

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM KERSHAW COUNTY

Court of Common Pleas

RECEIVED

Apr 13 2020

SC Court of Appeals

Honorable Robert E. Hood, Presiding Judge, Fifth Judicial Circuit

Appellate Case No. 2019-000624

Dottie R. Bell Appellant,

v.

John C. Bentley..... Respondent.

APPENDIX

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Certificate of Electronic Notification

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Carrie O'Brien - Notification transmitted on 09-10-2018 12:55:54 PM.

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******* IMPORTANT NOTICE - READ THIS INFORMATION *******
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A filing has been submitted to the court RE: 2016CP2801087

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Court: CIRCUIT COURT

Common Pleas

Kershaw

Case Caption: Dottie R Bell VS John C Bentley , defendant, et al

Document(s) Submitted: Motion/Substitute Parties

Filed by or on behalf of: Thomas Jefferson Goodwyn, Jr.

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The following people were served electronically:

Henry Ronald Stanley

Carrie Hailman O'Brien for Progressive Insurance
Company, John C Bentley

Thomas Jefferson Goodwyn, Jr. for Dottie R Bell

H. Thomas Morgan, Jr. for State Farm Mutual
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A filing has been submitted to the court RE: 2016CP2801087

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Court: CIRCUIT COURT

Common Pleas

Kershaw

Case Caption: Dottie R Bell VS John C Bentley , defendant, et al

Document(s) Submitted: Motion/Substitute Parties

Filed by or on behalf of: Thomas Jefferson Goodwyn, Jr.

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The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

ELECTRONICALLY FILED - 2018 Dec 05 2:26 PM - KERSHAW - COMMON PLEAS - CASE#2016CP2801087

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
COUNTY OF KERSHAW)

) Civil Action No.: 2016-CP-28-1087
Dottie R. Bell,)
)

Plaintiff,)

vs.)

John C. Bentley,)

Defendant.)

**PLAINTIFF’S MOTION TO
RECONSIDER THE ORDER
DENYING PLAINTIFF’S MOTION TO
SUBSTITUTE PARTIES**

COMES NOW, PLAINTIFF in the above-captioned matter and files this Motion to Reconsider the Order Denying Plaintiff’s Motion to Substitute Parties. In support of their Motion, Plaintiff shows the following:

FACTUAL BACKGROUND

Plaintiff filed this original action on December 13, 2016 in which Plaintiff suffered serious injuries as a result of the negligence of Defendant. Plaintiffs were unable to locate Defendant, thus served him by publication on February 17, 2017, and an affidavit of publication was filed with the Court on April 21, 2017. On January 25, 2018, Plaintiff was informed in an email by counsel for Defendant that counsel had learned Defendant was deceased (Pl. Exh. 1). Defendant’s counsel had no specific information regarding the death of Defendant which the Probate Court would need to appoint a personal representative. Plaintiff began an extensive search to track down information regarding the death of Plaintiff: i.e. a death certificate, funeral information, obituary, etc. After much due diligence and investigation including, but not limited to, checking with Kershaw County to see if an estate had been opened (January 29, 2018 *see* Pl. Exh. 2), making a list of all funeral homes in and around the area and contacting each funeral home (February 1-8, 2018 *see* Pl. Exhs. 4a-4j), sending numerous letters to DHEC requesting a Statement of Death (January 31, 2018 and

April 17, 2018 *see* Pl. Exhs. 3, 6), sending an unanswered request for discovery to Defense counsel requesting specific information regarding the death of Defendant (February 19, 2018 *see* Pl. Exh. 12), hand sending FOIA requests to Lee County (although Defendant was a residence of Fairfield County) regarding information about Mr. Bentley's death (April 17, 2018 *see* Pl. Exhs. 5a, 5b), Lee County's Coroner finally confirmed by telephone call that Mr. Bentley was in fact deceased (email dated April 17, 2018 attached as Pl. Exh. 5c). Plaintiff then sent a letter again requesting Defendant answer interrogatories sent on February 19, 2018 (Pl. Exh. 13). Defendant finally responded to Plaintiff's interrogatories on May 10, 2018, denying being in possession of any specific information related to Defendant's death outside of what information they heard on January 25, 2018. (Pl. Exh. 14). Plaintiff's counsel made one more attempt to get a Statement of Death from DHEC on May 16, 2018 (Pl. Exh. 7). DHEC finally responded and on June 12, 2018, they provided a Statement of Death. (Pl. Exh. 15).

It was around this time that Plaintiff contacted the now named Special Administrator of Defendant's estate about his interest in acting in such capacity. After confirmation, Plaintiff's counsel sent a proposed Order to Judge Branham on July 20, 2018, naming Bryan Caskey Special Administrator of Defendant's estate (Pl. Exh. 8). By Order of this Court, Bryan Caskey was named Special Administrator on August 14, 2018. Plaintiff promptly provided the requisite documents and Order to Mr. Caskey on August 16, 2018.

Pursuant to Rule S.C.R.C.P. Rule 17, Plaintiff filed a Motion to Substitute Bryan D. Caskey, Esquire as Personal Representative or Real Party in Interest for Defendant ("Motion to Substitute") on September 10, 2018. That Motion was heard before Judge Benjamin of this Court on October 15, 2018. At that time, Bryan Caskey had not been served the Summons and Complaint in this matter. Judge Benjamin made the determination, based upon the fact that

service of the Summons and Complaint had not been properly effectuated, that Plaintiff should be granted leave to serve Mr. Caskey. Then, Mr. Caskey could be properly substituted as a party per Rule 17. (See Pl. Exh. 10 p. 4 lines 10-22). No other arguments outside of the absence of service were raised by Defendant on October 15, 2018.

On October 19, 2018, Plaintiff properly served Special Administrator Bryan Caskey and he signed Acceptance of Service. (Pl. Exh. 11). Plaintiff refiled their Motion to Substitute, and the Motion was heard in front of Your Honor on February 13, 2019. Erroneously construing S.C.R.C.P. Rule 25 as an entirely new basis of defense of this Motion which was not presented to this Court previously, Defendant argued that Substitution of Bryan Caskey as Real Party of Interest was not made within a reasonable time.

QUESTION PRESENTED

WAS JUDGE BENJAMIN CORRECT IN HER ORIGINAL RULING TO PROVIDE PLAINTIFF LEAVE TO SERVE THE SPECIAL ADMINISTRATOR WITH THE SUMMONS AND COMPLAINT AND SUBSEQUENTLY, SHOULD BRYAN CASKEY BE SUBSTITUTED AS PERSONAL REPRESENTATIVE OR REAL PARTY IN INTEREST?

A. Judge Benjamin found the only outstanding issue was service of the Summons and Complaint upon the Special Administrator and no other issues were before the Court at the February 13, 2019 and therefore, any new defense to this issue should have been precluded at the February 13, 2019.

At the October 15, 2018 hearing on the previously filed Motion, after hearing all the evidence, Judge Benjamin granted leave for Plaintiff to serve Mr. Caskey. Judge Benjamin stated, “I will grant you leave to serve the PR—the administrator of the estate. Then you will have to come back and substitute him as a party. But you have to serve him first.” This ruling is clear, and although it could be viewed as a minor slip of the tongue, in calling Mr. Caskey the personal representative (PR) before correcting herself, it is obvious that Judge Benjamin herself had already decided Mr. Caskey is the proper personal representative but for the lack of service of the

Summons and Complaint. Otherwise, Judge Benjamin would have just denied the Motion, and not gone through the lengths of specifying she was granting leave to Plaintiffs.

Furthermore, the *only* argument made by Defense counsel at the previous Motion hearing on October 15, 2018, is that service was improper because service cannot properly be carried out upon a deceased individual. Defense counsel stated very concisely, “So your Honor, we are going to object to now, over two years after the fact, coming in and trying to substitute a real party in interest whenever they have not properly served him.” Defense counsel goes on to state, “So the whole point is, is you can’t serve someone via publication that is already dead. You have to serve an estate or someone acting on their behalf.” This is the only argument made by Defense counsel and has been cured by the corrective action of the Plaintiff. As a result, Plaintiff’s counsel was not fully prepared to defend the new issue raised by Defendant at the February 13, 2018 hearing, as the only issue before the Court was the issue of service upon a deceased individual. To allow Defendant to raise a completely new theory of defense of this motion would be to give them two bites at the apple and should be barred on principles of equity, judicial estoppel, and issue preclusion. Essentially, Judge Benjamin heard their argument previously and made her ruling that leave was the appropriate remedy for Plaintiff, and granted that leave so Mr. Caskey could subsequently be named Personal Representative or Party in Interest by proper service. As a result, this Court should reconsider.

b. Even if the Court is to consider Defendant’s argument based upon S.C.R.C.P. Rule 25(a)(1), Defendant has still not met their burden to show that the time to substitute a party was unreasonable.

Rule 25(a)(1) contemplates the need to substitute a party when a party to an action may become deceased. The Rule itself states, “If substitution is not made within a reasonable time, the action *may* be dismissed as to the deceased party.” (emphasis added). The plain language of the

rule does not define “reasonable” and allows the Court discretion in whether or not to dismiss even if substitution is not made in a reasonable time. The rule was clearly drafted in contemplation that identifying that a party is in fact deceased and subsequently, finding a suitable party for substitution can vary greatly from case to case.

South Carolina Courts have tried to give some parameters for deciding what constitutes reasonableness. In discussing Rule 25 the South Carolina Court of Appeals has held, “The test of whether an amendment should be allowed is whether the amendment will prejudice or work an injustice to the adverse party.” Shah v. Richland Memorial Hospital, 350 S.C. 139, 564 S.E.2d 681 (S.C. App. 2002) (quoting Forrester v. Smith & Steele Builders, Inc., 295 S.C. 504, 369 S.E.2d 156 (S.C. App. 1988)). The Shah Court continued in the absence a proper reason such as bad faith, undue delay, or prejudice, it is an abuse of discretion of the Court to deny leave to amend. The burden of showing a proper reason for the Court not to substitute a party is on the party opposing the motion.

Using the factors laid out in Shah, it is clear the substitution was made in a reasonable time.

The timeline is as follows (all supplemented with Plaintiff’s Exhibits attached hereto):

January 25, 2018: Opposing counsel informs Defendant they have heard from a third party Defendant may be deceased.

January 29, 2018: Plaintiff emails the Probate Court and determines no estate has been established.

January 31, 2018: Plaintiff sends DHEC a request for a statement of death.

February 1-8, 2018: Plaintiff compiles list of all funeral homes in the area.

February 9, 2018: Plaintiff emails 9 funeral homes requesting any information regarding Mr. Bentley. No funeral homes in Fairfield County have any information regarding Mr. Bentley.

February 19, 2018: Plaintiff sends discovery request to Defense counsel asking them to disclose specific information related to the death of Defendant. This request went

unheeded.

March 7, 2018: Plaintiff drafts FOIA Request to Lee County requesting any information regarding Mr. Bentley.

April 17, 2018: Plaintiff sends another FOIA Request to Lee County and request to DHEC requesting certificate of death.

April 17, 2018: Plaintiff receives email from Coroner of Lee County that Mr. Bentley was in fact deceased.

April 25, 2018: Plaintiff sends letter to Defense counsel requesting they answer Plaintiff's discovery request sent on February 19, 2018.

May 16, 2018: Plaintiff sends another follow-up correspondence to DHEC requesting a statement of death. **(Please note, the Probate Court will not consider any petition to appoint a Special Administrator without confirmation from DHEC.)**

June 12, 2018: Plaintiff receives a Statement of Death from DHEC confirming the death of Defendant (DHEC apparently did not have a Certificate of Death).

July 20, 2018: Plaintiff sends a Proposed Order naming Bryan Caskey Special Administrator.

August 14, 2018: Judge Branham signs proposed Order naming Bryan Caskey Special Administrator.

August 16, 2018: Plaintiff sends correspondence informing Bryan Caskey of appointment.

September 10, 2018: Plaintiff files Motion to Substitute.

It is clear from the action taken from the moment Plaintiff heard from Defense counsel that she had been informed of Defendant's death, up until today, that Plaintiff has not acted in bad faith or delayed in any action to have the proper party substituted. Furthermore, no prejudice has been incurred by the Defense, as they were the party that first heard rumblings that Defendant was in fact deceased. And as referenced in the first email exchange between the parties on January 25, 2018, Plaintiff's counsel informed Defense counsel of the intention to file for a Personal Representative and to ultimately name that Representative as the proper party. None of the action rises to the level of unreasonable time delay contemplated by Rule 25.

Defendant made an attempt at the hearing before Your Honor on February 13, 2019 to say that case law in South Carolina defines a reasonable amount of time as 90 days and not more than 120 days. In coming to this conclusion, counsel cited the footnote of Rule 25(a)(1) which reads, “This Rule 25(a)(1) is substantially the same as Federal Rule 25(a)...The Rule *substitutes ‘a reasonable time’ after such knowledge is obtained.*” (emphasis added). The rule, while substantially the same, makes a major change which was clearly considered by the South Carolina Legislature in the plain language of the Rule. South Carolina Courts have interpreted “reasonable time,” not as a bright line rule, but as a test contemplating the totality of circumstances (see *supra*).

Defendant also cites two cases in support of the position that a “reasonable time” ranges from 90 days to 120 days. However, neither one of these cases deals with Rule 25 and does not stand for the proposition Defendant is proffering.

Panhost v. Panhorst, 390 S.E.2d 376 (Ct. App. 1990) is a family law case. In one minor issue in the case, the Appellant maintained that 90 days was not a reasonable time for her to vacate the marital property and find another residence. In finding 90 days was a reasonable amount of time to vacate the marital residence, the Court found that Appellant had actually obtained another residence before the end of 90 days. The Court stated that based upon the fact that she had found another residence within 90 days, that she was not entitled to remain in the marital residence for any amount of time, and she did not suffer any prejudice as a result of the Judge’s Order that she vacate the premises within 90 days.

Panhost has no bearing on this current situation and is not on point. They are not analogous in the slightest, as Panhost is a family law case dealing with a completely different issue of law. *Even if* the Court is to give any credence to this bright line 90 day argument, Plaintiffs finally got a Statement of Death from DHEC after months of good faith efforts on June 12, 2018. It was only

at that time that the Probate Court would even consider appointing a Special Administrator. On July 20, 2018, Plaintiff submitted a proposed Order of Special Administration to the Court, a time frame well within this arbitrary 90 day limitation Defendant is trying to put forth.

The final case Defendant cites is the unpublished opinion of Pressley v. Blackwell, 2005 S.C. App. Unpub. Although this opinion has “No precedential value” and “should not be cited or relied on as precedent in any proceeding,” Defendant attempts to create a 120 day limitation as the absolute maximum the Court has ever allowed per Rule 25(a)(1). This is a false interpretation of this case.

In Pressley, the Court was considering Rule 3, SCRCPP and the post 2004 Amendment to the Rule. Specifically, the Court was asked to consider the service provision allowing for 120 days after proper filing of a civil suit per the statute of limitations. The Court found that the legislative intent showed that ordinarily, a reasonable time would be within 120 days, even before the 120 day amendment. The Court found the Trial Judge had not abused his discretion by finding effectuating service after the 120 day limitation was not “reasonable” based upon a totality of the circumstances, including Appellant’s lack of “dilatoriness in commencing publication.”

These situations are not analogous. Even if this case was good precedent, and even if the subject matter of proper service within a clearly laid out 120 day limitation was in any way on point with the current situation of reasonable time for substitution, the circumstances show that proper substitution occurred within 120 days. Plaintiffs got the statement of death from DHEC after months of dilatoriness on June 12, 2018. It was only at that time that the Probate Court would even consider appointing a Special Administrator. On July 20, 2018, Plaintiff submitted a proposed Order of Special Administration to the Court, a time frame well within this arbitrary 120 day limitation Defendant is attempting to assert.

CONCLUSION

Based upon the foregoing reasons, Plaintiff has taken all proper steps in the filing of their Motion to Substitute. The issues relevant to this matter were all raised and contemplated at the original hearing on October 15, 2018, in which Judge Benjamin granted Plaintiff leave to properly serve Mr. Caskey, which Plaintiff immediately did. Defendant should be precluded to raising any additional defenses that were not raised at that time.

Even should the new argument be considered, Plaintiff has acted in good faith and had been more than diligent in substituting the Real Party in Interest. No unreasonable delay as contemplated by the Rules of Civil Procedure has occurred. As this is not a bright-line rule, the Court is given discretion in determining the reasonableness given all the circumstances. Even implementing a 90 day or 120 day limitation on Plaintiff, substitution was still performed properly. Therefore, Plaintiff prays this Court reconsider its original ruling and grant their Motion to Substitute Bryan D. Caskey, Esquire as Personal Representative or Real Party in Interest for Defendant.

Respectfully submitted, this 6th day of March, 2019.

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Dottie R Bell
PLAINTIFF(S)

State Farm Mutual Automobile Insurance Company As Uim Carrie et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled);
 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Plaintiff's Motion to Reconsider the Order Denying Plaintiff's Motion to Substitute Parties is hereby Denied.

ORDER INFORMATION

This order ends does not end the case. See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/11/2019 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Kershaw Common Pleas

Case Caption: Dottie R Bell VS John C Bentley , defendant, et al

Case Number: 2016CP2801087

Type: Order/Electronic Form 4

So Ordered

s/ R.E. Hood #2164

Electronically signed on 2019-04-11 15:01:01 page 3 of 3

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In The Court of Appeals

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Honorable Robert E. Hood, Presiding Judge, Fifth Judicial Circuit

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John C. Bentley.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned attorney hereby certifies that this Appendix to the Record on Appeal contains only materials proposed to be included in the Record on Appeal in Respondent’s Consent Motion to Supplement the Record on Appeal dated April 11, 2020.

April 11, 2020

Respectfully submitted,

s/Sarah Rand-McDaniel

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