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S.C. SUPREME COURT

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Unpublished Opinion No. 2020-UP-021  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,

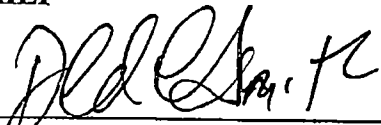
Petitioner,

v.

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

Respondents.

PETITIONER'S REPLY BRIEF

  
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Petitioner makes the instant submission in response to Respondents' Brief. Petitioner adopts and incorporates by reference the Statement of Case and Facts presented in his Brief of his Petition for Certiorari.

**1. Petitioner can rely on the facts and arguments raised, presented and submitted in the lower court.**

In their Return to Petitioner's Brief, Respondents contend Petitioner should not be allowed to raise the issue of spoliation. Petitioner has every right to mention Respondents' failure to preserve the video surveillance as a fact, since it happened in the lower court. In this Certiorari, Petitioner discussed spoliation of evidence as an example of Respondents' acts that deprived or limited Petitioner's opportunity to obtain full and fair adjudication of his claims. It was simply one of the multitude of acts designed to prevent the truth from being observed.

Respondents also 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. Petitioner submits Respondent omitted the fact that Petitioner questioned the application of res judicata (and estoppel) in his Motion for Reconsideration. (R., p. 298).

In his Motion for Reconsideration, Petitioner alleged that 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 that 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. In this particular case, 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) that defines 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.

**2. The Circuit Court improperly granted Summary Judgment because Res Judicata and Estoppel do not bar the negligence causes of action in the State court.**

In an attempt to confuse this Court, Respondents, in their Brief, contend the causes of action in the State action (i.e., false imprisonment, invasion of privacy, defamation, false arrest, outrage, malicious prosecution, conspiracy, conversion, and fraud) have already been litigated. However, Petitioner has made it clear in his previous submissions that his appeal and/or petition for certiorari has always been focused on the causes of action of negligent supervision and negligence, which were not alleged, much less decided in the Federal court.

The State claim was brought because of the negligent act of Defendant Rodgers in accusing herein Petitioner of shoplifting. His negligent training, negligent supervision, negligent maintenance of the video, etc., formed the core of the State claim.

Negligence was not raised in the Federal court, because Petitioner believes that Defendant Rodgers’ negligence, and that of their employees, is independent from and does not arise from the allegations of unconstitutional behavior by Rodgers and law enforcement. Since negligence was not raised in the Federal court, it was never adjudicated with finality. Thus, since

all the requisite elements for res judicata and collateral estoppel are not met in the present case, then res judicata and collateral estoppel do not apply.

Petitioner maintains the State Court was not barred from entertaining and/or litigating as to the issue of Respondents' negligence. Petitioner reiterates his position the issues of negligent supervision and negligence could not have been raised in the Federal Action because to do so would subject Petitioner to outright dismissal, having already alleged negligence in the first suit filed—the State Action.

Contrary to Respondents' arguments, the fact the Federal Action was filed subsequent to the State action is relevant in this particular case because it solidifies Petitioner's arguments as to why res judicata and estoppel cannot apply to the negligence causes of action. Respondents' insistence there was nothing that prevented Petitioner from raising the same issue is to pressure Petitioner to violate long established principles of law.

**3. Respondents have waived the defense of Res Judicata for failure to timely and properly raise the same.**

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 and estoppel were not among the defenses introduced by Respondents. They only presented such defenses in their Motion for Summary Judgment.

Petitioner maintains that when the State court granted Respondent's Motion for Summary Judgment, said Order ran in conflict with the established rulings of this Court in the following cases: Resolution Trust Corp. v. Eagle Lake and Golf Condominiums, 310 S.C. 473,

475, 427 S.E.2d 646, 648 (1993) and Town of Kingstree v. Chapman, 405 S.C. 282, 313 747 S.E.2d 494, 510 (2013).

*Town of Kingstree* laid down the principle that failure to plead an affirmative defense is a waiver of right to assert it, pursuant to Rule 12. *Ibid.* While in *Resolution Trust Corp.*, this Court emphasized that unpled issues and defenses may not be raised for the first time on a motion for summary judgment. *Resolution Trust Corp., supra.* Despite Respondents having not raised res judicata in their Answer but only in a subsequent motion for summary judgment, which was filed beyond the period for filing responsive pleading, the State court erroneously applied res judicata. The State court should not have allowed Respondents to plead res judicata as they have been deemed to waive such defense.

**4. This matter is an exception to issue preclusion.**

Assuming arguendo an issue is actually litigated and determined by a valid and final judgment and the determination is essential to the judgment, litigation of the issues in a subsequent action between the parties is not precluded where “it will contravene other public policies; the court must weigh the competing public policies.” Johns v. Johns, 309 S.C. 203, 420 S.E.2d 856, 859 (Ct. App, 1992) as cited in Nelson v. Coker, No. 3626, (Ct. App. 2003). In balancing the public policies in this case, public policy of finality of judgment versus the basic human rights to liberty, privacy, due process and equal protection of law, the Court should give deference to the overriding rights granted by the United States Constitution.

Petitioner maintains that the combination of circumstances that occurred in the lower court deprived him of a full adjudication of his case: (1) when the Respondents did not show up for the criminal trial court date; (2) when Respondent’s counsel moved for and received a continuance for a trial scheduled as a date certain due to a “child’s birthday party”; (3) failure by Respondents to preserve the store’s security camera despite their knowledge and anticipation of

litigation for the alleged incident based on Petitioner's visit to Respondent within 48 hours of the arrest; (4) lower court's denial of Petitioner's motion to strike Respondents' Answer or, in the alternative, give an adverse inference due to spoliation; and, (5) the court's refusal to acknowledge the evidence (receipt, bank statement, etc.) submitted by Petitioner as exhibits to establish his case.

The State action had been set for trial for a date certain with the consent of counsel for both parties. Petitioner lives in Texas and had to travel for the trial only for the Court to Order a continuance-for defense counsel's daughter's birthday party.

Respondents filed to dismiss Petitioner's Federal Complaint based on the fact he had this case pending in State court. The Judge denied the motion, ordering Respondents to refile the motion with both parties briefing the issue of the Colorado abstention and its relation to the facts of the filings in each Court. Respondents failed to refile the motion as ordered. Petitioner believes Respondents implicitly acquiesced to both actions continuing simultaneously, thereby waiving their right to raise the defense of res judicata.,

Petitioner was deprived of a full adjudication of his case. However, assuming arguendo the Court found the elements of res judicata applied in this case, Petitioner could still pursue his action for negligence in the State Court due to certain exceptions.

The Court in *Pye v. Ack* presented exceptions for the application of res judicata *Pye v. Ack*, 325 S.C. 426. One such exception is that of a clear and convincing need for a determination of the issue 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. *Id.*

Respondents had the opportunity to terminate the Federal case based on the Colorado abstention issue. However, they disobeyed the Judge's order to refile their motion. By doing so, they willfully and wantonly allowed the two parallel actions to continue. Thus, even if the Court found the elements of res judicata and collateral estoppel were present, Petitioner should be able to pursue his negligence causes of action because allowing Respondents to succeed by ignoring a Court order contravenes public policy.

### **CONCLUSION**

For these reasons, as well as those addressed in his Brief to this Court, Petitioner respectfully requests the Lower Court's judgment or orders be reversed, and the be remanded for trial.

Respectfully submitted by:



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