THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

Case No. 2019-CP-42-02092
Appellate Case No. 2020-001110

Luther Harris, Donna Harris, and Bobby E. Leopard, Appellants,

v.

Perry Wendall Barbour and Southland Transportation Co., Respondents.

BRIEF OF RESPONDENTS

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II. **Did the trial court properly determine that Appellants had failed to meet the requirement of commencing an action as set forth in the Rules of Procedure?**

III. **Did the trial court properly determine that equitable tolling was not applicable under the facts of this case?**

STATEMENT OF THE CASE

On June 16, 2016, Luther Harris, Donna Harris, Bobby Leopard and Jerry White were injured when they were struck by a truck operated by Perry Barbour on behalf of Southland Transportation Co. while travelling on south Interstate 85 in Spartanburg County. Luther Harris, Donna Harris and Bobby Leopard (Appellants) filed suit in Spartanburg County on June 7, 2019 seeking damages for injuries they sustained in the accident (R. pp. 20-30). (Jerry White was represented by another attorney in a separate action also filed in Spartanburg County). The Appellants, through their attorney, thereafter attempted to negotiate with the liability insurer for Perry Barbour and Southland Transportation Co. ("Respondents") (R. pp. 153-161), but did not immediately attempt service until much later after negotiations apparently failed on August 8, 2019 (R. p. 172). The various attempts at service of the Respondents thereafter attempted by Appellants, however, failed to meet the deadline set by Rule 3 of the South Carolina Rules of Civil Procedure, which requires that service be accomplished no later than 120 days after filing in order that the civil action might properly be commenced. Respondents' motion to dismiss for failure to timely commence the civil action was granted by court Order, dated March 10, 2020 (R. pp. 5-8). This Order was subsequently affirmed on July 14, 2020 after a motion for reconsideration was filed (R. p. 2). Appellants have thereafter appealed those rulings.

STANDARD OF REVIEW

Appellants' action for damages was dismissed by the circuit court for failure to comply with Rules 3(a) and 12(b)(2), (4) and (5) of the South Carolina Rules of Civil Procedure (R. pp. 5-8). Rule 3(a) concerns the commencement of an action, which requires both filing and service of a Summons and Complaint. Rule 12 is concerned with the response to a Complaint. Specifically, Rule 12 requires a response to be made within thirty days after service. Rule 12 (b) (2) concerns the lack of personal jurisdiction, while Rule 12(b)(4) concerns the inefficiency of process and Rule 12 (b)(5) concerns the insufficiency of service of process. Normally, when an appeal is made from a motion to dismiss, the underlying facts are to be construed in a light most favorable to the non-moving party with the allegations of the Complaint being taken as true. Stiles v. Onorato, 318 S.C. 297, 457, S.E.2d 601 (1995). Otherwise, in an appeal from a non-jury matter, the findings of fact of the trial judge will not be disturbed unless found to be without evidence which would reasonably support the judge's findings. Townes Associates, Ltd. v. City of Greenville, 266 S.C.81, 221 S.E.2d 773 (1976).

ARGUMENTS

I.

THE TRIAL COURT PROPERLY DISMISSED APPELLANTS' CASE DUE TO A FAILURE TO COMMENCE THE CASE WITHIN 120 DAYS AFTER FILING. (Issue I)

Appellants contend that the trial court erred by failing to find that Respondents had waived their affirmative defenses of personal jurisdiction, sufficiency of process and sufficiency of service of process by failing to timely raise those defenses in accordance with Rule 12 of the South Carolina Rules of Procedure. However, before Rule 12 becomes applicable, Rule 3 requires that a civil action be commenced by filing and serving the Complaint. Only after an action has been commenced does Rule 12 direct a defendant to serve his response to the Complaint within thirty days after service has been made.

Rule 3 of the South Carolina Rules of Civil Procedure requires that a Summons and Complaint be filed and served before an action is commenced. In this instance, the Appellants properly and timely filed their Complaint with the Spartanburg County Clerk of Court on June 7, 2019 Complaint. Since the accident occurred on June 10, 2016, the three year statute of limitations would become applicable on June 10, 2019. (See §15-3-530, S.C. Code (1976)) However, Rule 3 permits a Plaintiff to serve the Complaint within 120 days after filing if the Complaint is filed within the applicable statute of limitations but not served within that statutory period, thereby staying the application of the Statute of Limitations for that time period. Under the facts of this case, the 120 days would end on October 5, 2019. However, because that day was on a weekend, the deadline was extended until October 7, 2019. Any service beyond that

date would be out of compliance with Rule 3 since there would be no proper service within the allotted 120 day period and, therefore, no commencement of the action.

If we return to the facts of this matter, it becomes clear that there was no commencement of this action. After properly filing the Complaint, Appellants' attorney began to negotiate with the insurer for Respondents (R. pp. 153-161). These negotiations apparently broke down around August 8, 2019, almost two months before the deadline of October 7, 2019 (R. p. 172). Appellants then attempted to serve Southland Transportation Company pursuant to section 15-9-245 of the South Carolina Code (R. p. 143). Section 15-9-245 is applicable to any foreign business which is not authorized to transact business in South Carolina, as was true with Southland Transportation Company. Under this statute, the Secretary of State serves as agent for service of process for the foreign corporation. Service of process is accomplished by delivering the Complaint to the Secretary of State who thereafter forwards the Complaint by certified mail to the corporation. Proof of service by affidavit of compliance is filed with the Clerk of Court along with the signed return receipt for the certified mail. In this case, the certified mail to Respondents was posted on October 4, 2019 but not sent by the Post Office until October 7, 2019. The certified mail was not received by Southland Transportation Co. and the Secretary of State until October 9, 2019 (R. p. 145), outside of the specified time period for service. Since service was not timely made on Southland Transportation Co., the action was not properly commenced.

Appellants nonetheless argue that Respondents were required to raise these affirmative defenses within thirty days of service under Rule 12. However, with regard to Southland Transportation Co., the defenses were timely filed, even if the issue of "commencement" is overlooked. As noted, Southland Transportation would not have received the Complaint until October 9, 2019 (R. p. 143). Assuming the service was timely, a response from Southland

Transportation would not have been due until November 13, 2019 since it would be entitled to thirty days plus an additional five days under Rule 6(e). Southland Transportation's Answer was filed on November 8, 2019 (R. pp. 33-38), where the defenses of insufficiency of process, inefficiency of service of process and lack of personal jurisdiction were raised. Therefore, there was no waiver of any potential affirmative defenses.

Likewise, with regard to Perry Barbour, there was a failure by the Appellants to timely serve him such that there might be a commencement of the action against him. As noted, the Complaint was filed on June 7, 2019. Service pursuant to Rule 3 was to be completed by October 7, 2019. Appellants initially attempted to serve Perry Barbour by certified mail but were unsuccessful in doing so. According to the affidavit of Kristen Smith, office manager for the Appellants' attorney, the Summons and Complaint were post marked for October 4, 2019, but not mailed until October 7, 2019 (R. p. 174). On October 10, the certified letter to Perry Barbour was returned due to the fact that Perry Barbour had moved and, therefore, the letter was not accepted. A second certified letter was thereafter sent but also returned as undeliverable. Appellants then attempted service upon the Office of General Counsel for the South Carolina Department of Motor Vehicles on October 25, 2019 pursuant to section 15-9-350 (R. p. 147). Obviously, this service was untimely and did not meet the deadline of October 7, 2019, as required by Rule 3.

Appellants, however, argue that the affirmative defenses were not timely made pursuant to Rule 12 and therefore, have been waived. Again, this argument ignores the fact that without timely service under Rule 3, the litigation had not commenced. In fact, Rule 12 only comes into play when service has been completed. See Rule 12 (a), SCRCP.

Moreover, when a party has failed to accept and receipt for certified mail which contains the notice of service and a copy of the process, section 15-9-380 provides the procedure for

service. Pursuant to that statute, when the certified mail is returned, the envelope is to be retained and process is to be resent by open mail. The original envelope and subsequent affidavit of mailing is to be filed with the Clerk of Court. When the envelope and affidavit of mailing have been filed, section 15-9-380 provides that "the filing thereof [of the envelope and affidavit] shall have the same force and legal effect as if such process had been personally served upon such defendant". As a result, under circumstances where the certified letter has not been accepted, filing of the returned envelope enclosing the Summons and Complaint and affidavit of service of subsequent mailing sets the date of filing for purposes of service. In this case, any such filing would have had to occur after November 21, 2019 since that is the date that the South Carolina Department of Motor Vehicles received the open letter back from the Post Office as being undeliverable (R. p. 149). If we assume the original envelope and subsequent Affidavit of Mailing were properly filed with the Clerk of Court on November 21, 2019, the service would be completed on that date pursuant to section 15-9-380. Perry Barbour would then have until December 26, 2019 to file an Answer or Motion to Dismiss pursuant to Rule 12 and the five day extension provided by Rule 6(e). A Motion to Dismiss on behalf of Perry Barbour was filed on December 23. As a result, even assuming there was a proper commencement of this case, there was no waiver of affirmative defenses.

Appellants go on to argue that the rule regarding the commencement of an action should be ignored where the insurer for the Respondents has knowledge that the Complaint has been filed. There is no authority for this. The insurer is not a party to the action and cannot legally accept service of the Summons and Complaint. Jurisdiction of a matter is based upon proper service of the Summons and Complaint which acts to bring a party before the court and subjects that party to its holdings. Financial Federal Credit, Inc. v. Brown, 384 S.C. 555, 683 S.E.2d 486

(2009). Without jurisdiction, the Court lacks the authority to give judgment against a defendant. Id. The insurer, by contrast, simply serves to indemnify the insured defendant for any monetary judgment rendered against him by a court of competent jurisdiction up to his policy limits. Because this matter was not properly commenced due to insufficient service, the trial court properly dismissed this action.

II.

BECAUSE THE ACTION WAS NOT PROPERLY COMMENCED, THE TRIAL COURT WAS WITHOUT AUTHORITY TO EXTEND THE TIME PROVIDED FOR PROPER SERVICE. (Issues II and III)

Appellants argue that under the Federal Rules of Civil Procedure, a court has the discretion to permit a Complaint to be served beyond the statute of limitations. Although the Federal Rules of Civil Procedure often serve as a guideline as to how the South Carolina Rules of Procedure are to be applied, in this instance, there are differences which preclude authority decided under the Federal Rules of Civil Procedure from being applicable.

Under Rule 3 of the South Carolina Rules of Civil Procedure, an action is commenced only after both filing and service of a Complaint. Under Rule 3 of the Federal Rules of Civil Procedure, an action is commenced when a Complaint is filed. As a result, in the federal system, a court has jurisdiction and the authority to act once a Complaint is filed. This is not true in the South Carolina court system. Since a state court has no authority to act in the absence of proper service, Appellant's reliance on Rule 4(m) of the Federal Rules of Civil Procedure is misplaced. As a result, Appellants' argument regarding the court's discretionary power to permit additional time to serve upon a showing of "good cause" is also misplaced. While a federal court has the

power to dismiss a Complaint if service is not made within ninety days, a state court has no corresponding authority because it has not acquired jurisdiction since the action has not commenced.

Appellants' argument mirrors an argument for an estoppel of the application of statute of limitation. Under South Carolina law, a defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute has been induced by the defendant's actions. Kleckley v. Northwestern Nat. Cas. Co., 338 S.C. 131, 526 S.E.2d 218 (2000). In order for equitable estoppel to apply, however, the party to be estopped must have misrepresented or concealed material facts which were unknowingly relied upon by the aggrieved party. Maher v. Tietex Corp., 331 S.C. 391, 500 S.E.2d 204 (Ct. App. 1998). Appellants have not argued that any affirmative act of deceit or misrepresentation by the Respondents caused them to delay service. As a result, a theory of equitable estoppel is inapplicable even if it were assumed to be required where there was no commencement of the action.

A similar argument exists under the theory of equitable tolling. This theory is also inapplicable since the case was never properly commenced. Moreover, equitable tolling is reserved for use only in extraordinary circumstances. Hooper v. Ebenezer Senior Services and Rehabilitation Center, 377 S.C. 217, 659 S.E.2d (Ct. App. 208). Pursuant to Hooper, equitable tolling typically applies in cases where a litigant is prevented from filing suit because of an extraordinary event beyond his or her control. The Hooper court went on to note that equitable tolling is to be used sparingly and only when the interests of justice compel its use. As noted in the case of Irwin v. Dept. of Veteran Affairs, 111 S. Ct. 453, 112 L. Ed. 2d 435, 498 U.S. 89 (1990), equitable tolling is allowed where a claimant actively pursues available remedies but files

defective pleadings or is induced by an adversary into allowing a deadline to pass. However, it is normally not allowed where a claimant fails to exercise due diligence in pursuing his or her legal rights.

Notwithstanding Appellants arguments to the contrary, it is clear from a review of the facts of this case that Appellants simply failed to serve their Complaint in a timely manner when they had more than sufficient time to do so. As noted, the accident giving rise to Appellants' attempted action occurred on June 10, 2016 (R. p. 22, lines 3-4). They filed their Complaint on June 7, 2019. Pursuant to Rule 3, they had 120 days to complete service. They initially attempted to negotiate a settlement with the insurer for the Respondents (R. pp. 153-161). By August 8, 2019, Appellants had received an offer from the insurer which they knew was unacceptable (R. p. 172). At that point in time, they had sixty days in which to complete service (October 7, 2019). For some reason, Appellants did not attempt to serve Southland Transportation Co. by certified mail until October 7, 2019 (R. p. 143) (it should be noted that the certified letter was apparently sent to the Post Office on October 4 but not sent until October 7). Appellants attempted service by certified mail in two ways: service upon the defendant corporation and substitute service upon the Secretary of State pursuant to section 15-9-245 (R. p. 145). Delivery was made on Southland Transportation on October 9, 2019. Likewise, delivery was made on the Secretary of State on October 9, 2019. October 9, 2019 is beyond the deadline for completion of service.

Appellants also attempted to serve Nathan Barbour by certified mail to his last known address. On October 10, 2019, this was returned undeliverable (R. pp. 58, 175). Pursuant to Rule 4(d)(8), if service by certified mail is returned undeliverable, service must be made by other methods as provided by the Rules of Civil Procedure. Appellants then attempted service through the South Carolina Department of Motor Vehicles pursuant to section 15-9-370. This was

accomplished with a certified letter being sent out by the Department of Motor Vehicles on October 25, 2019 (R. pp. 58, 175-176). It was returned undeliverable. On November 22, 2019, the Department of Motor Vehicles advised the attorney for the Appellants that the Summons and Complaint were placed in open mail to Perry Barbour, but returned on November 21, 2019 (R. p. 189). Pursuant to Section 15-9-380, under these circumstances, upon filing of the letter with the Clerk of Court, the date of filing shall be deemed the equivalent of personal service. As a result, the earliest service would be November 22, 2019, well beyond the deadline for service.

Appellants have advanced the argument that the service by certified mail was late due to the Post Office failure to forward the mail on a timely basis. However, this argument ignores the fact that Appellants procrastinated until the next to last day service could be initiated and simply took the chance that nothing would go wrong with service by delivery. Equity does not reward those who sit on their rights. Hemmingway v. Mention, 228S.C. 211, 89 S.E.2d 369 (1955); Eldridge v. Eldridge, 398 S.C. 113, 728 S.E.2d 24 (2013).

Appellants have also argued that Respondents already had actual knowledge of the pending litigation since the attorney for Respondents was retained by the insurer for the Respondents. Appellants assert, without authority, that the insurer had a duty to advise and inform its insured about the filing of the litigation. However, the insurer is not an agent for service of process of its insured. The duty to accomplish proper service upon a named defendant lies with the plaintiff and cannot be handed off onto other entities unless there is a true agency relationship allowing vicarious service or there is statutory authority allowing substitute service. Neither exist with the insurer for the Respondents.

As noted by the Court in Pelzer v. State of South Carolina, 378 S.C. 516, 662 S.E.2d 618 [Ct. App. 2008]:

> The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present sufficiently rare and exceptional circumstances that would warrant application of the doctrine.
>
> Equitable tolling has been deemed available where –
> - Extraordinary circumstances prevented the plaintiff from filing despite his or her diligence
> - The plaintiff actively pursued his or her judicial remedies [but] has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass
> - The plaintiff, despite due diligence, is unable to obtain vital information bearing on the evidence of his or her claim.

In this instance, Appellants were not tricked or misled by Respondents. The fact that the individual defendant moved after the accident is of no moment since people often move within a three year period and nothing suspicious has been proven about his moving his residence. As noted, Appellants simply allowed the time for service to slip away from them. Service could easily have been effectuated well within the 120 day period. Instead, Appellants procrastinated and waited until time had almost expired before attempting the substitute service which was always available to them.

CONCLUSION

Pursuant to Rule 3 of the South Carolina Rules of Civil Procedures, Appellants had an additional 120 days to properly serve the Respondents in order to commence their action. Despite the existence of numerous methods of service, Appellants failed to meet this requirement with regard to either Respondent. This failure to timely serve caused there to be an absence of a commencement of the action which was necessary for the court to rule on any factual or legal issues presented in the case. Although Appellants acknowledge a failure to timely serve, they argue that this failure should be excused due to circumstances beyond their control as well as due

to alleged misleading actions by the Respondents. However, the facts show otherwise. Appellants sat on their rights until the very end when they could have easily served Respondents well before the deadline of 120 days. They were not misled by any statements or actions by the Respondents. Respondents were never evasive – Respondent Barbour simply moved.

Appellants assert that service was late due to circumstances beyond their control. Their assertion that service was late due to a mistake by the Post Office is unfounded and without evidence. Moreover, any alleged untimely mailing by the Post Office could have been avoided by simply getting the certified mail to the Post Office earlier. There were no barriers. Most importantly, Appellants were not diligent in attempting to obtain service. Instead, they dallied until the last moment and now complain that failure of service was someone else's fault. Equitable tolling is only available to those who are diligent. Appellants were not. There was nothing extraordinary preventing them from properly perfecting service.

Since Appellants failed to properly file and serve, there is simply no active lawsuit. As a result, the requirements of Rule 12 do not apply nor can there be a default. Instead, the trial court properly dismissed this action.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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