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THE STATE OF SOUTH CAROLINA
In the Supreme Court

On Petition for Writ of Certiorari
To the Supreme Court of South Carolina

Appellate Case No. 2020-000689
Unpublished Opinion No. 2020-UP-021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.

BRIEF OF THE PETITIONER

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QUESTIONS PRESENTED

I. Did the South Carolina Court of Appeals err by affirming the lower court's decision to apply res judicata to the State action?

II. Did the South Carolina Court of Appeals err in affirming the lower court's summary judgment when it conflicted with prior rulings on res judicata?

STATEMENT OF THE CASE

This suit is brought pursuant to the arrest of Petitioner for allegedly shoplifting a case of beer from Respondents' retail establishment on Sunday, May 5, 2013. Respondent said that Petitioner stole a case of beer. Petitioner said he did not steal a case of beer. There was a genuine issue of material fact.

Petitioner came to Anderson County from El Paso, Texas to work a concession stand at the annual Anderson County Fair. Petitioner had spent the morning breaking down the concession stand he had been working at and, during a break, went to purchase a case of beer. Since Petitioner is not a resident of this county, he was unaware of the prohibition of the sale of alcohol on a Sunday. Petitioner selected Respondents' retail establishment to make his purchase based on the proximity of the store to the fair grounds.

After entering the store and making his way to the back of the building where the beer is located, Petitioner picked up one case and proceeded to the register to make his purchase. When the transaction was complete, the clerk gave Petitioner a receipt for his beer purchase and he exited the store. Upon getting into his truck, Petitioner thought one case would not suffice based on his friend's birthday coinciding with the breakdown of the fair. Petitioner then entered the store for a second time and made his way back to the "beer cave" for a second case.

When Petitioner approached the clerk this time, she realized the mistake she had made by selling alcohol on a Sunday; and informed Petitioner she would not be able to sell him the second case. Petitioner returned the case to where he had found it, left the store and returned to the fair grounds to finish tearing down the stand.

Respondent Rodgers (hereinafter referred as "Respondent") claimed at this time, one of the clerks in his store called him on his cell phone, informed him Petitioner stole a case of beer, ran out of the store and drove off. He stated upon arriving at the store, his review of the video camera footage of the incident, which included Petitioner's *wet appearance* and the direction the surveillance video showed him exiting the property, he concluded Petitioner must have been working the fairgrounds.

However, his testimony was contradicted by his 911 call following the alleged incident. Respondent was at the store when Petitioner left the store, because he followed him back to the fairgrounds. This claim was supported by the exchange between Respondent and the 911 operator which was memorialized by the State. (CAD Report, Motion to Stricken Answer, or in the Alternative, Motion for Adverse Inference due to Spoliation, December 29, 2017. R. p. 253). Respondent Rodgers informed the 911 operator he was behind Petitioner's truck. He kept Petitioner in his sight from the time he left his store until he had been cuffed and placed in the back of the police car.

The case of beer confiscated by police was Busch beer. Petitioner's receipt and associated purchase evidence on his bank statement (his bank in San Antonio, Texas), for the month of May 2013, was a $14.30 case of Busch as well. (Bank Statement, R. p. 255 and Beer Receipt, Motion to Stricken Answer, December 29, 2017, R. p. 256). Respondent Rodgers has claimed Petitioner bought the first case; and he stole the second case. He has

never presented anything tangible to support the claim. The woman who sold him the case said she never saw a *second* case leave the store. (Deposition of Amanda Nicole Brown, p. 19, 10.11, R. p.257). Only one case of beer was found in Petitioner's truck when he was arrested at the fairgrounds. A charge was brought against Petitioner for taking the beer, but it was later dismissed when Respondent Rodgers and law enforcement failed to appear at court and, in doing so, failed to prosecute.

The State Action

On July 23, 2013, Petitioner filed a suit for false imprisonment, invasion of privacy, defamation, false arrest, outrage, malicious prosecution, conversion, fraud, negligence, negligent hiring, training, supervision or monitoring. The action was filed with the Anderson Common Pleas Court, and named David Rogers and Janice Rodgers, d/b/a Whitehall Express Mart (hereinafter collectively referred as "Respondents") as defendants.

Respondents moved for Summary Judgment on December 14, 2014. A hearing was held on the motions by Judge Stilwell on March 18, 2015, who granted summary judgment on the conspiracy and fraud causes of action but denied the motion for the remaining causes of action. (Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, March 18, 2015, R.p. 54).

In the meantime, Petitioner prepared for the trial of his State action. Petitioner called San Antonio home. Thus, it was necessary to request a date certain trial. Petitioner was attempting to do so in the late spring of 2015. On December 1, 2015, a date certain was set for February 16, 2016. Petitioner's ticket was purchased on January 27, 2016. On February 11, 2016, counsel for Respondents, Phillip Reeves, Esquire moved for a continuance because "his daughter was having a birthday." (Order of Continuance, June 3, 2016, R. p. 201). Petitioner believed this

continuance was a dilatory action on the part of the Respondents. The trial was set the prior year without issue from Respondents. Respondents' counsel previously had various issues which had prolonged the litigation such as vacation and "conflicts".

Mr. Reeves asked for the continuance on the Thursday before a Tuesday *date certain* trial. Ironically, he filed for protection in Federal Court for the last week of May in another action. He didn't file for any protection in the State action, nor was he granted any.

In the Order drafted by Respondents', and endorsed by the Honorable Cordell Maddox, it is stated the matter would be continued. More importantly, he ordered, "(T)he parties shall be permitted to select a second date certain for the trial of this matter after the United States District Court for the District of South Carolina has ruled on pending motions for summary judgment." The second date certain would be set following the ruling in the federal court. He also stated, "Respondents shall be responsible for any reasonable change fees incurred by the Petitioner, Mario Escalante, in altering his flight plans."

Judge Maddox did not change any aspect of the Order for Continuance prepared for him. He states affirmatively the date certain trial will be reset upon the Federal Court's ruling on summary judgment. He also states Respondents shall pay for the difference of altering his flight plans for the next date certain trial. There is no language whatsoever indicating summary judgment in the Federal Court would allow Respondents to escape the trial they continued for a birthday.

The Federal Action

On January 13, 2015, Petitioner filed a §1983 case against the Anderson County Sheriff's Office, Sheriff John Skipper, Sergeant Andrew R. Hyslop, and Deputy Brandon Surratt; (collectively referred as law enforcement"). The Complaint also alleged Respondents conspired

with the state actors to cause Petitioner's arrest and detention. Petitioner alleged false imprisonment, assault and battery, intentional infliction of emotional distress, civil conspiracy, slander and defamation, abuse of process and conversion. The case was filed in the district court (hereinafter referred as Federal action). Petitioner thereafter amended his Complaint on March 4, 2015. The State actors moved for summary judgment on November 23, 2015, to which Petitioner filed a response in opposition on December 17, 2015. Respondents also filed a motion for summary judgment on November 24, 2015. Petitioner filed his response in opposition on December 17, 2015, and Respondents filed a reply on January 25, 2016.

The Federal Court found probable cause for the arrest of Petitioner and granted summary judgment in favor of State Actors and Respondents. On appeal, the Fourth District Court of Appeals affirmed the Federal Court's finding.

Armed with judgment from the Federal Court, Respondents moved for summary judgment of the State action, based on res judicata. The lower court granted the summary judgment, which on appeal, was affirmed by the Court of Appeals on January 29, 2020. Petitioner filed a Petition for Rehearing, which the Court denied.

ARGUMENT

I.

I. SOUTH CAROLINA COURT OF APPEAL ERRED IN AFFIRMING LOWER COURT'S DECISION TO APPLY RES JUDICATA TO STATE ACTION.

A. IN THIS PARTICULAR CASE, THE ORDER IN WHICH THE LAWSUIT IS FILED IS RELEVANT IN DETERMINING RES JUDICATA.

The issue at the center of this appeal is the lower court's interpretation of the phrase "prior action" or "prior proceedings" as it relates to the doctrine of res judicata. Petitioner avers the lower court applied res judicata to the instant action upon considering the judgment rendered

in the Federal action. In effect, the lower court declared "prior action" or "prior proceedings" refers to whichever suit obtains judgment first. However, there is a dearth of cases which support this assumption. In most cases where South Carolina courts were asked to determine the application of res judicata, the first action filed was also the first action to reach final judgment. In this case, however, a final judgment was rendered in the second action. The Court applied res judicata to the earlier case. Petitioner believes this would be an opportune time for this Court to clarify this matter.

Final judgment in a prior action or proceedings refers to the first lawsuit filed. Res judicata precludes the assertion of a claim after a judgment on the merits in a prior suit by parties or their privies based on the same action. Meekins v. United Transp. Union, 946 F.2d 1054, 1057 (4th Cir., 1991). In addressing whether res judicata applies, the Court usually looks at three (3) factors: (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)). Simply put, res judicata requires at least two successive lawsuits involving the same parties and same claims where the first lawsuit resulted in a final judgment.

The order in which the lawsuits are filed is relevant in determining res judicata. To interpret it otherwise defeats the purpose and effect of the doctrine. The rationale behind the doctrine of res judicata is a claim fully litigated should not be litigated again. It operates to bar a litigant "from raising any issues which were adjudicated in the former suit and any issues which might have been raised in the former suit." Hilton Head Center of S.C., Inc. v. Pub. Serv. Comm.'n of S.C. 294 S.C. 9, 362 S.E.2d 176 (1987).

The case at bar was filed in State court on July 22, 2013, while the §1983 action was filed in the District court on January 13, 2015. While the State action was delayed by unnecessary

motions and continuances, the proceedings at the District court progressed. Respondents obtained summary judgment in the Federal action when the District court found probable cause in favor of the State actors, which ruling was affirmed by the Fourth Circuit Court of Appeals. Thereafter, herein Respondents, moved for summary judgment of the State action on grounds of res judicata. On appeal, the Court of Appeals affirmed the summary judgment as follows:

> PER CURIAM:
>
> Mario Escalante appeals the circuit court's order granting summary judgment in favor of David L. Rodgers and Janice W. Rodgers. On appeal, Escalante argues the circuit court erred in granting summary judgment because res judicata does not apply to his claims. Because the state and federal actions involved the same parties, arose from the same occurrence, and the federal court granted summary judgment in the federal action, we hold res judicata barred Escalante's state action. See S.C. Pub. Interest Found. v. Greenville Cty., 401 S.C. 377, 385, 737 S.E.2d 502, 506 (2013) ("Res judicata bars subsequent actions by the same parties when the claims arise out of the same transaction or occurrence that was the subject of a prior action between those parties." (quoting Judy v. Judy, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011))). **Additionally, res judicata barred Escalante's negligence claim because he should have brought the claim in the federal action. See id. ("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."** (quoting Judy, at 172, 712 S.E.2d at 414)). Accordingly, the circuit court did not err in granting summary judgment.

Order, Court of Appeals, January 29, 2020. (Emphasis supplied).

Petitioner did not, and could not, have alleged the negligence claims in the Federal action for the following reasons: (1) the negligence claims had nothing to do with the deprivation of Petitioner's civil rights by State actors; and, (2) to do so is to invite the application of res judicata. Since the Federal action is the second action filed, raising the negligence claims in it would have done exactly what the law prohibits, which is the re-litigation of claims. Besides, Petitioner did not take into account Respondents' dilatory actions would prolong the State action past the Federal Action when it had been filed nearly seventeen months prior.

In upholding res judicata applies to the State action due to the summary judgment obtained in the Federal action, the Court of Appeals treated the Federal action as the "prior action" or "prior proceeding", despite it being the subsequent action. Assuming the lower court's interpretation was to be upheld, the claims of negligence and negligent training and supervision in the State action, must subsist since they were not raised, nor could have been raised in a "prior proceeding". As such, the negligence claims should not have been barred. Petitioner has not been afforded a full and fair opportunity to be heard on his negligence claims in either Court.

B. EVEN ASSUMING THE SEQUENCE OF FILING IS RELEVANT, RES JUDICATA DOES NOT APPLY IN THE INSTANT CASE.

1.1. The elements of res judicata have not been established in the state action.

In addressing whether there is res judicata, the court usually looks at three (3) factors: (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)). Petitioner maintains res judicata is not present in the State action.

No identity of parties.

There was no identity of parties between the two cases. In the State action, the Petitioner sued Respondents as private business owners, charged for their failure to train, supervise or monitor their employees, falsely accusing Petitioner of shoplifting and defaming his reputation, among others.

In the federal action, Respondent Rodgers (hereinafter referred as "Respondent") was sued "under color of law". It has long been established a private entity or individual can be said to act under the "color of law". Hall v. Garson, 430 F.2d 430 (5th Cir. 1970). Respondent was

sued for having willfully participated in a joint action with law enforcement to arrest and detained Petitioner. Respondent's act of (1) reporting an alleged shoplifting despite evidence otherwise; (2) furnishing law enforcement with Petitioner's still photo to assist them in recognizing and arresting Petitioner; (3) surveilling and tracking down Petitioner to the fairgrounds; and, (4) summoning law enforcement to Petitioner's whereabouts, were all part of a concerted effort to detain and impute liability to Petitioner and to conceal and/or avert attention from the store's unlawful activity (i.e. allowing prohibited sale of liquor).

In order to find a private entity was acting under the color of law, there has to be a State action which caused damage to a plaintiff. *Id.* Additionally, the nexus between the State and complained of action must be so close it appears the private actor's actions could be attributed to those of the State. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n., 531 U.S. 288, 295 (2001).

> State action requires both an alleged constitutional deprivation "caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State responsible," and that "the party charged with the deprivation must be a person who may fairly be said to be a state actor."

Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).

> Private persons, jointly engaged with state officials in a challenged action, are acting "under color" of law for purposes of § 1983 actions. And the judge's immunity from damages liability for an official act that was allegedly the product of a corrupt conspiracy involving bribery of the judge does not change the character of his action or that of his co-conspirators. Dennis v. Sparks, 449 U.S. 24 (1980)

Cited in Brunson v. Lloyd, C/A 3:07-2977-MBS-JRM (D.S.C. Nov. 21, 2007)

Respondents being named as defendants in both actions does not bar his quest in the State action. Petitioner maintains the rule of differing capacities applies with regards to Respondent.

Thus, this appeal turns on the proper application of the rule of differing capacities. The theory behind the rule rests on a legal fiction about individuals having two separate identities: one identity (or capacity) as an official representative of either the government or a corporation; and a separate identity (or capacity) as an individually autonomous human being. The rule of differing capacities is generally understood to mean defendants in their official and individual capacities are not in privity with one another for the purposes of res judicata. *See* 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.").

The Fourth Circuit addressed this issue in the case of *Andrews v. Daw*. In that case, the Fourth Circuit Court reversed the district court's dismissal of the second suit, relying on the "differing capacities rule," which requires "`[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.'" . Andrews v. Daw, 201 F.3d at 525 (4th Cir. 2000 (quoting Restatement (Second) of Judgments § 36(2) (1982)).

No Identity of Subject Matter

In some cases, the courts consider collateral estoppel as a concept subsumed in res judicata. Petitioner will not dwell on this. Under *res judicata* principles, a prior judgment between the same parties can preclude subsequent litigation on those matters actually and necessarily resolved in the first adjudication. See *In re Varat Enters., Inc.*, 81 F.3d 1310, 1315 (4th Cir. 1996).

> The doctrine of *res judicata* encompasses two concepts: 1) claim preclusion and 2) issue preclusion, or collateral estoppel. *Varat*, 81 F.3d at 1315 (citing *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980)). The rules of claim preclusion provide

> that if the later litigation arises from the same cause of action as the first, then the judgment in the prior action bars litigation "not only of every matter actually adjudicated in the earlier case, but also of every claim that might have been presented." *Varat,* 81 F.3d at 1315 (citing *Nevada v. United States,* 463 U.S. 110, 129-30, 103 S.Ct. 2906, 77 L.Ed.2d 509 (1983)). However, issue preclusion is more narrowly drawn and applies when the later litigation arises from a different cause of action between the same parties. *Varat,* 81 F.3d at 1315. Issue preclusion operates to bar subsequent litigation of those legal and factual issues common to both actions that were "actually and necessarily determined by a court of competent jurisdiction in the first litigation." *Varat,* 81 F.3d at 1315 (quoting *Montana v. United States,* 440 U.S. 147, 153, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)). Thus, while issue preclusion applies only when an issue has been actually litigated, claim preclusion requires only a valid and final judgment. Compare *Restatement (Second) of Judgments* § 27 (1980) (when issue of fact or law is actually litigated the determination is conclusive in subsequent action between the same parties) with § 17 of the same *Restatement* (a valid final judgment is conclusive between the parties and bars subsequent action on the claim).
> Cited in **Orca Yachts, L.L.C. v. Mollicam, Inc., 287 F.3d 316 (4th Cir. 2002).**

In the present case, there is no issue preclusion or collateral estoppel because the issue of Respondent's negligence (for wrongful accusation and negligence in training and supervision of their store employees) was not raised, litigated nor adjudicated in the Federal court. Since it was not raised and/or alleged, the issue of negligence could not have been "actually and necessarily determined" by the Federal court. Since the federal magistrate refused to address the negligent conduct of Respondents, and Judge Stilwell specifically stated there was a genuine issue of material fact as it relates to negligence, Petitioner is entitled to have this matter adjudicated.

There was no identity of subject matter. Petitioner asserts the issues raised in the two actions are different. In the case of Plum Creek Dev. Co. v. City of Conway, the Court laid down the criteria for comparing two causes of action.

> 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.

Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 35, 512 S.E.2d 106, 109 (1999).

It should also be noted the Tort Claims Act was in effect for the actions of the State actors. Thus, the negligence claims would not have survived against said state actors based on the necessity of proving gross negligence. In the State action, Petitioner sued for the negligent actions of Respondents in running their business. As stated before, the State action involves the negligent training and supervision of Respondents' employees.

On the other hand, Petitioner sued Respondent Rodgers in the Federal action for acting jointly with the law enforcement by performing police work: surveilling and pursuing Petitioner, reporting his location to the law enforcement, with the objective of depriving his freedom. Respondent was liable for violation of Petitioner's constitutional rights against unlawful deprivation of liberty (unlawful and illegal arrest and detention) in the Federal action. The subject matter is not the same.

1.2. The two lawsuits had different burdens of proof.

The standards/burden of proof to be applied were different in each case and, therefore, the cases were not parallel.

The Federal court applied the probable cause standard of proof to determine whether Petitioner's civil rights were undermined. The Respondents were able to use the lesser threshold to avoid liability.

In the State case, the standard for escaping summary judgment is less stringent. In fact, the Supreme Court has held only a mere scintilla is necessary to defeat summary judgment.

> Accordingly, we hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. However, in cases requiring a heightened burden of proof or in cases applying federal law, we hold that the

> non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment.

Hancock v. Mid-South Management Co., Inc. Op. No. 26587, (S.C.: Sup. Ct., 2009).

In the State action, the Plaintiff has the duty to prove his case. In the Federal action, the Respondent is the one with the ability to have the Court "objectively" determine the existence of probable cause-to have the matter ultimately resolved.

> Even had the issue actually been litigated, we hold collateral estoppel does not apply to issues decided at administrative hearings held pursuant to § 56-5-2950. The doctrine of collateral estoppel is intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the notion that it is unfair to permit a party to relitigate an issue that has already been decided. Since it is grounded upon concepts of fairness, it should not be rigidly or mechanically applied. *In re Juan C.*, 89 N.Y.2d 659, 679 N.E.2d 1061, 657 N.Y.S.2d 581 (1997). *See also* 50 C.J.S. *Judgments* § 779 (1997). Thus, even if all the requirements of issue preclusion are met, when unfairness or injustice results or public policy requires it, the doctrine's application may be precluded. *Id.*

Cited in: **State v. Bacote, 331 S.C. 328 (S.C. 1998)** (emphasis supplied).

II.

THE DECISION BELOW RUNS IN CONFLICT WITH THE RULES OF COURT AND PRIOR RULINGS OF THE COURT OF APPEALS ON RES JUDICATA.

A. RES JUDICATA MAY NOT BE RAISED FOR THE FIRST TIME IN A MOTION FOR SUMMARY JUDGMENT.

Under Rule 8(c) of the South Carolina Rules on Civil Procedure (SCRCP), res judicata is an affirmative defense available to a party in a case. It is an affirmative defense which must be pled in a responsive pleading or a motion. Under Rule 12 (b) SCRCP, if an affirmative defense is pled in a motion, such motion shall be made before an answer. A party may be held to have waived the affirmative defense of res judicata when the party has not properly and timely asserted the same. Rule 12(b) SCRCP.

Petitioner filed the State action on July 22, 2013. Respondents filed their Answer on August 21, 2013, raising the following defenses: failure to state facts constituting a cause of action, failure to mitigate damages, assumptions of risks, failure to join party, good faith, truth, comparative and contributory negligence, proximate cause and unconstitutionality of imposition of punitive damages. Res judicata was not among the defenses raised by Respondents.

The South Carolina Supreme Court held "(E)ven if these affirmative defenses were not procedurally barred, we disapprove of the practice of orally raising unpled issues for the first time at a summary judgment motion." Resolution Trust Corp. v. Eagle Lake and Golf Condominiums, 310 S.C. 473, 475, 427 S.E.2d 646, 648 (1993). Failure to plead an affirmative defense is a waiver of right to assert, pursuant to Rule 12. Town of Kingstree v. Chapman, 405 S.C. 282, 313 747 S.E.2d 494, 510 (2013). Having not raised res judicata in their Answer, and with the motion for summary judgment filed beyond the period for filing responsive pleading, Respondents should not be allowed to plead res judicata as they are deemed to have waived such defense.

B. THE STATE ACTION IS AN EXCEPTION TO RES JUDICATA.

The Court of Appeals overlooked circumstances exempting the State action from the application of res adjudicata.

As it is in every rule which is seemingly immutable, there are inevitably exceptions. The Second Restatement gives courts the discretion to suspend the rules in the name of justice. The Second Restatement sets forth limitations to the rules of res judicata in order to define the situations under which preclusion should not be invoked. For instance, it allows a party who can show a clear and convincing need for a new determination of the issue to win a fresh hearing on the facts, even when the black letter rules of preclusion would block re-litigation of same. A

party could base this showing on several factors, including, among others, the potential adverse impact of the determination on the public interest; the unforeseeability, at the time of the initial suit, the issue would arise in a later suit; or, most generally, the lack of an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. Restatement (Second) of Judgments § 28(5) (1982).

1. RESTATEMENT (SECOND) OF JUDGMENTS §26 (1982 & Supp. 2011)

Under the Restatement (Second) of Judgments §26 (1982 & Supp. 2011),

(1) when any of the following circumstances exists, the general rule of [claim preclusion] does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

(a) the parties have agreed in terms of in effect that the plaintiff may split the claim, or the defendant acquiesced, therein

xxx

Petitioner maintains Respondents waived their right to raise res judicata in the State action. Initially, Respondents moved the Federal court to abstain from taking jurisdiction over the State actions against them due to the pending case in the state court, pursuant to the Colorado River Abstention Doctrine. Recognizing numerous differences simply on the face of the pleadings in the two lawsuits, Judge Lewis dismissed Respondents' motion without prejudice.[1] The Court required additional briefing on these issues before it could determine whether the

[1] TEXT ORDER dismissing [12] Motion to dismiss without prejudice with leave to refile. Defendants David L. Rodgers and Janice W. Rodgers d/b/a Whitehall Express Mart ("the Rodgers") have moved to dismiss Plaintiff's Complaint pursuant to the Colorado River abstention doctrine or, in the alternative, to stay the proceedings. [Doc. 12.] The threshold question in deciding whether Colorado River abstention is appropriate is whether there are parallel federal and state suits. Great Am. Ins. Co. v. Gross, 468 F.3d 199, 207 (4th Cir. 2006).
"Suits are parallel if substantially the same parties litigate substantially the same issues in different forums." McLaughlin v. United Va. Bank, 955 F.2d 930, 934 (4th Cir. 1992).
Neither party has adequately addressed the fact that Plaintiff's state court case is against only the Rodgers while this federal action is against the Rodgers, seven additional named defendants, and twenty John Does. Further, the federal action raises additional causes of action against the defendants. The Court requires additional briefing on these issues before it can determine whether Colorado River abstention is appropriate. Accordingly, by August

Colorado River Abstention was appropriate.

To that end, Judge Lewis stated the following: "the Rodgers shall refile their motion to dismiss" by August 21, 2015. Respondents never filed such a brief. Petitioner asserts the Respondents' failure to refile their motion to dismiss as required by the Court acted as a waiver of said motion. Respondents have implicitly acknowledged the difference between the two lawsuits. In effect, Respondents have acquiesced to the filing of two separate lawsuits.

> Even where a factual grouping is found to constitute one claim under the transactional approach, tacit consent to claim-splitting has been recognized if a defendant fails to object to splitting a single claim between two pending actions. See Patrons Mut. Ins. v. Union Gas System, 250 Kan. 722, 728, 830 P.2d 35, 40 (1992) (citing Todd v. Central Petrol. Co., 155 Kan. 249, 124 P.2d 704 (1942)); Shaw v. Chell, 176 Ohio St. 375, 199 N.E.2d 869 (1964). See also Restatement (Second) of Judgments 26 cmt. a, illus. 1. While it may be impractical to require a defendant to object to a plaintiff's failure to join every claim growing out of a single transaction, "a defendant who is defending two simultaneous actions has little to lose and much to gain by an objection to the splitting." 18 Charles A. Wright, Federal Practice and Procedure 4415, at 125. Failure to timely object to the other action pending may be viewed as consent to the claim-splitting.

Bockweg v. Anderson, 333 N.C. 486 (N.C. 1993).

2. RESTATEMENT (SECOND) OF JUDGMENTS §28 (1982)

The Restatement (Second) of Judgments § 28 (1982) enumerates five exceptions to the general rule of issue preclusion:

Although an issue is litigated and determined by a valid and final judgment, and the determination is essential to the judgment, re-litigation of the issue in a subsequent action

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21, 2015, the Rodgers shall refile their motion to dismiss, addressing more thoroughly whether the suits have substantially the same parties and substantially the same issues. Additionally, the Rodgers should clarify in their subsequent motion to dismiss whether they seek to have the Court apply the Colorado River abstention doctrine to dismiss only the Rodgers, and whether such an application is appropriate, or to abstain from the entire suit. Signed by Honorable Mary G Lewis on 7/31/2015. (gpre)

between the parties is not precluded in the following circumstances:

(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

2.1. On Exception No. 4 – Petitioner had a different burden of persuasion/proof with respect to the issue of negligence in the State action.

Petitioner submits exception number (4) is applicable to bar res judicata in the State action. Law enforcement and Respondent Rodgers had the burden of proof to show probable cause existed to divest them of liability for the civil rights' claims brought in the Federal action. In the State action, however, Petitioner had to show a mere scintilla of evidence to get his negligence claims against Respondents to a jury. Petitioner has had to address two (2) separate summary judgment motions and now is entangled in a res judicata argument even though the

case is a simple negligence case. Petitioner has suffered a significantly heavier burden of persuasion with respect to his negligence claims in the State action.

2.2. Exception No. 5(c)- Petitioner did not obtain a full and fair adjudication of his claim in the State action.

The Courts have applied these exceptions in several cases one of which is Pye v. Ack, 325 S.C. 426, where the Court abstained from applying res judicata because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

Applying exception number 5(c) to the State action, Petitioner maintains the actions or inaction of Respondents have left him in the quandary in which he finds himself. Respondents initially opposed having to litigate in two forums. They filed a motion requesting the Federal Court to abstain from assuming jurisdiction pursuant to the Colorado River Abstention Doctrine.

As stated previously, Judge Lewis dismissed the motion with the caveat she was doing so without prejudice. Moreover, since she noticed numerous differences, she demanded Respondents refile the motion-supplemented by a brief. It is understood her intent was to ascertain whether Petitioner would have two lawsuits proceeding forward, or one lawsuit due to her abstention of the case in the Federal Court. Regardless, Petitioner would have a day in court.

Respondents failed to refile the motion for abstention, as requested. It is Petitioner's contention this failure acted as an implicit acquiescence to his having competing litigation. Because Respondents did not refile the motion, Petitioner did not need to combine the two actions (such as bringing the negligence claim into the Federal Court). Respondents specifically allowed two cases to proceed. In essence, they withdrew their objection to issues surrounding May 5, 2013, being tried in two forums simultaneously.

Respondents proceeded unfettered with the two cases only to pursue a res judicata after the dismissal of the Federal action. This is patently unfair. Had they complied with the Court's order, they would have gotten the answer they sought. More importantly, Petitioner would have had the opportunity to be heard. Respondents willfully and wantonly disobeyed the Court. They are now using their disregard for the Court's Order to prevent Petitioner from getting his day in court.

The unfairness Petitioner has faced in the past nearly seven (7) years has prevented him from realizing Due Process in this State. The following are examples of this denial: (1) when the Respondents did not show up to the criminal court date; (2) when Respondent's counsel unfairly and unceremoniously moved for a continuance of a trial due to a "child's birthday party"; (3) when Respondents failed to preserve the store's security footage despite their knowledge and anticipation of litigation for the alleged incident; (4) when the lower court failed to rule on Petitioner's motion for adverse inference due to spoliation; and, (5) the fact Petitioner was arrested for stealing a case of beer after he purchased one (using his ATM card from his bank in San Antonio), in conjunction with the woman who sold him the beer ***never seeing a second case of beer leave the store;*** while, the Anderson business owner was not arrested for conclusively selling beer on a Sunday, illustrated he did not get Equal Protection of the State's laws either.

> It is clear that a motion to dismiss based on improper claim-splitting need not — indeed, often cannot — wait until the first suit reaches final judgment. *See Calderon Rosado v. Gen. Elec. Circuit Breakers, Inc.,* 805 F.2d 1085, 1087 (1st Cir. 1986) (recognizing that, if two suits based on the same claim are pending, but the defendant waits to file a motion to dismiss until "after judgment enters on one of the two," then "the motion should be denied"); *Bockweg v. Anderson,* 333 N.C. 486, 428 S.E.2d 157, 164 n. 2 (1993) ("While it is clear that defendants could not raise their res judicata defense until and unless the [prior] court action resulted in a final judgment, defendants could have moved to dismiss on the grounds of a prior action pending

> involving the same claim."); *Lake v. Jones,* 89 Md.App. 579, 598 A.2d 858, 861-62 (1991) ("[Defendant] may not lie in wait silently until one of the two actions is brought to judgment to ambush the plaintiff and defeat the other action." (quoting J. Friedenthal et al., *Civil Procedure* § 14.3 (1985))); Restatement (Second) of Judgments § 26 cmt. a (1982) ("Where the plaintiff is simultaneously maintaining separate actions based upon parts of the same claim, and in neither action does the defendant make the objection that another action is pending based on the same claim, judgment in one of the actions does not preclude the other plaintiff from proceeding and obtaining judgment in the other action."). Thus, in the claim-splitting context, the appropriate inquiry is whether, assuming that the first suit were already final, the second suit could be precluded pursuant to claim preclusion.

Cited in Hartsel Springs Ranch v. Bluegreen Corp., 296 F.3d 982 (10th Cir. 2002). (Emphasis supplied).

In sum, res judicata cannot operate to bar the claims of damages and negligence in the State action because: (1) it is the "prior action" referred to in the doctrine; and, (2) the negligence claims in the State action, were not raised in the subsequent Federal action and as such, they were not addressed, much less adjudicated; (3) the elements of res judicata were not established in the State action; (4) the circumstances surrounding the State action preclude the application of res judicata.

The issue of Res Judicata has been properly raised for appeal

Since this case has been appealed, Respondents contend 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 Respondents conveniently omitted was the fact Petitioner questioned the application of res judicata (and estoppel) in his Motion for Reconsideration. (R., p. 298).

> If a party is unsure whether he properly raised all issues and obtained a ruling, he must file a Rule 59(e) motion or an appellate court may later determine the issue or argument is not preserved for review.

<u>Elam v. South Carolina Department of Transportation</u>, 361 S.C. 9 (S.C. 2004).

In his Motion for Reconsideration, Petitioner alleged 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 the issue of Respondents' negligence was never adjudicated with finality.

The purpose of Rule 59(e), SCRCP, 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).

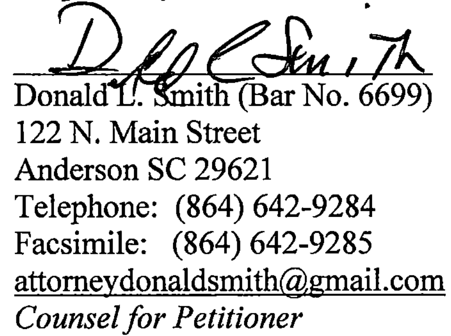
On the issue of the interpretation of the phrase "prior action" or "prior proceeding", Petitioner raised the same as a novel question of law as it related to the doctrine of res judicata. The South Carolina courts routinely applied the doctrine of res judicata in successive actions where judgment was rendered in the first action filed, dismissing the second action. Here, 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) which define 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.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests this Court to grant his Petition

for Writ of Certiorari and review the Court of Appeal's decision affirming the circuit court's ruling. Petitioner believes the unique circumstances of this case merit the re-examination of the rules on res judicata.

Respectfully submitted,



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October 19, 2020.

FORM 7
PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In the Supreme Court

RECEIVED
OCT 21 2020
S.C. SUPREME COURT

On Petition for Writ of Certiorari
To the Supreme Court of South Carolina

Appellate Case No. 2020-000689
Unpublished Opinion No. 2020-UP-021
(Rehearing denied March 27, 2020)

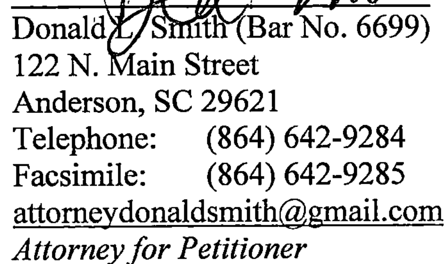
Mario Escalante, Petitioner,

v.

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

PROOF OF SERVICE

I certify that I have filed one (1) original and ten (10) bound copies of Brief of the Petitioner, and one (1) unbound and ten (10) bound copies of the Appendix to the Petition for Certiorari, and Proof of Service for same upon The Honorable Daniel E. Shearouse, Clerk of Court South Carolina Supreme Court at PO Box 11330, Columbia SC 29211. A copy of the above materials have been served to Respondents, by and through their counsel of record, Mr. Phillip Reeves, Esquire and Mr. Nicholas A. Farr, Esquire, at Gallivan White and Boyd , P.A., Post Office Box 10589, Greenville, SC 29603. This service is being made by depositing copies of the materials in the United States Mail, postage prepaid, on October 21, 2020.



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