THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM OCONEE COUNTY
COURT OF COMMON PLEAS

The Honorable R. Scott. Sprouse, Circuit Court Judge

Appellate Case No.: 2019-002011

Jane Doe

Appellant,

v.

Oconee Memorial Hospital, Greenville Health System, Upstate Affiliate Organization, Kevin Docyk, M.D., Mary Beth Hendricks

Respondents.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

REPLY BRIEF OF RESPONDENTS

ARGUMENT

Appellant hereby responds to the arguments set forth in Respondents' initial brief as follows and would argue that for those reasons, as well as those set forth more fully in Appellant's initial brief, the Court should grant Appellant's appeal and reverse the circuit court's October 31, 2019 Order granting summary judgment to Respondents.

I. Appellant's Claims Relate Back to Appellant's Initial Complaint.

Respondents argue that summary judgment was properly granted on Appellant's tort claims as time-barred, even in light of Appellant's argument that said claims relate back to her previous complaint pursuant to Rule 15(c) of the South Carolina Rules of Civil Procedure, because Rule 15(c) does not apply under the procedural facts of this case. Specifically, Respondents argue that Rule 15(c) only applies to amended complaints and that Plaintiff's claims were brought by way of a wholly new action and not by way of an amended complaint. Respondents point to no precedent or case law from any other courts to support this position. In fact, contrary to Respondent's assertion, Appellants can point the court to decisions from other courts that have allowed subsequent complaints to relate back to prior actions without the requirement of the subsequent action being filed in the form of an amended complaint. *See, e.g., Buran v. Coupal*, 87 N.Y.2d 173 (Ct. App. 1995) (allowing relation back of second complaint filed ten years after prior action).

Regardless, Appellant asserts that equitable principles require that Plaintiff's complaint in the instant action be treated as an amended complaint, especially in light of the fact that Plaintiff had filed a motion to amend her complaint in the previously dismissed action to allege additional claims against Respondents, which motion the circuit court refused to address and/or rule on prior to dismissal of that entire previous action. *See*

Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 368 S.C. 108, 687 S.E.2d 29 (S.C. 2009) ("The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies…").

As noted in Appellant's initial brief, and prior to the hearing on Respondents' motion to dismiss Appellant's prior December 5, 2017 action, Appellant filed a motion to amend her complaint, pursuant to Rule 15(a), to allege additional causes of action against Respondents. However, the circuit court heard no argument on Appellant's motion to amend and completely failed to rule on the motion prior to dismissing that entire action. Had the circuit court properly addressed Appellant's motion to amend in the previous action and allowed her to submit a proposed amended complaint with additional claims, as the interests of justice freely support and appear to mandate, the claims at issue in the pending action could have been included in the prior action and would not have been subject to an argument that they were time-barred by the applicable statute of limitations. *See Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222, 226 (1962) (explaining that Rule 15(a)'s "freely given" provision as a "mandate" that "is to be heeded"). However, the circuit court never even considered Appellant's motion to amend, which failure was an abuse of the court's discretion under Rule 15. *State v. Hawes*, 411 S.C. 188, 191, 767 S.E.2d 707, 708 (2015) (quoting *Samples v. Mitchell*, 329 S.C. 105, 114, 495 S.E.2d 213, 218 (Ct. App. 1997)). This failure should not work to the direct and substantial prejudice of Appellant.

While the circuit court failed to rule on Appellant's motion to amend in the previous action, it did note in the order dismissing that action that such dismissal was "without prejudice to any future claims by the Plaintiff in a new action against the Defendant

pertaining to different causes of action." In light of the circuit court's erroneous refusal to address Appellant's motion to amend her complaint in the previous action to allege such "future claims," the claims at issue should relate back to the original action pursuant to Rule 15(c). Those claims "arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings," and, as such, the new action "relate back to the date of the original pleading." Rule 15(c), SCRCP. No new information was required to assert those claims and Respondents were fully aware of the facts and the asserted claims. Therefore, under the principles espoused by Rule 15(c), the claims at issue relate back to the date of the original pleading that was filed within the statute of limitations. *See Thomas v. Grayson*, 318 S.C. 82, 456 S.E.2d 377 (1995) (purpose of Rule 15(c) is to salvage causes of action otherwise barred by statute of limitations).

II. Appellant's Claims Are Not Barred by the Doctrines of Res Judicata and/or Collateral Estoppel.

Respondents also argue that Appellant's tort claims, even if not time-barred, are barred by the doctrines of res judicata and/or collateral estoppel. Specifically, Respondents argue that Appellant's tort claims are essentially the same claims previously dismissed in Appellant's previous action - negligence, gross negligence, negligent supervision and intentional infliction of emotional distress – brought under the same facts at issue in the instant action. In support of its motion to dismiss that previous action, grant of which is currently also on appeal, Respondents argued that all of Appellant's claims were essentially an attempt at seeking civil liability for spoliation of evidence, a claim Respondents argued is not recognized in South Carolina. Respondents now argue that Appellant's tort claims in this action are simply an attempt at re-litigating that same issue and should, therefore, have also been held barred by the doctrines of res judicata and/or

collateral estoppel. That argument must also fail for the reasons set forth below.

As an initial matter, the circuit court's July 9, 2018 Order dismissing Plaintiff's previous action against Respondents does not bar – and appears to even contemplate – Appellant's claims in the instant action. In fact, the circuit court expressly noted that its dismissal of the claims in that previous action was "without prejudice to any future claims by the Plaintiff in a new action against the Defendant pertaining to different causes of action." "A dismissal of a case without prejudice means that the plaintiff can reassert the same cause(s) of action by curing the defects that led to dismissal. By contrast, dismissals with prejudice are intended to bar relitigation of the same claim.'" *Collins v. Sigmon*, 299 S.C. 464, 467, 385 S.E.2d 835, 837 (1989)(citing Friedenthal, Kane & Miller, Civil Procedure 651 (1985)). Thus, because the dismissal of the previous action was made without prejudice to either party, res judicata does not apply.[1] *See McEachern v. Black*, 329 S.C. 642, 651, 496 S.E.2d 659, 663 (Ct. App. 1998).

Next, Plaintiff's claims are not barred under the doctrines of res judicata and/or collateral estoppel because they are not the same claims adjudicated in the previous action. The doctrine of res judicata bars a party from bringing claims against a defendant when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those same parties and was actually already adjudicated in the previous action. *Plum Creek Dev. Co. v. City of Conway*, 334 S.C. 30, 34, 512 S.E.2d 106, 109

[1] Res judicata is an affirmative defense that must be pled at trial in order to be pursued on appeal. *Wagner v. Wagner*, 286 S.C. 489, 491, 335 S.E.2d 246, 247 (Ct. App. 1985). An affirmative defense is waived if not pled. *Howard v. S. C. Dep't of Highways*, 343 S.C. 149, 152, 538 S.E.2d 291, 294 (Ct. App. 2000). Generally, claims or defenses not presented in the pleadings will not be considered on appeal. *McNeely v. S.C. Farm Bureau Mut. Ins. Co.*, 259 S.C. 39, 41, 190 S.E.2d 499, 499 (1972). Respondents did not assert res judicata or collateral estoppel as an affirmative defense and, as such, this argument should be considered waived and should not be considered on appeal.

(SC 1999). The fundamental purpose of the doctrine of res judicata is "to ensure no one should be twice sued for the same cause of action." *S.C. Pub. Interest Found. v. Greenville County*, 401 S.C. 377, 386, 737 S.E.2d 502, 507 (2013) (emphasis added). To establish that claims are barred under the doctrine of res judicata, a defendant must prove the following: "(1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *Id.* Such a showing cannot be made in this action because Appellant's claims in this action are not the same as were adjudicated in the previous action. Specifically, the claims dismissed by way of the previous action - negligence, gross negligence, negligent supervision and intentional infliction of emotional distress – are wholly different in nature from Appellant's tort claims in the instant action. While Respondents argue there is no real distinction between Appellant's tort claims in this action and the claims in the previous action, and that "labeling the claim as 'bailment' instead of 'negligence'" does not justify a finding that the claims are different, South Carolina law specifically recognizes the "bailment" as a tort that is distinct from general negligence.[2] The mere fact that Appellant's tort claims are based on the same underlying facts as the claims alleged against Respondents in the previously dismissed action does not make them the same causes of action and/or seeking adjudication of the same issues raised in the previous action as required for application of the doctrines of res judicata and/or collateral estoppel.

[2] Respondents repeatedly assert, both in the circuit court and in the brief to this Court, that Appellant is "assert[ing] a negligent spoliation of evidence claim, which is not recognized under South Carolina law." This assertion is false and Respondents' repetition of it does not make it true. Despite Respondents' repeated mischaracterization of the plain language of Appellant's pleadings, Appellants have never asserted a claim for negligent spoliation of evidence.

CONCLUSION

For all of the reasons set forth above, as well as those already set forth more fully in Appellant's Initial Brief, Appellant respectfully requests that this Court grant Appellant's appeal in this matter and reverse the circuit court's October 31, 2019 Order granting summary judgment to Respondents on Appellant's claims.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have submitted for filing the Appellant's Reply Brief to the South Carolina Court of Appeals via email to ctappfilings@sccourts.org on July 20, 2020. I further certify that I have emailed the Appellant's Reply Brief to the Respondents' attorney by way of counsel's AIS email address at kshaw@hsblawfirm.com, as well as by depositing a copy of it in the U.S. Mail, postage prepaid, address to Kenneth N. Shaw, Haynsworth Sinkler Boyd, P.A. at Post Office Box 2048, Greenville, SC 29602.

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VIA ELECTRONIC MAIL
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Re: Jane Doe vs. Oconee Memorial Hospital, et al.
Appellate Case No.: 2019-002011

Dear Ms. Kitchings:

Enclosed please find the Appellant's Reply Brief and Proof of Service for filing in the above-referenced case.

Should you have any additional questions or concerns, please do not hesitate to contact me.

Sincerely,

Hannah Rogers Metcalfe

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HRM/ezv

Enclosure

cc: Kenneth N. Shaw, Esq.