THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ANDERSON COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

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Unpublished Opinion No. 2020-UP-021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

Mario Escalante,..... Appellant,

v.

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

BRIEF OF RESPONDENTS

Phillip E. Reeves (S.C. Bar No. 4672)
Nicholas A. Farr (S.C. Bar No. 78769)
Gallivan, White & Boyd, P.A.
55 Beattie Place, Suite 1200 (29601)
P. O. Box 10589
Greenville, SC 29603
Telephone: (864) 271-9580
Facsimile: (864) 271-7502

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

STATEMENT OF ISSUES ON APPEAL

I. DID THE TRIAL COURT PROPERLY GRANT RESPONDENTS' MOTION FOR SUMMARY JUDGMENT ON THE GROUNDS THAT THE APPELLANT'S CLAIMS ARE BARRED BY THE DOCTRINE OF RES JUDICATA AND COLLATERAL ESTOPPEL?

INTRODUCTION

The circuit court's grant of the motion for summary judgment filed by David L. Rodgers and Janice W. Rodgers d/b/a Whitehall Express Mart (hereinafter referred to as "Whitehall" or "Respondents") should be affirmed because Appellant's claims are barred by operation of the doctrine of res judicata. While Appellant has tried to raise a host of issues through the appellate process, many of which are not properly before this Court, the only real issue is whether the circuit court correctly determined that the claims asserted in this action arise out of the same transaction or occurrence as those claims asserted by Appellant against Respondents in a related action filed in the United States District Court for the District of South Carolina. Because the two actions arise out of the same transaction or occurrence and Respondents obtained summary judgment in the federal action (and such decision was affirmed by the Fourth Circuit Court of Appeals), the circuit court correctly granted Respondents' motion for summary judgment in this state court action.

STATEMENT OF THE CASE

This matter arises out of an incident which occurred on Sunday, May 5, 2013, at the Whitehall Express Mart ("Whitehall") owned by David and Janice Rodgers and located 704 Whitehall Road in Anderson, South Carolina. Appellant alleges that on that date Respondents wrongfully accused him of shoplifting a case of beer. As a result of the incident, Appellant was arrested and spent one night in jail. The charges against Appellant were dismissed for failure to prosecute when Respondents did not appear on his court date due to an alleged lack of notice.

On July 22, 2013, Appellant initiated an action in the Anderson County Court of Common Pleas against Respondents ("the State Action"). In the complaint, Appellant asserts false imprisonment, invasion of privacy, defamation, negligence, false arrest, outrage, malicious

prosecution, conspiracy, conversion, and fraud causes of action. (App. pp. 4-16).[1] Appellant alleges Respondents filed a complaint with the Anderson County Sheriff's Department and stated that they had video footage of Appellant stealing beer. (App. p. 9 at ¶ 7). Appellant alleges that David Rodgers followed Appellant, aided the Sheriff's Department in locating him, and instructed the police that Appellant had stolen beer from his store. (App. p. 9 at ¶¶ 9-10). As such, the police arrested Appellant for shoplifting. (App. p. 9 at ¶ 12). Further, Appellant alleges that Respondents accused Appellant of stealing the beer in an effort to protect themselves from prosecution for violating local ordinances prohibiting the sale of alcohol on Sundays. (App. p. 10 at ¶ 17).

With the State Action still pending, on January 13, 2015, Appellant filed suit in the United States District Court for the District of South Carolina, Anderson Division, against Respondents, the Anderson County Sheriff's Department, Sheriff John Skipper, Sergeant Andrew Hyslop, Deputy Brandon Surratt, the City of Anderson Police Department, and James S. Stewart (hereinafter referred to as "the Federal Action"). The complaint in the Federal Action contains nearly identical allegations as in the State Action and, with the exception of negligence which was not clearly pled in the Federal Action, asserts the same causes of action against Mr. and Mrs. Rodgers. (App. pp. 222-236). In addition, the complaint in the Federal Action asserts assault, battery, civil rights, and abuse of process claims against the police defendants. (*Id.*)

---

[1] Appellant's brief is replete with many bald assertions disguised as "facts." These purported "facts" find no support in the record and were not considered by the circuit court in any context. *See Becker v. Uhe*, 221 S.C. 334, 339, 70 S.E.2d 346 (1952) ("[F]acts improperly stated in the brief will not be considered."). In addition, Appellant fails to include proper reference to the materials from which many of the statements are included in Appellant's Statement of Fact were taken. *See* Rule 208(b)(4), SCACR.

While Respondents dispute many of the allegations in Appellant's brief, because the issue before the Court is one involving issues of res judicata and/or collateral estoppel, Respondents refer only to the allegations contained in the pleadings.

Respondents and the co-defendants filed separate motions for summary judgment in the Federal Action. While the motions were pending, the State Action was set for a date certain trial on February 16, 2016. The parties held a telephone status conference with Judge Cordell Maddox to discuss the trial of the case. (App. p. 201). Due to the pending motions for summary judgment in the Federal Action, Judge Maddox continued the trial of the State Action until such time as the outcome of the Federal Action was known. (App. p. 201)

By order dated August 16, 2016, U.S. District Judge Mary G. Lewis granted summary judgment in the Federal Action to Respondents and the police defendants as to each cause of action asserted by Appellant, finding that the evidence in the record supported the Magistrate Judge's "central conclusions":

> (1) that Plaintiff has produced no evidence to support his entirely speculative contention that the shop owner defendant David Rodgers manufactured the shoplifting allegation against Plaintiff in order to shield his store from possible punishment for a Sunday alcohol sale ordinance violation; and
>
> (2) that probable cause ultimately supported Plaintiff's shoplifting arrest.

(App. p. 238). Appellant appealed the order granting summary judgment to the Respondents in the Federal Action. On October 12, 2017, the Fourth Circuit Court of Appeals affirmed the order granting summary judgment to Respondents for the reasons stated by the district court in its August 16, 2016 order. (App. pp. 239-242).

Following the Fourth Circuit Court of Appeals' affirmation of the order granting summary judgment in the Federal Action, on October 18, 2017, Respondents moved for summary judgment in the State Action on the grounds that Appellants' claims are barred by the doctrines of res judicata and collateral estoppel. (App. pp. 207-242). That motion was granted by the trial court by order dated January 16, 2018. Appellant filed a motion for reconsideration, which was denied by the trial court.

On February 6, 2018, Appellant filed a notice of appeal with respect to the order granting Respondents' motion for summary judgment. In his subsequent appellate brief, Appellant argued that the trial court erred in granting summary judgment because (1) there was no identity of subject matter between the State and Federal Actions; (2) there is no identity of issues between the State and Federal Actions; (3) Respondents' answer should have been stricken for alleged non-compliance with discovery rules; and (4) Respondents' purported acts of spoliation prevented Appellant from litigating his claims. (App. pp. 373-394). On January 29, 2020, the Court of Appeals issued an unpublished opinion affirming the decision of the trial court. (App. pp. 419-420).

ARGUMENT

For the reasons outlined below, the circuit court's order was proper and should be affirmed.

I. Appellant Cannot Rely Upon Facts and Arguments Not Properly Before the Court.

Before delving into the merits of the circuit court of the Court of Appeals' decisions, it is important to note that many of the issues raised in Appellant's brief are not properly before this Court. For example, Appellant rested many of his arguments with the Court of Appeals on the grounds that Respondents' answer should have been stricken on account of the alleged spoliation of video surveillance evidence. Appellant previously filed a motion to compel (App. pp. 32-31), a complaint for contempt and rule to show cause (App. pp. 63-66), and a motion to strike (App. pp. 244-252) all of which involved the issue of the video surveillance. All of these motions were denied. Appellant has not appealed the circuit court's denial of any of these motions as they are not included in the notice of appeal nor are they identified in his statement of issues on appeal. *See* Rule 208(b)(1)(B), SCACR ("ordinarily, no point will be considered which is not set forth in

the statement of the issues on appeal."); *Allen v. Pinnacle Healthcare Sys., LLC,* 394 S.C. 268, 715 S.E.2d 362 (2011) (declining to address argument on the merits which was not included in appellant's sole statement of the issue on appeal).

Rather, the only orders from which Appellant has appealed are the circuit court's orders granting Respondents' motion for summary judgment and denying Appellant's motion for reconsideration. The circuit court's orders make no mention of spoliation of evidence but, rather, properly found that Appellant's claims are barred by res judicata.

In addition, Appellant has raised a host of other issues before this Court which were not previously raised. Appellant now argues, for the first time before this Court: (1) that the lower court improperly interpreted the phrase "prior action" or "prior proceedings" as it relates to the doctrine of res judicata; (2) that res judicata is an affirmative defense and was deemed waived when Respondents failed to properly and timely assert the same; and (3) Respondents waived their right to raise a res judicata defense after requesting the federal court abstain from exercising jurisdiction over the Federal Action under the Colorado River Abstention Doctrine.[2] These arguments were not raised in response to Respondent's Motion for Summary Judgment or in his Final Brief to the Court of Appeals. This Court does not address issues which were not preserved on appeal. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012). "Generally, an issue must be both raised to and ruled upon by the trial court in order to be preserved for appellate review. Arguments raised for the first time on appeal are not preserved for our review." *In re Walter M.*, 386 S.C. 387, 392, 688 S.E.2d 133, 136 (Ct. App. 2009) (internal citations omitted). Because Appellant first raised these issues in

[2] Appellant raised the issue of the Colorado River Abstention Doctrine in his petition for rehearing of the Court of Appeals' opinion. That issue is nonetheless unpreserved for review.

his Petition for Writ of Certiorari, they are not properly preserved for this Court's review. *See In re Walter M.*, 386 S.C. at 387, 688 S.E.2d at 136.

II. The Circuit Court Properly Granted Summary Judgment to Respondents' Because Appellant's Claims Are Barred By Res Judicata

While Appellant makes much ado about being deprived of his day in court, such cannot be further from the truth. Appellant is now attempting to relitigate the same issues before a fifth tribunal. The procedural history of this matter is admittedly convoluted, but the issues related thereto were created by Appellant's decision to simultaneously file suit against Respondents in two separate forums, both of which relate to his May 5, 2013 shoplifting arrest. For the reasons discussed below, Appellant cannot get a second (or fifth) bite at the apple after Respondents obtained judgment in their favor in the Federal Action.

"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." *S.C. Pub. Interest Found. v. Greenville County*, 401 S.C. 377, 737 S.E.2d 502 (Ct. App. 2013) (quoting *Judy v. Judy*, 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011)). "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." *Id.* (citation and quotation marks omitted). "Res judicata bars relitigation of the same cause of action while collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." *S.C. Pub. Interest Found.*, 401 S.C. at 386, 737 S.E.2d at 506 (quoting *Pye v. Aycock*, 325 S.C. 426, 436, 480 S.E.2d 455, 460 (Ct. App. 1997)).

"Res judicata's fundamental purpose is to ensure that no one should be twice sued for the same cause of action." *S.C. Pub. Interest Found.*, 401 S.C. at 386, 737 S.E.2d at 507 (quoting *Yelsen Land Co. v. State*, 397 S.C. 15, 22, 723 S.E.2d 592, 596 (2012)). "The doctrine of

collateral estoppel, or issue preclusion, on the other hand, rests generally on equitable principles." *Town of Sullivan's Island v. Felger*, 318 S.C. 340, 344, 457 S.E.2d 626, 628 (Ct. App. 1995) (citing *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E.2d 317 (1944)). In *Watson*, the Supreme Court contrasted the origin of the doctrine of collateral estoppel with the origin of res judicata:

> Estoppel rests generally on equitable principles, which res judicata does not, but upon the two maxims which were its foundation in the Roman law, *nemo debet bis vexari pro eadem causa* (no one ought to be twice sued for the same cause of action) and *interest reipublicae ut sit finis litium* (it is the interest of the state that there should be an end of litigation) . . . Res judicata is rather a principle of public policy than the result of equitable considerations, which [the] latter estoppel is.

205 S.C. at 221-22, 31 S.E.2d at 319-20 (citations omitted) (emphasis added); *see also First Nat'l Bank of Greenville*, 207 S.C. at 24, 35 S.E.2d at 56-57 (citing *Watson*) (contrasting the origins of res judicata and collateral estoppel).

A. The Issues in the State Action Have Already Been Litigated

As much as Appellant would like to distinguish the State and Federal Actions, a cursory review of the complaints in the two suits reveals two nearly identical actions. Aside from the addition of the police defendants and a few additional causes of action (§1983, Assault, Battery), the factual allegations of the Federal Action are essentially repeated verbatim from the complaint in the State Action. Moreover, with the exception of negligence, Appellant asserts the same causes of action against Respondents in the complaint in the Federal Action as he does in the State Action.

While Appellant has argued in this appeal that Respondent Rodgers was included as a party in the Federal Action, merely to establish his involvement in the "conspiracy" to deprive

the Appellant of his constitutional rights, such a distinction is not reflected in the pleadings.[3] Appellant also sought to hold Respondents liable for conspiracy in the State Action. (App. p. 152 at ¶¶ 54-57). Appellant did not posit Respondent Rodgers as a mere co-conspirator in the Federal Action but, rather, alleged that Respondent Rodgers was the one who "instigated the unlawful arrest of [Appellant] by, among other fraudulent means, providing false information and misleading still photographs to authorities." (App. p. 226 at ¶ 10(first)).

Moreover, just as is the case in the State Action (App. p. 10 at ¶ 17), the crux of Appellant's case in the Federal Action is the notion "Rodgers and his employees alleged that [Appellant] had stolen the beer, in an effort to protect themselves from prosecution for violating the Sunday alcohol ordinance." (App. p. 227 at ¶ 21). As the District Court held and the Fourth Circuit affirmed:

> [Appellant] has produced no evidence to support his entirely speculative contention that the shop owner defendant David Rodgers manufactured the shoplifting allegation against Plaintiff in order to shield his store from possible punishment for a Sunday alcohol sale ordinance violation.

(App. p. 238).

While Appellant attempts to construe the Federal Action merely as one involving the deprivation of civil rights, purportedly with a different burden of proof, he fails to address the fact that the Federal Action also contains, with the exception of negligence, the same common law causes of action as the State Action (false imprisonment, invasion of privacy, defamation, false arrest, outrage, malicious prosecution, conspiracy, conversion, and fraud). Each of these claims requires the same burden of proof in the State and Federal Actions. It is clearly apparent

[3] While admittedly not a part of the record in the State Action, Respondents would also represent to the Court that, in seeking to hold Rodgers liable under § 1983 as a private citizen, Appellant submitted in his briefing to both the United States District Court and the Fourth Circuit Court of Appeals that Respondent Rodgers was essentially the driving force behind his arrest.

that the State and Federal Actions arise out of the same transaction or occurrence, the May 5, 2013 shoplifting incident, and involve the same legal theory against Respondents (i.e. manufacturing a shoplifting crime to cover a Sunday alcohol sale). Because Respondents obtained summary judgment as to all causes of action in the Federal Action, res judicata bars Appellant from re-litigating those causes of action in the State Action.

B. Appellants' Negligence Claim Is Also Barred By Res Judicata

Nonetheless, Appellant contends that the negligence claim contained in the complaint in the State Action is not barred by res judicata because it was not raised in the Federal Action and, thus, was not adjudicated.[4] Under the doctrine of res judicata, however, 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." *S.C. Pub. Interest Found.*, 401 S.C. at 385, 737 S.E.2d at 506 (emphasis added). As such, even if negligence was not formally adjudicated in the Federal Action, it is barred by res judicata if it could have been raised in the Federal Action. That is clearly the case here. While Appellant wants to construe the negligence claim as one involving conduct inside Respondents' store as opposed to claims in the Federal Action which purportedly involve conduct that occurred after Appellant left the store, the negligence claim asserted in the State Action arises out of the same transaction or occurrence – the May 5, 2013 shoplifting incident. There was nothing prohibiting Appellant from raising the negligence claim in the Federal Action along with the other state-law claims which he did raise (i.e. false imprisonment,

[4] It appears that Appellant is not contesting that his false imprisonment, invasion of privacy, defamation, false arrest, outrage, malicious prosecution, conspiracy, conversion, and fraud causes of action are barred by res judicata. *See* Appellant's Initial Brief to Court of Appeals, p. 7 ("Appellant believes that he is not precluded from raising the cause of action for negligence against Respondents.") (emphasis added). In fact, counsel for Appellant admitted at the hearing on Respondents' motion that negligence was the only cause of action which could potentially survive. (App. p. 287).

invasion of privacy, defamation, false arrest, outrage, malicious prosecution, conspiracy, conversion, and fraud). As such, the negligence claim is also barred by res judicata.

C. The Fact that the Federal Action Was Filed Subsequent to the State Action is Irrelevant to the Issue of Res Judicata

While not properly reserved for review, Appellant also contends that res judicata is not applicable because the Federal Action was filed subsequent to the State Action and, thus, does not constitute a "prior action" or "former suit." However, res judicata does not rest simply with a matter of timing but of adjudication of another suit. To establish res judicata, three elements must be shown: (1) identity of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit. *Sealy v. Dodge,* 289 S.C. 543, 347 S.E.2d 504 (1986) (emphasis added). "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." *Judy v. Judy,* 393 S.C. 160, 172, 712 S.E.2d 408, 414 (2011) (emphasis added). As such, the issue when determining whether res judicata is applicable is whether the other action has previously been "adjudicated."

While admittedly Appellant's decision to file the Federal Action based on the same facts and circumstances 18 months after the State Action may be unorthodox, there is no dispute that the Federal Action was fully adjudicated prior to Respondents moving for summary judgment in the State Action of the issue of res judicata. The trial court in the Federal Action granted Respondents' motion for summary judgment on August 16, 2016, and the Fourth Circuit Court of Appeals affirmed the same on October 12, 2017. Thereafter, Respondents moved for summary judgment in the State Action on October 18, 2017. As such, the claims at issue had been adjudicated in the former suit (Federal Action) and Appellant was barred from continuing to litigate them in the State Action.

Because the State and Federal Actions arise out of the same transaction or occurrence and Respondents obtained summary judgment as to all causes of action in the Federal Action, this action is barred by the doctrine of res judicata. Accordingly, the circuit court's order granting Respondents' motion for summary judgment should be affirmed.

III. Res Judicata Was Timely Raised by Respondents

While not properly preserved for appeal, Appellant now argues that Respondents failed to timely raise the defense of res judicata because the defense was not pled in Respondents' answer. However, at the time Respondents filed their answer in this matter (August 21, 2013), there was no related action filed nor did Respondents have any reason to know that there would be one. Likewise, even after the Federal Action had been filed, it had not been fully adjudicated until October 12, 2017, when the Fourth Circuit affirmed the grant of summary judgment.

Even if Respondents were required to raise res judicata as an affirmative defense, the court has the discretion to overlook the defendant's failure to plead an affirmative defense when it "is timely raised to the trial court without resulting in unfair surprise to the opposing party." *Plyler v. Burns*, 373 S.C. 637, 648, 647 S.E.2d 188, 194 (2007). This is not an issue that was sprung on Appellant. In fact, the issue served as the basis for the continuance of the trial of the State Action. (App. p. 201 ("[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."). Respondents' motion for summary judgment in the Federal Action had been fully briefed at the time for the date certain trial in the State Action and the trial judge recognized the confusion and issues that would have surfaced had an order granting summary judgment, in whole or in part, been issued during the trial. Raising res judicata in a written motion for summary judgment when Appellant had adequate

time to respond should he have chosen to do so is far from an "unfair surprise."

IV. This Matter Does Not Fall Within the Exceptions for Issue Preclusion Cited By Appellant from The Restatement (Second) of Judgments

Appellant also argues for the first time before this Court that this matter falls within an exception to issue preclusion set forth the Restatement (Second) of Judgments § 28 (1982). As an initial matter, the trial court granted summary judgment and the Court of Appeals affirmed on the issue of res judicata, not collateral estoppel (issue preclusion). As such, the exceptions set forth by Appellant are not applicable to this appeal.

Regardless, Appellant's contention is without merit. Appellant contends that the "actions or inactions of Respondents have left him in the quandary in which he finds himself," taking particular issue with Respondents' attempt to have the federal court abstain under the Colorado River Abstention Doctrine. To the contrary, the "quandary" for which Appellant now complains was created by his own doing in attempting to litigate the merits of his suit across multiple forums. Respondents attempted to have the federal court abstain from exercising jurisdiction over the matter to avoid the very scenario he now finds himself and Appellant opposed that attempt. Appellant cannot now use the very scenario he created, litigating the merits of his claim in two separate courts, as a means of bypassing the result.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully requests that this Court affirm the Court of Appeals' ruling affirming the Circuit Court's decision granting summary judgment to Respondents.

Phillip E. Reeves (S.C. Bar No. 4672)
Nicholas A. Farr (S.C. Bar No. 78769)
Gallivan, White & Boyd, P.A.
55 Beattie Place, Suite 1200 (29601)
Post Office Box 10589
Greenville, South Carolina 29603
Telephone: (864) 271-9580
Facsimile: (864) 271-7502

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

Greenville, South Carolina

November 18, 2020