THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Scott Sprouse, Circuit Court Judge

C.A. No. 2018-CP-37-00762
Appellate Case No. 2019-002011

Jane Doe ..... Appellant,

v.

Oconee Memorial Hospital; Greenville Health System; Upstate Affiliate Organization; Kevin Docyk, MD; Mary Beth Hendricks ..... Respondents.

FINAL BRIEF OF RESPONDENTS

HAYNSWORTH SINKLER BOYD, P.A.

Kenneth N. Shaw (SC Bar 77859)
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200
kshaw@hsblawfirm.com

Attorney for Respondents

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STATEMENT OF ISSUES ON APPEAL

I. **Was the Circuit Court correct in holding Appellant's tort claims were barred by the statute of limitations?**

II. **Were Appellant's tort claims also barred by the doctrines of res judicata and/or collateral estoppel?**

STATEMENT OF THE CASE

This case involves allegations that Respondents mishandled a sexual assault examination kit on December 5, 2015. Appellant "Jane Doe" has filed three separate civil actions asserting numerous causes of action. The instant appeal is of the circuit court's October 31, 2019 Order dismissing the tort claims alleged in C.A. No.: 2018-CP-37-00762.[1]

Appellant filed her initial action on December 5, 2017 against Oconee Memorial Hospital[2] and Greenville Health System ("GHS"). That Complaint included the following causes of action, all of which stem from a sexual assault forensic examination performed by a GHS employee at Appellant's request following her allegations that she had been drugged and sexually assaulted in Atlanta: (1) negligence – failure to properly collect and protect evidence; (2) negligence – failure to order necessary tests; (3) gross negligence – failure to properly collect and protect evidence; (4) gross negligence – failure to order necessary tests; (5) negligent supervision; and (6) intentional infliction of emotional distress. (R. 2-15, App. Case No. 2018-001480). GHS filed a motion to dismiss the Complaint on January 10, 2018. (R. 16-22, App. Case No. 2018-001480).

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[1] The October 31, 2019 Order also dismissed the medical malpractice claims set forth in C.A. No.: 2019-CP-37-0271. Appellant is challenging that dismissal in a separate appeal, 2019-002009. Appellant has chosen to treat this as a distinct and separate appeal; therefore, Respondents will do the same.

[2] Oconee Memorial Hospital is not a distinct entity capable of being sued, but rather is the name of a hospital that at all times relevant to this action was operated by GHS.

A hearing on the Motion to Dismiss was held on June 4, 2018. Just prior to the start of the hearing, Appellant filed a motion to amend her Complaint. (R. 258-259, App. Case No. 2018-001480). Appellant argued the motion to amend was necessary to add additional defendants and add two new causes of action. (Id.). Appellant's motion to amend did not identify the additional defendants nor did it specify the two new causes of action, nor did the motion include a proposed amended complaint; however, during the hearing, Appellant's counsel stated the two new causes of action would be "breach of contract" and "bailment." (R. 247, App. Case No. 2018-001480).

On June 8, Appellant filed a Memorandum in Opposition to the Motion to Dismiss and GHS filed a reply memorandum. (R. 118-130 and 23-29, App. Case No. 2018-001480). The circuit court issued an Order granting the Motion to Dismiss on July 9, 2018. By way of the Order, the circuit court dismissed with prejudice the six causes of action set forth in Appellant's Complaint. (R. 263-271, App. Case No. 2018-001480). However, the circuit court provided that its ruling was "without prejudice to any future claims by the Plaintiff in a new action against the Defendant pertaining to different causes of action." (Id.).

Contrary to what is stated in Appellant's Brief, the Order did address Appellant's Motion to Amend. The circuit court included the following as a footnote to the "Facts" section:

> "In ruling on Defendant's 12(b)(6) motion, the Court was constrained by the facts alleged in Plaintiff's Complaint. The Court notes that approximately one hour prior to the hearing on June 4, 2018, and without any prior notice to Defendant, Plaintiff electronically filed a motion to amend her complaint. While Plaintiff's counsel briefly mentioned the motion to amend during the hearing, the merits of Plaintiff's motion were not properly before the Court and were not discussed. Further, the Court could not consider the merits of Plaintiff's motion to amend even if it were inclined to do so, because no proposed amended complaint was ever submitted to the Court." (Id. at 263).

Appellant filed a Motion to Reconsider on July 16, 2018, which was followed by GHS'

Memorandum in Opposition on July 18, 2018. (R. 272-279 and 280-281, App. Case No. 2018-001480). The circuit court issued a written order denying Appellant's Motion for Reconsideration on July 19, 2018. (R. 282-283, App. Case No. 2018-001480). Appellant filed a Notice of Appeal of August 8, 2018. (R. 284-296, App. Case No. 2018-001480). That appeal is still pending. See Appellate Case No. 2018-001480.

On December 5, 2018, Appellant filed the civil action which is the subject of the instant appeal. In the Complaint, Appellant essentially made the same factual allegations as she had previously alleged; however, she added Upstate Affiliate Organization ("UAO"), Kevin Docyk, MD, and Mary Beth Hendricks as defendants and alleged four new causes of action: 1) "Breach of Contract as to Oconee Memorial Hospital, GHS, and UAO"; 2) "Breach of Implied Contract as to Oconee Memorial Hospital, GHS, and UAO"; 3) "Bailment as to all Defendants", and; 4) Implied Bailment as to all Defendants". (Dec. 5, 2018 Compl., R. pp. 22-30).

Respondents filed a motion to dismiss on December 21, 2018. (Mot. to Dismiss, R. pp. 31-36). Respondents argued Appellant's tort claims were barred by the doctrines of res judicata and/or collateral estoppel and by the applicable statute of limitations. The motion initially came before the court on March 20, 2019. During the hearing, Appellant's counsel argued there were questions of fact about whether Respondents were subject to the Tort Claims Act. After taking the matter under advisement, the court issued a Form 4 Order on April 11, 2019 denying the motions to dismiss on the basis Respondents' arguments invoked matters outside of the pleadings. (April 11, 2019 Form 4 Order, R. pp. 1-4). Respondents responded by timely filing a motion to reconsider. (Mot. to Reconsider, R. pp. 42-45). On May 8, 2019, the court issued another Form 4 Order whereby it granted a *de novo* hearing on the statute of limitations issue which it stated would be treated as a motion for summary judgment under Rule 12(c), SCRCP. (May 8, 2019 Form 4 Order,

R. pp. 5-8). The court invited both parties to submit additional materials in furtherance of their arguments related to the statute of limitations issue. (Id.).

The *de novo* hearing was held on September 23, 2019. In support of their argument that Appellant's tort claims were subject to the two year statute of limitations within the Tort Claims Act, Defendants submitted a memorandum which included an affidavit from Cynthia Cambron. (Supp. Mem. in Support of Mot. to Dismiss, R. pp. 79-86). The affidavit established the following pertinent facts:

- GHS is a governmental entity and healthcare facility within the meaning of the South Carolina Tort Claims Act.
- In December 2015, and at all times relevant to this action, Oconee Memorial Hospital was one of numerous hospital facilities within the System operated by GHS.
- In December 2015, and at all times relevant to this action, Kevin Docyk, MD and Mary Beth Hendricks were employees of GHS pursuant to the Tort Claims Act.
- UAO, a 501(c)(3) corporation, had nothing to do with the care rendered to Appellant on December 5, 2015, as it did not exist as an entity at that time.

In response, Appellant did not submit any evidence to the contrary. Rather, Appellant filed a memorandum in opposition in which she argued dismissal was inappropriate, because she had not had adequate time to conduct discovery on the statute of limitations issue, and she believed her new claims should relate back to the filing of her initial civil action. (Mem. in Opp. to Defs. Mot. to Dismiss, R. pp. 87-167). A few days after the hearing, Appellant filed a supplemental memorandum in opposition in which she continued to argue that she had not had adequate time to conduct discovery. (Supp. Mem. in Opp. to Defs. Mot. to Dismiss, R. pp. 168-241). Respondents then filed a reply memorandum in which they addressed Appellant's discovery arguments. (Reply Mem. in Support of Defs. Mot. to Dis/Mot. for Sum. Judg., R. pp. 242-256).

On October 17, 2019, via a Form 4 Order, the circuit granted Appellants' motion to dismiss. Appellant filed a motion to reconsider on October 25, 2019. The court entered a formal Order on October 31, 2019, which granted Respondents' motion to dismiss as to all causes of action, except

Appellant's breach of contract and breach of implied contract actions. Further, the Order dismissed all claims against UAO, Kevin Docyk, MD, and Mary Beth Hendricks. The court denied Appellant's motion to reconsider on November 4, 2019. The instant appeal followed.

However, in the instant appeal, Appellant abandons her argument that she did not have adequate time to conduct discovery on the statute of limitations issue. Her sole argument on appeal in this case is her belief that her tort claims should relate back to the filing of her initial civil action pursuant to Rule 15 of the South Carolina Rules of Civil Procedure.

STANDARD OF REVIEW

The South Carolina Rules of Civil Procedure permit a court to consider a motion to dismiss under Rule 12(b)(6) as a Rule 56 motion for summary judgment if matters outside the complaint are presented to and not excluded by the court, and if the parties are given a reasonable time to present additional evidence according to Rule 56. Rule 12(b), SCRCP. Prior to the court considering the motion as a motion for summary judgment, the parties must be "fairly apprised that the court would look beyond the pleadings." Higgins v. Med. Univ. of S.C., 326 S.C. 592, 598, 486 S.E.2d 269, 272 (Ct. App. 1997) (quoting Garaux v. Pulley, 739 F.2d 437, 439 (9th Cir.1984)); see also Baird v. Charleston Cty., 333 S.C. 519, 528, 511 S.E.2d 69, 74 (1999); Johnson v. Dailey, 318 S.C. 318, 321, 457 S.E.2d 613, 615 (1995). Parties must also be afforded a reasonable opportunity to introduce evidence pursuant to Rule 56(c) and (e). Crosswell Enterprises, Inc. v. Arnold, 309 S.C. 276, 279, 422 S.E.2d 157, 159 (Ct. App. 1992).

Assuming the circuit court provided sufficient notice, the proper standard of review is that of a traditional summary judgment analysis. Baird, 333 S.C. at 529, 511 S.E.2d at 74-75. Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the conclusions and inferences to be drawn from the facts are undisputed. Calvert v. House

Beautiful Paint and Decorating Ctr., Inc., 313 S.C. 494, 443 S.E.2d 398 (1994). In ruling on a motion for summary judgment, the evidence should be viewed in the light most favorable to the non-moving party; however, "[i]t is not sufficient [to defeat a motion for summary judgment] that one create an inference which is not reasonable or an issue of fact that is not genuine." Shuler v. Tuomey Reg'l Med. Ctr., 313 S.C. 225, 227, 437 S.E.2d 128, 129 (S.C. Ct. App. 1993). A party opposing a motion for summary judgment may not rest on the mere allegations or denials of her pleadings, but must set forth or point to specific facts showing that there is a genuine issue of material fact. George v. Empire Fire & Marine Ins. Co., 344 S.C. 582, 593, 545 S.E.2d 500 (2001).

ARGUMENTS

I. THE CIRCUIT COURT CORRECTLY FOUND THAT APPELLANT'S TORT CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS.

It is undisputed that GHS is the only proper defendant.[3] It is further undisputed that GHS is a governmental entity and healthcare facility within the meaning of the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, et seq. (1976, as amended), and it and its agents and employees are, therefore, entitled to all rights, privileges, defenses, limitations, and immunities afforded by the Act and afforded by the doctrine of sovereign immunity, as is retained by the Act. Sloan v. Greenville Hosp. System, 388 S.C. 152, 694 S.E.2d 532 (2010); Knox v. Greenville Hosp. System, 362 S.C. 566, 608 S.E.2d 459 (Ct. App. 2005); Murphy v. Richland Mem. Hosp., 317 S.C. 560, 455 S.E.2d 688 (1995), and Benton v Roger C Peace, 313 S.C. 520, 443 S.E.2d 537 (1994)).

In light of the undisputed facts, it is clear Appellant's tort claims are subject to the Tort

[3] Appellant has not challenged the dismissal of Upstate Affiliate Organization, Kevin Docyk, MD, and Mary Beth Hendricks as individual defendants; rather, Appellant's sole argument is her claims against GHS should relate back to filing of her original complaint.

Claims Act and the limitations set forth therein. Pursuant to S.C. Code § 15-78-110, the applicable statute of limitations for all tort claims is 2 years. Plaintiff's alleged injuries occurred on December 5, 2015. Plaintiff filed the instant action on December 5, 2018, a full year after the statute of limitations expired in regards to any tort claims. Therefore, any tort claims, including her bailment causes of action, were barred by the applicable statute of limitations. See Hadfield v. Gilchrist, 343 S.C. 88, 538 S.E.2d 268 (2000) (holding that, although contractual in nature, "an action for breach of the duty of care by a bailee sounds in tort").

Appellant does not appear to challenge the applicability of the Tort Claims Act; rather, Appellant argues her tort claims should have related back to the filing of her original complaint. She cites to Rule 15(c) of the South Carolina Rules of Civil Procedure, but Rule 15(c) is inapplicable to the instant action, because it only applies to amended complaints. The instant action was not filed as an amended complaint. Rather, it was filed as an entirely new action. Respondents are aware of no legal authority, and in fact, Appellant cites none for the proposition that Rule 15 can be used to save a wholly separate, untimely filed civil action from being barred by the statute of limitations.

Rather, Appellant argues equitable principals demanded the circuit court treat her new complaint as an amended complaint. Appellant's argument presupposes that the circuit court erred in its refusal to grant her motion to amend the complaint in her original negligence action; however, that decision is the subject of another appeal. See Appellate Case No. 2018-001480. Respondents contend the circuit court acted within its discretion in that case, but even if the circuit court were inclined to believe it erred in its previous decision, Respondents are not aware of any legal theory whereby the circuit court could essentially *sua sponte* revisit the decision while the order was on appeal.

Nevertheless, even if it were legally possible to treat Appellant's instant Complaint as an amended complaint, her new causes of action would not relate back to the filing of the original action. As the circuit correctly noted in its Order, it is well established that a complaint cannot be amended to state a new or different cause of action after the statute of limitations has expired. Scott v. McCain, 272 S.C. 198, 202, 250 S.E.2d 118, 121 (1978); Coral Gables v. Palmetto Brick Co., 183 S.C. 478, 191 S.E. 337 (1937) ("[A]n amendment which introduces a new or different cause of action and makes a new or different demand does not relate back to the beginning of the action, so as to stop the running of the statute of limitations, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed.")[4]

In summary, given the procedural history and the undisputed facts, the circuit court had no choice but to dismiss Appellant's tort causes of action, as they were unquestionably filed after the running of the applicable statute of limitations.

II. APPELLANT'S TORT CLAIMS WERE BARRED BY THE DOCTRINES OF RES JUDICATA AND/OR COLLATERAL ESTOPPEL

In dismissing Appellant's tort causes of action, the circuit court specifically refused to address Respondents' argument that Appellant's claims were barred by the doctrines of res judicata and/or collateral estoppel (see October 31, 2019 Order, p. 3, fn. 2, R. p. 14); however, this Court may affirm the dismissal for any reason appearing in the record. Rule 220(c), SCACR. Respondents contend that if Rule 15(c) could somehow be used to save Appellant's claims from the statute of limitations, then her claims should be barred under the doctrines of res judicata and/or

[4] As previously noted, Appellant does not appear to be challenging the dismissal of Defendants Docyk and Hendricks, but to the extent she may be, she would have no basis for arguing the claims against them were not barred by the statute of limitations. Rule 15(c) applies when an existing party is changed, not when a new party is added. Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 371, 597 S.E.2d 27, 29 (Ct. App. 2004).

collateral estoppel.

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, while collateral estoppel, also known as issue preclusion, prevents a party from re-litigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same. See Judy v. Judy, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011). In dismissing Appellant's initial civil action, the circuit court reached three legal conclusions which would be applicable to the instant action:

1. GHS owed no legal duty to Appellant in regards to the sexual assault examination kit; rather, the court held GHS was performing a service on behalf of law enforcement. (July 9, 2018 Order, p. 3, R. 263-271, App. Case No. 2018-001480).

2. The circuit court interpreted Appellant's claims as an improper attempt to assert a negligent spoliation of evidence of claim. (Id., p. 5).

3. Appellant failed to allege a cognizable injury. The circuit court held that the only reasonable inference that could be drawn from Appellant's allegations was that she had endured emotional distress, which was not recoverable under the circumstances. (Id., p. 6, citing Kinard v. Augusta Sash & Door Co., 286 S.C. 579, 336 S.E.2d 465 (1985); Doe v. Greenville County School Dist., 375 S.C. 63, 67-68, 651 S.E.2d 305 (2007)). In the instant action, Appellant failed to make any new allegations from which the circuit court could reasonably draw any other inference.

Wherefore, given the circuit court's holdings in the prior civil action, had Appellant's claims not been barred by the statute of limitations, they would have still been barred by the doctrines of res judicata and/or collateral estoppel. If GHS owed no legal duty under a negligence theory, then neither could GHS owe a legal duty under a bailment theory. Further, labeling the

claims as "bailment" instead of "negligence" should not matter. The substance of the claims were the same, and either way, it was still an improper attempt to assert a negligent spoliation of evidence claim, which is not recognized under South Carolina law. See Cole Vision Corp. v. Hobbs, 394 S.C. 144, 151, 714 S.E.2d 537, 541 (2011); see also Austin v. Beaufort County Sheriff's Office, 377 S.C. 31, 659 S.E.2d 122 (2008) (refusing to adopt the tort of third party spoliation of evidence where plaintiff sued sheriff's office for destroying evidence that plaintiff alleged prevented her from being able to pursue wrongful death claim against another party). Finally, in the instant Complaint, Appellant failed to make any new allegations from which the circuit court could reasonably infer any cognizable damages under a tort theory of recovery.

CONCLUSION

It is undisputed that Appellant filed her tort claims a full year after the two-year statute of limitations expired. Despite acknowledging that she did not file an amended complaint, Appellant argues her tort claims should relate back to the filing of her original action; however, Appellant cites no legal authority for her argument. Respondents contend there is no cognizable legal theory whereby Rule 15(c), SCRCP can be applied to a wholly new civil action. Further, given the circuit court's July 9, 2018 Order, Appellant's tort claims were also barred by the doctrines of res judicata and/or collateral estoppel.

Wherefore, for the reasons stated herein, Respondents respectfully request this Court affirm the October 31, 2019 Order issued by Circuit Judge R. Scott Sprouse dismissing Appellant's tort causes of action in favor of Respondents.

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Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

Kenneth N. Shaw (SC Bar 77859)
Post Office Box 2048
Greenville, South Carolina 29602
(864) 240-3200
kshaw@hsblawfirm.com

Attorney for Respondents

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CERTIFICATE OF COUNSEL

The undersigned certifies that Respondents' Final Brief complies with Rule 211(b), SCACR:

HAYNSWORTH SINKLER BOYD, P.A.

Kenneth N. Shaw (SC Bar 77859)
PO Box 2048
Greenville, South Carolina 29602
(864) 240-3200
kshaw@hsblawfirm.com

Attorney for Respondents

Dated: 8/31/2020
Greenville, South Carolina