RECORD NO. 08-6670

In The
United States Court of Appeals
For The Fourth Circuit

TYRONE LORENZO ROBINSON,

Plaintiff – Appellant,

v.

JOSEPH FRANKLIN CLIPSE, Public Safety Trooper First Class,

Defendant – Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions, Statutes and Rules

Other Authorities

ARGUMENT

I. THE AMENDMENT FORMALLY ADDING CLIPSE RELATES BACK UNDER RULE 15(c), AND THEREFORE THE STATUTE OF LIMITATIONS DOES NOT BAR THIS ACTION

As shown below in subpart A, Clipse acknowledges that the district court erred in concluding that, under Rule 15(c)(1)(C), a newly added defendant must have the requisite notice before the statute of limitations expires. Instead of relying on the district court's reasoning, Clipse essentially makes two arguments against the application of Rule 15(c). First, Clipse makes a novel argument, without supporting authority, that Rule 15(c)(1)(C)'s notice period must terminate 120 days from the original complaint's filing (an argument which serves as the premise for his contention that he did not receive timely notice). Second, Clipse argues against application of the "mistake" prong of Rule 15(c)(1)(C)(ii).

As shown in subpart B, Clipse's first argument—in favor of a strict and narrow notice period—is contrary to the text of Rules 4(m) and 15(c) and case law. As shown in subpart C, when the notice period is properly measured—using this case's Rule 4(m) service period—there is no question that, for purposes of Rule 15(c)(1)(C)(i), Clipse timely received such notice of the action that he will not be prejudiced in defending on the merits. Indeed, Clipse does not contend he will be prejudiced by Robinson's amendment. Finally, as shown in subpart D, Clipse's argument on the "mistake" prong of Rule 15(c)(1)(C)(ii) is flawed.

A. Clipse Acknowledges That The District Court Erred In Reasoning That, Under Rule 15(c)(1)(C), A Newly Added Defendant Must Have Notice Before The Statute Of Limitations Expires

Clipse essentially acknowledges that the district court's Rule 15(c) reasoning was erroneous. The district court held that the amended complaint cannot relate back under Rule 15(c) because Clipse did not have the requisite notice "within the limitations period" (J.A. 377–79 (citing *Goodman v. Praxair, Inc.*, 494 F.3d 458 (4th Cir. 2007))), which the district court evidently equated with requiring notice before the statute of limitations expired. J.A. 380 n.5. Robinson's opening brief showed that Rule 15(c) does not require notice before the statute of limitations expires. Br. of Appellant 17–20. In response, Clipse "*agrees* that reading *Goodman* to hold that a newly added defendant must receive notice of the action before the statute of limitations expires would be incorrect." Br. of Appellee 18 (emphasis added). Thus, Clipse acknowledges that the district court's reasoning was flawed.

Clipse, however, tries to defend the judgment by invoking a novel theory that the district court did not adopt below. Clipse's new position is that the notice required by Rule 15(c)(1)(C) must occur no later than 120 days after the original complaint is filed. As shown below, Clipse's argument in favor of an inflexible 120-day notice period cannot withstand analysis.

B. Clipse's Argument That Rule 15(c) Notice Must Occur Within 120 Days Of The Original Complaint's Filing Is Contrary To The Text And Advisory Committee Notes Of Rules 4(m) and 15(c), Not To Mention A Wall Of Authority

Citing no cases or even secondary authorities to support his position, Clipse contends that, for purposes of Rule 15(c)(1)(C), a newly added defendant must have the requisite notice "within 120 days of [the original complaint's] filing." Br. of Appellee 18. Clipse then oddly changes his mind and argues that the notice must occur not within 120 days of the *original complaint's filing*, but instead within "the statute of limitations plus 120 days." *Id.* (emphasis added). While Clipse may not be entirely clear on which approach he is urging the Court to adopt, this much is clear: either approach is contrary to law.

1. Clipse's position is contrary to Rule 4(m) and Rule 15(c)

First, Clipse's position is contrary to Rule 15(c)(1)(C)'s text. The text does not say that an amendment relates back if the party to be added had the requisite notice "within 120 days of filing of the initial complaint" (or "within 120 days of the statute of limitations"). Rule 15(c)(1)(C) mentions neither "120 days" nor the filing of the complaint. Rather, the rule says an amendment relates back if the newly added defendant had the requisite notice "within the period provided by Rule 4(m) for serving the summons and complaint." Fed. R. Civ. P. 15(c)(1)(C). Thus, the rule makes clear that Rule 15(c)'s notice period for a particular case is determined by reference to the service period that applies in that case.

Second, contrary to Clipse's premise, Rule 4(m)'s service period (incorporated by reference in Rule 15(c)(1)(C)) is *not fixed* at 120 days after the filing of the original complaint. The 120-day period is a default which may be tolled or extended by the district court, as happened below. *See* Fed. R. Civ. P. 4(m). In fact, Rule 4(m) provides that when there is "good cause" for not completing service within 120 days, "the court *must* extend the time for service for an appropriate period." *Id.* (emphasis added).[1] Indeed, relying on the Advisory Committee Notes for Rule 4(m), the Supreme Court has observed that Rule 4(m) "permits a district court to enlarge the time for service 'even if there is no good cause shown.'" *Henderson v. United States*, 517 U.S. 654, 658 n.5 (1996) (quoting Fed. R. Civ. P. 4, Advisory Comm. Notes to 1993 Amendments). Because Rule 4(m)'s service period may close more than 120 days after an original complaint is filed (and *must* do so if good cause is shown), the Rule 4(m) service period—and thus the Rule 15(c)(1)(C) notice period—cannot plausibly be fixed at 120 days from the filing of the original complaint (let alone 120 days from expiration of the statute of limitations).

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[1] The district court below authorized service beyond 120 days when (after this Court ordered that Clipse should be added to this action) the district court entered an order on July 3, 2007 finally authorizing the issuance of a summons and directing the U.S. Marshals Service to serve Clipse. J.A. 276–78. The district court later rejected Clipse's argument (an argument Clipse wisely does not resurrect on appeal) that service failed to comport with Rule 4. J.A. 376–77.

Rule 15(c)'s Advisory Committee Notes make doubly clear that the relevant period is not 120 days from an original complaint's filing. The Notes advise that "this rule [15(c)] *allows not only the 120 days specified in [Rule 4(m)], but also any additional time resulting from any extension ordered by the court pursuant to that rule."* Fed. R. Civ. P. 15, Advisory Comm. Notes to 1991 Amendment (emphasis added). Again, Clipse ignores this.

2. Clipse's position is contrary to the case law

Clipse also sidesteps the circuit cases that are cited in the opening brief for the proposition that, in a case like Robinson's, the 120-day service period in Rule 4(m)—and thus the Rule 15(c)(1)(C) notice period—is tolled or extended until the district court screens the case and authorizes the U.S. Marshals Service to serve the summons and complaint. Br. of Appellant 21–24.[2] As the opening brief explains, courts have embraced this tolling principle in recognition of the fact that a district court's delay in processing and screening a case and authorizing service of process by the Marshals Service is beyond a plaintiff's control. *Id.*

An example is *Urrutia v. Harrisburg Police Dep't*, 91 F.3d 451 (1996). In that case, the plaintiff alleged that police officers violated his civil rights, and the

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[2] As explained in the opening brief, the district court processed Robinson's complaint under the *in forma pauperis* statute (28 U.S.C. § 1915), screened his case under the Prison Litigation Reform Act (*id.* § 1915A), and understood that the service had to be conducted by the Marshals Service and authorized by the court. *See* J.A. 23, 26, 276.

district court dismissed the complaint. *Id*. at 453–54. On appeal, the Third Circuit decided that the case should be remanded to permit a curative amendment; but because the statute of limitations had expired, the amendment could not be allowed unless it related back under Rule 15(c). *Id.* The Third Circuit faced the question "whether the 120 day period . . . is suspended while the district court considers the [*in forma pauperis* petition] so that the amendment will not be barred by a statute of limitations that expires after the complaint is filed." *Id.* at 453. The Third Circuit held that the 120-day period should be "suspended" until the district court authorizes service of the amended complaint. *Id.* at 460. "Upon the entry of th[e] order directing service of the amended complaint," the Third Circuit held, "the suspension ends and the 120 day period of Rule 15(c)[] begins to run." *Id.* at 459.

Clipse does not mention persuasive authorities such as *Urrutia*, much less cast doubt on them.[3] Clipse does not even discuss tolling.

Moreover, as further explained in the opening brief, while some courts refer to this suspension of Rule 4(m)'s period as a product of "tolling," it may also be characterized as a "good cause" extension of Rule 4(m)'s 120-day period. Br. of Appellant 22–23; *see Graham v. Satoski*, 51 F.3d 710, 713 (7th Cir. 1995) (ruling

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[3] In addition to the cases cited in the opening brief, *see*, *e.g.*, *Robinson v. America's Best Contacts & Eyeglasses*, 876 F.2d 596, 597–98 (7th Cir. 1989) (cited with approval in Fed. R. Civ. P. 4, Advisory Comm. Notes to 1993 Amendment); *Sidney v. Wilson*, 228 F.R.D. 517, 523 (S.D.N.Y. 2005) (holding that 120-day service period was tolled until the Marshals Service received the Service Form).

that the Marshals Service's failure to complete service is automatically good cause to extend time under Rule 4(m)); *Dumaguin v. Sec'y of Health and Human Servs.*, 28 F.3d 1218, 1221 (D.C. Cir. 1994) (same). As noted above, Rule 15(c)'s Advisory Committee Notes make clear that any Rule 4(m) extension enlarges the Rule 15(c) notice period. Again, Clipse does not discuss this.

In this case, the district court unquestionably authorized service beyond 120 days from the filing of Robinson's original complaint. Following Robinson's successful appeal of the district court's erroneous qualified immunity ruling, the district court entered an order on July 3, 2007 which (for the first time in this case) authorized the issuance of a summons and directed the Marshals Service to serve process on Clipse. J.A. 277. Clipse does not dispute that Robinson had to rely on the district court to authorize service by the Marshals Service. Nor does Clipse contend that the district court acted improperly by authorizing service on July 3, 2007 or that the service violated Rule 4(m). *See* note 1, *supra.*

Furthermore, and significantly, Clipse does not explain how Robinson could have possibly effected service within 120 days after filing his original complaint when: shortly after that filing the district court issued its order forbidding the clerk from issuing and authorizing service of process (J.A. 23); that order was accompanied by the magistrate's recommendation of dismissal which the district court adopted, resulting in a judgment dismissing the case with prejudice and

necessitating an appeal (J.A. 31); the case was then pending on appeal until this Court's April 2007 mandate requiring Clipse to be formally added as a defendant (which could happen only be way of amendment); and it was not until July 3, 2007 that the district court finally authorized the issuance of a summons and allowed the Marshals Service to serve Clipse. In light of the foregoing circumstances, Clipse cannot plausibly contend—and indeed does not contend—that the district court lacked good cause to extend or toll the Rule 4(m) service period so that the 120-day period commenced on July 3, 2007.

3. Clipse's policy argument does not withstand analysis

Clipse contends that allowing Rule 15(c) to incorporate the district court's enlargement of the Rule 4(m) service period "would impermissibly extend the South Carolina statute of limitations." Br. of Appellee 18. This argument fails on multiple levels.

First, Clipse forgets that this is a federal action under 42 U.S.C. § 1983, for which the state statute of limitations is merely borrowed in determining the *federal* limitations period. *See Wilson v. Garcia*, 471 U.S. 261, 266–67 (1985) ("When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation *as federal law* if it is not inconsistent with federal law or policy to do so." (emphasis added)), *superseded by statute on other grounds as stated in Jones v. R.R. Donnelly & Sons Co.*, 541 U.S.

369, 379–82 (2004). When a federal court merely borrows a state statute of limitations for a federal cause of action, the state's substantive rule about service of process in relation to the limitations period is not adopted. *West v. Conrail*, 481 U.S. 35, 39 & n.4 (1987).

Second, Clipse's argument is really an assault on Rule 4(m) and Rule 15(c). In all § 1983 cases (and in diversity cases), Rules 4(m) and 15(c) operate to "extend" the statute of limitations in the manner that Clipse complains of here. After all, Rule 4(m) permits service of process *after* the limitations period expires. Fed. R. Civ. P. 4(m) (allowing service 120 days after the complaint is filed, plus any extension). And the whole purpose of Rule 15(c) is to allow amendments that *postdate* the limitations period to relate back in time so that the statute of limitations poses no bar. Thus, Clipse's complaint about an "extension" is really a complaint about Rules 4(m) and 15(c).

Finally, Clipse's account of South Carolina law is not even accurate. The South Carolina Supreme Court has held that a statute of limitations may be extended through equitable tolling. *See Hooper v. Ebenezer Senior Servs., Rehab. Cntr.*, --- S.E.2d ----, 2009 WL 4796129, at *4 (S.C. Dec. 14, 2009). This doctrine, the South Carolina Supreme Court wrote, is applied "to ensure fundamental practicality and fairness." *Id.* Since South Carolina recognizes tolling, it is Clipse's position, not Robinson's, that is inconsistent with South Carolina law.

* * *

In conclusion, Clipse's position—that he had to receive the requisite notice within 120 days after the original complaint was filed—is contrary to the text of Rules 4(m) and 15(c), their Advisory Committee Notes, and case law. Clipse does not cite a single case holding that Rule 15(c)(1)(C)'s notice period must terminate no later than 120 days after the original complaint is filed (or 120 days after expiration of the limitations period). And he does not dispute the cases cited in the opening brief that refute his position. His position should be rejected.

C. Clipse Received Such Notice Of The Action Within The Rule 4(m) Service Period That He Will Not Be Prejudiced In Defending On The Merits

Clipse does not dispute that if the Rule 4(m) service period (and thus the Rule 15(c)(1)(C) notice period) commenced on July 3, 2007, he received notice of the action within the service period. Clipse acknowledges he was on notice by May 2007. *See* Br. of Appellee 16. (As the opening brief shows, he was aware of this action well before May 2007: in 2006 he referenced this case in a document he filed in the district court. Br. of Appellant 25. Clipse does not dispute this.)

Moreover, and significantly, Clipse does *not* argue that he would be prejudiced by Robinson's amendment—an amendment this Court approved. J.A. 53. As the opening brief demonstrated, Clipse cannot plausibly claim prejudice. *See* Br. of Appellant 26–28. After all, proceedings in the district court did not

advance to the point where Clipse could be prejudiced. *See id.* And, given the unusual procedural posture of this case, allowing the amendment to relate back would put Clipse in no worse a position than he would have occupied had Robinson named him as a defendant in the caption of the original complaint. *See id.* Clipse does not deny this. At no point in his brief does he advance an argument showing how he would be prejudiced by allowing Robinson's amendment to relate back under Rule 15(c).

D. Clipse's Argument On The "Mistake" Prong of Rule 15(c)(1)(C)(ii) Is Contrary To The Law Of This Circuit And A Legion Of Cases From Other Circuits

As the opening brief showed, Clipse should have known within the Rule 4(m) service period that Robinson intended to hold Clipse personally accountable for shooting him and that Robinson would have named Clipse as a defendant in the original complaint but for a mistake on Robinson's part. Br. of Appellant 28–37.

Clipse first contends that Robinson, a *pro se* litigant, did not make a "mistake" but instead made a "conscious decision" or "conscious choice" when he did not include Clipse's name in the caption of the original complaint. Br. of Appellee 7, 16. That argument disregards this Court's decision in *Goodman*, which disavowed any notion that "amendments resulting from strategic error" are different in kind from other mistakes. 494 F.3d at 471. This Court rejected an inquiry into the *nature* of the plaintiff's error, instructing that "[t]he 'mistake'

language is textually limited to describing the notice that the new party had." *Id.* Thus, contrary to Clipse's suggestion, whether Robinson knew he could sue Clipse does not answer the "mistake" issue posed by Rule 15(c). Rather, the issue is whether a reasonable officer in Clipse's position should have known from the notice that Clipse received within the Rule 4(m) service period that Robinson intended to name him as a defendant all along. *See id.*[4]

Clipse contends that there is nothing in this case from which a reasonable officer in Clipse's shoes should have known (within the Rule 15(c) notice period) that Robinson intended to sue Clipse all along. That is incorrect. Within the Rule 15(c)(1)(C) notice period (i.e., before October 31, 2007), Clipse answered the amended complaint which *named him as a defendant* (and which attached this Court's earlier decision granting Robinson's motion to add Clipse as a party). Thus, within the Rule 15(c)(1)(C) notice period, Clipse knew that Robinson *had in fact* added Clipse in his personal capacity.

But putting aside the notice furnished by the amended complaint, there is the notice provided by the original complaint. As explained in the opening brief, this Court clearly stated in *Goodman* that Rule 15(c)'s "mistake" requirement is

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[4] Even if Robinson *did* make a "conscious decision" to sue only the immune state agency that employed Clipse—on a mistaken belief that the state could be accountable for damages under the doctrine of *respondeat superior*—this is the type of mistake of law that is recognized in the relation-back cases cited in the opening brief and ignored by Clipse. *See* Br. of Appellant 32–35.

satisfied if a newly added defendant *should have known from the face of the original complaint* that the plaintiff would have named him as a defendant but for a mistake. Br. of Appellant 29. In *Goodman*, for example, this Court relied on "the complaint's facial expression of intent" to sue the named defendant's subsidiary in finding that the subsidiary should have known it would have been sued but for a mistake. *Goodman*, 494 F.3d at 474. Clipse's argument defies *Goodman*'s instruction about examining the face of the original complaint. Robinson's opening brief gave three separate reasons why a reasonable officer reading Robinson's original complaint should have known that he intended to hold Clipse personally accountable for violating Robinson's civil rights. Br. of Appellant 28–32. Clipse fails to address, much less refute, any of the three reasons.

First, Clipse ignores the fact that Robinson's original complaint repeatedly alleged that Clipse—and Clipse alone—violated Robinson's civil rights by shooting him without justification. *See id.* at 29–30. The original complaint asserted that Clipse was the only actor who engaged in the challenged conduct (the shooting) and that Clipse was the only actor who violated Robinson's rights. J.A. 13–17. The original complaint alleged no wrongdoing by the South Carolina Department of Public Safety ("Department"). A reasonable officer reading the complaint would conclude that Robinson intended to sue Clipse.

Second, Clipse disregards the fact that Robinson's § 1983 complaint explicitly disavowed that Clipse's shooting was the product of any custom or policy by the Department. *See* Br. of Appellant 30–31. By pleading that Clipse did not act pursuant to a departmental policy or procedure, the complaint indicated that Clipse acted beyond the scope of his authority—the type of allegation that bespeaks an individual-capacity claim. *Id.* Upon seeing a § 1983 complaint disavow any custom or policy by a named (and immune) governmental entity, a reasonable officer in Clipse's shoes should have known that Robinson made a mistake and that he would have added Clipse to the original complaint's caption but for that mistake.

Third, Clipse fails to address the fact that Robinson's original complaint sought compensatory and punitive damages, which are available under § 1983 *only* in individual-capacity suits. *See id.* at 31–32. The opening brief cited several Rule 15(c) cases holding that when a *pro se* complaint prays for damages, a reasonable officer who is responsible for the challenged conduct but not named personally in the original complaint should know that the plaintiff intended to sue the officer in his individual capacity. *Id.* Clipse fails to address these authorities.

In sum, it was evident from the face of Robinson's original complaint that Robinson intended to hold Clipse personally accountable for shooting him. Therefore, Clipse should have known or expected that he "would have been sued

but for a mistake." *Goodman*, 494 F.3d at 470. Indeed, the district court itself apparently treated Robinson's original complaint as if it was seeking a recovery against Clipse individually, since the district court (in 2006) addressed *sua sponte* whether Clipse had qualified immunity from suit (J.A. 34–38), a defense that is available only to an officer who is sued in his individual capacity (J.A. 53).

Clipse fails to cite any authority in his favor on the "mistake" issue. Moreover, he completely ignores the legion of Rule 15(c) cases from other circuits holding that when *pro se* litigants suing under § 1983 make a mistake of law by suing the government instead of suing an officer in his individual capacity, an amendment naming the individual officer should relate back. *See* Br. of Appellant 32–36 (discussing cases from the Second, Third, Sixth, and Seventh Circuits).

Finally, as the opening brief explained, denying relation back to correct Robinson's mistake would conflict with Rule 15(c)(1)(C)(ii)'s purpose, since the "mistake" language was added to the rule decades ago to permit relation back when plaintiffs mistakenly sue government entities instead of officers. Br. of Appellant 37; *see Goodman*, 494 F.3d at 474 (observing that "[t]he central concern when the current [Rule 15(c)(1)(C)] was added in [1966] was the misnaming of government instrumentalities"). This is the type of mistake that Robinson made. In response to the argument that denying relation back in this case would contravene the rule's purpose, Clipse once again has no response.

For these reasons, the Court should reject Clipse's argument on the "mistake" prong of Rule 15(c)(1)(C)(ii).

E. Conclusion

Robinson's amendment formally adding Clipse satisfies the requirements of Rule 15(c) and thus relates back to the original complaint's filing date. Rule 15(c) focuses on prejudice. *See id.* at 470. In a case where this Court granted Robinson's motion to add Clipse as a defendant, where Clipse answered the amended complaint within the Rule 4(m) service period, and where Clipse has not established any prejudice, there should be no concern about allowing the amendment to relate back.

It bears reminding that "[t]he basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion," and thus the rules should be interpreted "to further, not defeat the ends of justice." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966). The "rules are to be liberally construed" to "determine the rights of litigants on the merits." *Holley Coal Co. v. Globe Indem. Co.*, 186 F.2d 291, 295 (4th Cir. 1950). The merits of this case should be heard.

II. CLIPSE HAS FAILED TO ESTABLISH THAT THIS CASE IS BARRED BY *RES JUDICATA*

Clipse's informal Fourth Circuit brief for this appeal asserted that "[t]he issue of *res judicata* is not before this Court." Informal Br. of Appellee, *Robinson v. Clipse*, No. 08-6670, at 4 (4th Cir. May 28, 2008). Now Clipse asks this Court to resolve his *res judicata* defense. *Id.*[5]

Res judicata (or claim preclusion) is an affirmative defense; therefore Clipse has the burden of proving that *res judicata* properly applies. Fed. R. Civ. P. 8(c); *Taylor v. Sturgell*, 128 S. Ct. 2161, 2179–80 (2008). For *res judicata* to bar this action, Clipse must establish three elements: (1) that there was final judgment on the merits in a prior suit, (2) that the prior suit resolved claims by the same parties or their privies, and (3) that this suit is based on the same cause of action as the earlier suit. *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 210 (4th Cir. 2009). Clipse has not met his burden of establishing *res judicata*. As shown below in subpart A, the judgment in the 2003 suit has no preclusive effect. As shown in subpart B, the judgment in the 2006 suit does not bar this action.

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[5] While Clipse has renounced his position that the *res judicata* defense is not before this Court, he appears to remain consistent (and correct) in his view that the district court "did not rule on" *res judicata.* Informal Br. of Appellee, *Robinson v. Clipse,* No. 08-6670, at 4 (4th Cir. May 28, 2008). As noted, even if the district court had ruled on *res judicata,* this Court would still engage in *de novo* review. *See Q Int'l Courier, Inc. v. Smoak*, 441 F.3d 214, 216 (4th Cir. 2006).

A. The District Court's Dismissal Of Robinson's 2003 Action Has No Preclusive Effect Because It Was Dismissed *Without Prejudice*

The judgment in Robinson's 2003 action has no preclusive effect because, while it did assert the same cause of action against Clipse that is asserted here (excessive force for shooting Robinson), when the district court dismissed the 2003 suit for failure to prosecute, the court did so *without prejudice*. J.A. 336.

A dismissal for failure to prosecute functions as an adjudication on the merits "*[u]nless the dismissal order states otherwise*." Fed. R. Civ. P. 41(b) (emphasis added). The district court "states otherwise" by specifying that a dismissal is without prejudice; when the district court does that, the judgment does not operate as an adjudication on the merits. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (holding that for purposes of Rule 41(b), "an 'adjudication upon the merits' is the opposite of a 'dismissal without prejudice'"; "'[b]oth parts of Rule 41 . . . use the phrase 'without prejudice' as a contrast to adjudication on the merits'" (citation omitted)); *Payne ex rel. Estate of Calzada v. Brake*, 439 F.3d 198, 204 (4th Cir. 2006) (concluding that Rule 41(b) gave the lower court the discretion to dismiss a case without prejudice in order to prevent an adjudication on the suit's merits); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1180 (4th Cir. 1989) (ruling that a dismissal based upon a ground not enumerated in Rule 41(b) was an adjudication on the merits because the district court "did not otherwise specify the dismissal to be 'without prejudice,' and the

[plaintiffs] failed to move the court . . . to specify that the judgment was 'without prejudice.'"); *cf. Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396 (1990) (stating in context of Rule 41(a) that "'[d]ismissal . . . without prejudice' is a dismissal that does not "operat[e] as an adjudication upon the merits" (citation omitted)). Indeed, as the Supreme Court has observed, "'Black's Law Dictionary (7th ed. 1999) defines 'dismissed without prejudice' as 'removed from the court's docket in such a way that the plaintiff may refile the same suit on the same claim[.]'" *Semtek*, 531 U.S. at 505 (citation omitted).[6]

Clipse fails to acknowledge this controlling authority and the text of Rule 41(b). Instead Clipse cites a single case decided more than sixty years ago, *Angel v. Bullington*, 330 U.S. 183 (1947), which did not mention Rule 41(b) or involve a dismissal for failure to prosecute. *Angel* is irrelevant to this case.

In *Angel*, the plaintiff lost an appeal in the North Carolina Supreme Court. *Id.* at 185. Rather than seek review in the U.S. Supreme Court, the plaintiff reinstituted the same cause of action against the same defendant in a U.S. District Court. *Id.* The defendant moved to dismiss the federal suit on the basis that it was barred by the final judgment in the previous state action. *Id.* The U.S. Supreme

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[6] *See also Elfenbein v. Gulf & W. Indus., Inc.*, 590 F.2d 445, 449 (2d Cir. 1978) ("We also strongly suggest to the district courts that they use the terms "with prejudice" or "without prejudice" only when making a determination as to the Res judicata effect of a dismissal.").

Court agreed, holding that the plaintiff's failure to seek review in the U.S. Supreme Court in the earlier state court action did not prevent the earlier state court judgment from having preclusive effect. *Id.* at 189. *Res judicata* applied because the "controversy ha[d] once gone through the courts to conclusion." *Id.* at 193. *Angel* is among "early cases often cited for the proposition that preclusion is not affected by the failure to appeal," 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4433 (3d ed. 2009), and it "stands for the proposition that where the merits of a suit have been reached, they may not be relitigated," *Compagnie Des Bauxites de Guinee v. L'Union Atlantique S.A. d'Assurances*, 723 F.2d 357, 361 (3d Cir. 1983).

Angel involved a final judgment adjudicating the merits; it did not involve a Rule 41(b) dismissal *without prejudice*. Because Robinson's 2003 action was dismissed without prejudice, there was no final adjudication on the merits. Therefore, the judgment in the 2003 action has no preclusive effect.

B. The District Court's Dismissal Of Robinson's 2006 Action Has No Preclusive Effect On This Case

1. This excessive-force action and the 2006 unlawful-prosecution action involve different transactions

As noted, to establish *res judicata*, Clipse must prove that this action and the 2006 action were based on the same cause of action. Clipse cannot carry that

burden. The transactions at issue in the two suits spring from different sets of operative facts. *See* Br. of Appellant at 40–41.

This suit is an excessive-force action. The transaction—the shooting—concluded when Clipse fired his last shot at Robinson on Buck Island Road on November 14, 2002. In contrast, the 2006 suit is not based on excessive force. The gist of the 2006 suit is a theory of malicious prosecution.[7] The claims in the 2006 suit (perjury, false swearing, false imprisonment, etc.) arose from Robinson's criminal prosecution: the relevant transaction began when Clipse altered an existing arrest warrant on November 15, 2002, resulting in a January 13, 2003 grand jury indictment charging Robinson with resisting arrest on Highway 278. The cause of action did not accrue until Robinson was acquitted on May 12, 2003. (This description of the 2006 suit in the opening brief is not refuted by Clipse.)

Thus, the 2006 suit and this action are based on separate sets of operative facts and involve different types of alleged wrongdoing, injuries, and causes of action. Although the operative facts in both cases are related in time, their similarities end there. To prove his allegations in this excessive-force case, Robinson must demonstrate that Clipse unlawfully shot him without justification;

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[7] *See* Compl., *Robinson v. S.C. Dep't of Pub. Safety*, No. 2:06-cv-01288-SB (D.S.C. May 1, 2006). Despite bearing the burden of showing that the 2006 suit involved the same cause of action, Clipse failed to put the 2006 complaint in the record below.

the action boils down to whether Robinson's car began accelerating toward Clipse after the accident on Buck Island Road. In contrast, to prevail in the 2006 case, Robinson would have needed to show that Clipse unlawfully modified an arrest warrant to increase the severity of the charges against Robinson, and that the resulting criminal case terminated in his favor. Neither this case nor the 2006 case invoked the same causes of action. At best, the facts in this case provide no more than relevant background information for the 2006 action.

Clipse avoids discussing the actual cause of action in the 2006 suit. Instead of undertaking a reasoned analysis of the transaction and causes of action involved in this case and in the 2006 case, Clipse merely asserts, in a conclusory fashion, that "[t]here can be no doubt that all of the cases arise out of the same transaction or series of transactions." Br. of Appellee 9. As Clipse would have it, the transaction for both cases should be the car theft and police chase. *Id.* But that is not true. The cause of action in this suit is not based on a stolen vehicle or a police chase. It is based on *a shooting* which occurred *after* those events—a shooting which occurred after Robinson's car had come to a stop in a car accident and after Clipse had exited his vehicle. Clipse of course does not contend that he was justified in shooting an unarmed man based on a report of stolen car or based on an already-concluded chase.

In sum, Clipse failed to satisfy his burden to prove that this case and Robinson's 2006 action arose from the same transaction. Thus, Clipse's *res judicata* defense should be rejected.

2. The claims in this action could not have been brought in Robinson's 2006 case

In addition to Clipse's failure to demonstrate that this action and the 2006 suit involved the same transaction, the 2006 suit cannot properly bar this case because Clipse's premise—that Robinson could have brought his excessive-force claim in the 2006 suit—cannot withstand analysis. The excessive-force claim could not have been brought in the 2006 suit.

As noted in the opening brief, *res judicata* cannot apply if a plaintiff did not have "a fair opportunity to advance all [of] its 'same transaction' claims in a single unitary proceeding." *Dionne v. Mayor of Baltimore*, 40 F.3d 677, 683 (4th Cir. 1994); *see* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper *Federal Practice and Procedure* § 4412 (3d ed. 2009) ("It is clear enough that a litigant should not be penalized for failing to seek unified disposition of matters that could not have been combined in a single proceeding."). Robinson could not have pleaded his excessive-force claim in the 2006 action because the claim had been dismissed and was pending on appeal in this Court. To repeat, Robinson filed his 2006 suit *while this earlier-filed action was pending on appeal in this Court*, after the district court had dismissed this action upon an erroneous finding that Clipse

was entitled to qualified immunity. Rather than wrongly repleading the dismissed excessive-force claim in his 2006 suit, Robinson did the right thing by successfully taking an appeal of the district court's qualified immunity ruling.

Indeed, if Robinson had proceeded as Clipse's *res judicata* argument suggests—by refiling a recently dismissed claim in the same district court, instead of taking an appeal—Robinson would have flouted established procedure. The refiling of a recently dismissed claim could have been construed as an untimely motion for reconsideration under Rule 59, *see* Fed. R. Civ. P. 59 (motion must be filed within 10 days of entry of judgment), which the district court would not have jurisdiction to adjudicate, *see Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 392 (4th Cir. 2004) (en banc). Alternatively, if Robinson had refiled the dismissed claim, the district court could have construed the filing as an unauthorized Rule 60(b)(6) request for relief from the judgment dismissing that claim with prejudice. *See CNF Constructors, Inc. v. Donohoe Const. Co.*, 57 F.3d 395, 401 (4th Cir. 1995) ("where a motion is for reconsideration of legal issues already addressed in an earlier ruling, the motion 'is not authorized by Rule 60(b)'" (citation omitted)). Robinson would have stood accused of failing to heed this Court's repeated admonition that "[a] Rule 60(b) motion may not substitute for a timely appeal." *In re Burnley*, 988 F.2d 1, 3 (4th Cir. 1992). The bottom line is that Robinson did the right thing by taking a timely (and successful) appeal from

the earlier judgment of dismissal in this case, rather than refiling the dismissed excessive-force claim, as Clipse now suggests Robinson should have done.

What makes Clipse's current *res judicata* argument particularly untenable is that if Robinson *had* refiled the excessive-force claim in the 2006 action after that claim had been dismissed with prejudice in this action in early 2006, Clipse would have moved in the 2006 action to dismiss the excessive-force claim as barred by *res judicata.*

Clipse cannot plausibly maintain that he reasonably expected repose on the excessive-force claim when the district court entered summary judgment in the 2006 action. After all, when the district court entered summary judgment in the 2006 action on March 15, 2007, Clipse was aware that the excessive-force claim in *this* action was pending on appeal in this Court. *See* Br. of Appellant 25 (Clipse had notice of this action by October 2006). Clipse could not have reasonably expected repose on a claim that was pending on appeal. Indeed, Clipse's *res judicata* argument makes this Court's March 28, 2007 decision in the earlier appeal a nullity, since Clipse is contending that the district court's summary judgment order in the 2006 action (which predated this Court's 2007 decision in this case) automatically barred this action from proceeding under the doctrine of *res judicata.*

In conclusion, Clipse failed to carry his burden of establishing that the judgment in the 2006 suit bars this earlier-filed action under the doctrine of *res*

judicata. A court considering a *res judicata* defense must balance the interests of a defendant and the courts in closing a case against the interest of a plaintiff in not being denied the right to prosecute a valid claim. *Pittston Co. v. United States*, 199 F.3d 694, 704 (4th Cir. 1999). Given Clipse's lack of substantive analysis regarding the *res judicata* issue, this Court should reject the defense and allow this case to proceed on the merits.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND VOLUME LIMITATIONS

Pursuant to Fed. R. App. P. 32(a)(7)(C):

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word 2000.

I further certify that this brief complies with the volume limitation in Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains *6,486* words.

/s/ Sean E. Andrussier
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 25th day of January, 2010, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 25th day of January, 2010, the required number of bound copies of the foregoing Reply Brief of Appellant have been hand-filed with the Clerk of this Court and that one copy of the same has been served, via U.S. Mail, postage prepaid, upon all Counsel of Record at the above-listed address.

/s/ Sean E. Andrussier
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