Drive, Suite 400
Columbia, South Carolina 29204
Attorney for Respondents Walmart Stores, Inc., and Claims Management, Inc., and Josh Johnson

South Carolina Court Administration
1220 Senate Street, Suite 200
Columbia, South Carolina 29201

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Mary Kimbrell.....Appellant,

v.

Walmart Stores, Inc., Claims Management, Inc., and Josh Johnson.....Respondents.

Appellate Case No. 2020-000668

INTIAL BRIEF OF APPELLANT

Joshua T. Hawkins, S.C. Bar #78470
Helena L. Jedziniak, S.C. Bar #100825
Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, South Carolina 29605
(864) 275-8142 (telephone)
(864) 752-0911 (facsimile)
Attorneys for Appellant

Randi Lynn Roberts
Gaffney Lewis, LLC
3700 Forest Drive, Suite 400
Columbia, South Carolina 29204
Attorney for Respondents Walmart Stores, Inc., Claims Management, Inc., and Josh Johnson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

STATEMENT OF ISSUES ON APPEAL

1. WHETHER A DISMISSAL PURSUANT TO 40(J) HAS THE EFFECT OF A VOLUNTARY DISMISSAL SUCH THAT A PARTY CAN FILE A NEW ACTION RATHER THAN RESTORING THE STRICKEN ACTION.

2. WHETHER RULE 12(B)(8) PROHIBITS A DEFENDANT FROM RESTORING A STRICKEN ACTION AFTER THE PLAINTIFF HAS FILED A NEW ACTION.

STATEMENT OF THE CASE

On November 16, 2017, Mary Kimbrell ("appellant") brought this action against Walmart Stores, Inc., Claims Management, Inc., and Josh Johnson (collectively "the respondents") alleging causes of action for negligence and gross negligence; relief pursuant to the South Carolina Unfair Trade Practices Act; false imprisonment; negligent hiring, supervision, and retention; class action status; improper claim practices; abuse of process; and libel, slander, and defamation. The respondents answered denying all allegations.

The appellant's efforts to advance her case were stymied by the respondents, who filed multiple motions related to discovery, including motions to stay, to quash, and for protective orders. As a result, the parties were unable to make pre-trial progress, including conducting meaningful and thorough discovery. The parties' agreement to strike the case from the docket pursuant to SCRCP 40(j) was memorialized by an order issued by Judge Gravely on October 24, 2019.

On November 20, 2019, still within the statute of limitations for all asserted causes of action, the appellant filed a new lawsuit, case number 2019-CP-23-06795. In that lawsuit, the appellant incorporated relevant information garnered during the limited discovery that the parties were able to conduct while the prior case was active, as well as details concerning the progress of the appellant's criminal case. The respondents did not file an answer to this complaint, but instead filed a motion to restore the original action. The appellant opposed this motion. On March 17, 2020, Judge Stilwell granted the respondent's motion to restore the initial action, now case number 2020-CP-23-01792, and dismissed this action. The appellant timely filed a notice of appeal, which she served on the respondents.

STANDARD OF REVIEW

Questions of law are reviewed *de novo*, meaning "a reviewing court is free to decide questions of law with no particular deference to the trial court." *Personal Care, Inc. v. Theo,* 426 S.C. 78, 85, 825 S.E.2d 281, 284 (Ct. App. 2019) (quoting *Proctor v. Steedley*, 398 S.C. 561, 573, 730 S.E.2d 357, 363 (Ct. App. 2012)). In reviewing a South Carolina Civil Procedure Rule, the Court applies the same rules of construction used in interpreting statutes. *Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994). "If the rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary, and the stated meaning should be enforced." *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003).

FACTUAL BACKGROUND

On March 4, 2017, the appellant was detained by Walmart employees and accused of shoplifting at the Walmart located on White Horse Road in Greenville, South Carolina. The appellant vehemently denied stealing anything from the store, emptying her purse and pockets in front of store employees and producing receipts documenting the valid purchases that she had made just minutes earlier. The appellant repeatedly asked to see the video footage of the alleged theft and for proof of the respondents' accusations. The respondents were unable to produce either. As a result of the respondents' actions, the appellant was arrested and charged with shoplifting.

The plaintiff appeared *pro se* at her initial court date, pleaded not guilty, and requested a bench trial. Although this was a criminal matter, it was prosecuted by Walmart, not by the arresting officer or by a representative of the Solicitor's Office. After confirming that the parties were prepared to proceed, the court began the trial, hearing testimony from both the appellant and the Walmart loss prevention officer prosecuting the case. The court then learned that the loss prevention officer was not present at the time of the alleged crime, had no direct

knowledge of the events, and did not have a video recording of the incident, although such a recording existed. The court informed the parties that it would reschedule the trial because Walmart did not have any proof to support its allegations.

The appellant received notice of her new trial date. However, unbeknownst to the court, she was hospitalized shortly before her court date and at the time of her rescheduled trial. The court tried the appellant in her absence on the rescheduled trial date. After learning of her conviction, the appellant, through counsel, filed a motion to reopen her criminal case. On May 10, 2018, the Court held a hearing on that motion. The State was represented by the arresting officer, who consented to reopening the case. Counsel for Walmart, who had no right to participate in the hearing, was present and insisted upon being heard on the record. Walmart's counsel argued against reopening the case, even with knowledge that the State had already consented to the appellant's motion. Despite Walmart's interference, the court granted the appellant's motion and reopened the criminal case, which was turned over to the Solicitor's Office. The shoplifting charge against the appellant was subsequently dismissed.

ARGUMENT

I. Striking a matter from the docket pursuant to SCRCP 40(j) is the equivalent of a voluntary dismissal.

Rule 40(j) of the South Carolina Rules of Civil Procedure provides, in part:

> A party may strike its complaint, counterclaim, cross-claim or third party claim from any docket one time as a matter of right, provided that all parties adverse to that claim, counterclaim, cross-claim or third party claim agree in writing that it may be stricken, and all further agree that if the claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored. Rule 40(j) SCRCP.

"In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes." *Maxwell v. Genez*, 356 S.C. 617, 591

S.E.2d 26 (2003) citing *Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 443 S.E. 2d 906 (1994). "In interpreting a statute, it is imperative that the statute be accorded its clear meaning." *Nucor Steel, a Div. of Nucor Corp. v. S.C. Pub. Serv. Comm'n*, 310 S.C. 539, 545, 426 S.E.2d 319, 322 (1992) citing *Helfrich v. Basington Sand & Gravel Co.*, 268 S.C. 236, 233 S.E.2d 291 (1977). "A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569 citing *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995).

Under its plain language, "Rule 40(j) does not require that a party move to restore a case to the docket within one year after it was stricken. Instead, the unambiguous language provides that, if the claim is restored within one year after it is stricken, the status of limitations is tolled for that time." *Maxwell* at 621. Accordingly, as there is no requirement that parties restore a case stricken pursuant to Rule 40(j), the question becomes whether striking a case pursuant to Rule 40(j) is equivalent to a dismissal. That question is one that has already come before this Court in *Goodwin v. Landquest Development*, LLC, 414 S.C. 623, 631-32, 779 S.E.2d 826 (Ct. App. 2015).

According to the *Goodwin* court, "while our rules do not clearly provide that striking a case pursuant to Rule 40(j) is a dismissal, there is a basis in our law for considering a case stricken pursuant to the rule as the equivalent of dismissed." *Ibid.* In reaching this conclusion, the *Goodwin* court considered the notes to the 1994 amendment of SCRCP 40, which provide, in relevant part:

> Rule 40(j) is the final section of the rule and substantially revises the procedure for dismissing a case previously found in Rule 40(c)(3). Rule 40(j) now requires all adverse parties to consent to the dismissal in writing, but the consent also operates to toll the statute of limitations for one year after the case is stricken from the docket as to each consenting party. SCRCP 40, note to 1994 amendment.

Taking both the plain language of Rule 40(j) and this Court's prior reasoning together, the trial court should have determined that the parties were not required to restore the original action in this case and that striking the case pursuant to Rule 40(j) constituted a voluntary dismissal of the case.

II. If a plaintiff files a new cause of action instead of restoring an action stricken by Rule 40(j), then Rule 12(b)(8) prohibits another party from restoring the stricken action.

Because the original action in this case was dismissed when it was stricken from the roster pursuant to Rule 40(j), there was no action pending at the time that the appellant filed the new action against the respondents. Once filed, that new action prevented the respondents, pursuant to Rule 12(b)(8), from restoring the original action.

Rule 12(b)(8) provides for dismissal where "another action is pending between the same parties for the same claim." Rule 12 (b)(8), SCRCP. As previously interpreted by this Court, a "dismissal under Rule 12(b)(8) may be proper when there is (1) another action pending, (2) between the same parties, (3) for the same claim." *Capital City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 105, 674 S.E.2d 524. (Ct. App. 2009). This Court has determined that it will "interpret the rule narrowly such that the claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)." *Ibid* at 106.

The two actions filed in this case fit squarely within the Court's narrow application of Rule 12(b)(8). The parties agreed to strike the case from the roster pursuant to Rule 40(j). Because the statute of limitations had not yet run, the appellant opted to file a new action rather than move to restore the stricken action, as was within her rights. Once filed, that new action constituted the only pending action. When the respondents then moved to restore the stricken

action, they sought to bring a second action involving the same parties and claims. The respondents should have been prevented from restoring that action by Rule 12(b)(8). As a result, the appellant should be entitled to a dismissal of the improperly restored action.

CONCLUSION

For the foregoing reasons, the appellant respectfully requests that the Court reverse the circuit court's order to restore the stricken pleadings. Additionally, the appellant respectfully requests that his Court dismiss the improperly restored case and reinstate the second action filed by the appellant.

Respectfully submitted,

s/Joshua T. Hawkins
Joshua T. Hawkins, S.C. Bar #78470
Helena L. Jedziniak, S.C. Bar #100825
Hawkins & Jedziniak, LLC
1225 South Church Street
Greenville, South Carolina 29605
(864) 275-8142 (telephone)
(864) 752-0911 (facsimile)
josh@hjllcsc.com
helena@hjllcsc.com
Attorneys for Appellant

Greenville, South Carolina
July 10, 2020

RECEIVED
Jul 10 2020
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Robin B. Stilwell, Circuit Court Judge

Appellate Case No. 2020-000668

Mary Kimbrell,

Appellant,

v.

Walmart Stores, Inc., Claims Management, Inc., and Josh Johnson,

Respondents.

PROOF OF SERVICE

I certify that I served the Appellant's Initial Brief and Designation of Matter on the Respondents, by Certified U.S. Mail, addressed to their following attorneys of record: Randi Lynn Roberts and Lee Ellen Bagley, both at GaffneyLewis, LLC, 3700 Forest Drive, Suite 400, Columbia, South Carolina 29202, on this date July 10, 2020.

- SIGNATURE PAGE TO FOLLOW -

Respectfully submitted,

HAWKINS & JEDZINIAK, LLC

Joshua T. Hawkins, S.C. Bar #78470
Helena L. Jedziniak, S.C. Bar #100825
1225 South Church Street
Greenville, South Carolina 29605
(864) 275-8142 (telephone)
(864) 752-0911 (facsimile)
josh@hjllc.com
helena@hjllcsc.com
Attorneys for Plaintiff

Greenville, South Carolina
July 10, 2020

Copies:

Randi Lynn Roberts
GaffneyLewis, LLC
3700 Forest Drive, Suite 400
Columbia, South Carolina 29204
Attorney for Respondents Walmart Stores, Inc., and Claims Management, Inc., and Josh Johnson

South Carolina Court Administration
1220 Senate Street, Suite 200
Columbia, South Carolina 29201