

STATE OF SOUTH CAROLINA
 COUNTY OF Oconee
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-37-319

Randolph M. James, P.C., a North Carolina
 Professional Corporation

Oconee County, South Carolina, a political
 subdivision of the State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: C. Daniel Atkinson	Attorney for : <input type="checkbox"/> Plaintiff <input checked="" type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

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
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX)**
 Affirmed; Reversed; Remanded; Other

FILED OCONEE, SC
 BEVERLY N. WHITFIELD
 CLERK OF COURT
 2013 APR 5 PM 3:30

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: Defendant's Motion to Dismiss with Prejudice is GRANTED.

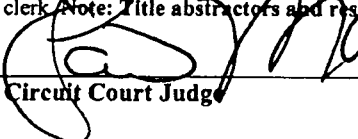
ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE PUBLIC INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


A TRUE COPY
2155
3-25-13

Circuit Court Judge Judge Code Date

APR 5 2013
 JB

CLERK OF COURT - OCONEE COUNTY

For Clerk of Court Office Use Only

This judgment was entered on the 5th day of Apr, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 5th day of Apr, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Peter Fredrick Asmer, Jr.

Charles Daniel Atkinson

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Whitfield

CLERK OF COURT

Court Reporter: Jo Rice

STATE OF SOUTH CAROLINA)
)
 COUNTY OF OCONEE)
)
 Randolph M. James, P.C., a North Carolina)
 Professional Corporation,)
)
 Plaintiff,)
)
 v.)
)
 Oconee County, South Carolina, a political)
 subdivision of the State of South Carolina,)
 d/b/a Oconee County Regional Airport)
 (KCEU),)
)
 Defendant.)
)

IN THE COURT OF COMMON PLEAS

C.A. No. 2012-CP-37-319

ORDER

FILED OCONEE, SC
 BEVERLY H. WHITFIELD
 CLERK OF COURT
 2013 APR 5 PM 3 38

This matter is before the Court on the consolidated Motions of Defendant Oconee County, a body politic and corporate, and a political subdivision of the State of South Carolina, incorrectly identified by Plaintiff as “Oconee County, South Carolina, a political subdivision of the State of South Carolina,” (hereinafter “Oconee”) to Dismiss the Complaint of Plaintiff Randolph M. James, a North Carolina Professional Corporation (hereinafter “Plaintiff”), due to improper service, pursuant to Rule 12(b)(5), SCRCF, and to Dismiss the Amended Complaint of Plaintiff with Prejudice, pursuant to Rule 12(b)(6), SCRCF. In its Rule 12(b)(5) Motion, Oconee contends that Plaintiff failed to properly serve Oconee with the Summons and Complaint in this matter, with the first proper service on Oconee being service of the Amended Summons and Amended Complaint on September 7, 2012. In its Rule 12(b)(6) Motion, Oconee contends that Plaintiff failed to commence its action within the period allowed under S.C. Code Ann. §15-78-110.

The Court conducted a hearing on this Motion on December 11, 2012. Attorney C. Daniel Atkinson appeared for Oconee, while Attorney Peter Asmer appeared for Plaintiff. At the December 11, 2012, hearing, the Court considered briefs submitted by both Oconee and Plaintiff, Affidavits of Service filed April 16, 2012 reflecting attempted service via certified mail upon Elizabeth Hulse, T. Scott Moulder, and Reginald Dexter as well as three affidavits, related to purported service, executed by process server Tony Finley. The Court also considered a transcript from a previous hearing on September 4, 2012, where Judge Alexander Macaulay received live testimony from Oconee County Administrator Scott Moulder, and Oconee County Deputy Administrator Glenn Breed.

For the reasons set forth below, the Court finds that Oconee was first properly served with process on September 7, 2012. Accordingly, Oconee's Motion to Dismiss with Prejudice, pursuant to Rule 12(b)(6), SCRPC, is hereby GRANTED.

STANDARD OF REVIEW

In a civil action,

[t]he plaintiff has the burden to establish that the court has personal jurisdiction over the defendant. The plaintiff need only show compliance with the rules. When the civil rules on service are followed, there is a presumption of proper service. Rule 4, SCRPC, [which sets for the rules for service of process upon defendants] serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action.

Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996). Without following the rules of service set forth in Rule 4, SCRPC, the Court of Common Pleas does not obtain personal jurisdiction over a defendant.

A defendant is allowed to challenge the sufficiency of service of process through Rule 12(b)(5), SCRPC. *Unisun Ins. v. Hawkins*, 342 S.C. 537, 541, 537 S.E.2d 559, 561 (Ct. App.

2000). Any motion must assert the defects in the purported service. A party must challenge the sufficiency of service of process at the outset of litigation, either by Motion to Dismiss or by challenging the sufficiency of service of process in its responsive pleading. Rule 12(h), SCRCP.

“Questions of fact arising on a motion to quash service of process for lack of jurisdiction over the defendant are to be determined by the court [rather than by a jury]. The findings of the circuit court on such issues are binding on the appellate court unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law.” *Brown v. Carolina Emergency Physicians, P.A.*, 348 S.C. 569, 583, 560 S.E.2d 624, 631 (Ct. App. 2001) (internal citations omitted).

“[Rule 12(b)(6)] permits a defendant to move for a judgment on the pleadings when the defendant contends the complaint fails to state facts sufficient to constitute a cause of action.” *Bradshaw v. Anderson County*, 388 S.C. 257, 262, 695 S.E.2d 842, 844 (2010) (internal citations omitted). “The reviewing Court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deductible from the pleadings would entitle the plaintiff to relief on any theory of the case.” *Id.* (internal citations omitted). A defendant may move for a dismissal pursuant to Rule 12(b)(6), SCRCP, where claims brought are barred under an applicable Statute of Limitations. *See Spell v. South Carolina Dep't of Highways and Pub. Transp.*, 292 S.C. 228, 355 S.E.2d 860 (1987) (affirming Rule 12(b)(6) dismissal of claims against Highway Department where claims were not brought within statutory claims period).

In this case, the Court is allowed to resolve all questions of fact related to service of process, with no preference given to the non-moving party. Once the Court makes its

determination on service, it must view all remaining facts in the light most favorable to the non-moving party.

FINDINGS OF RELEVANT FACT

Plaintiff Randolph M. James, P.C. ("Plaintiff"), is a North Carolina professional corporation acting as a law firm, with its principal place of business in Winston-Salem, North Carolina. (Amended Complaint, ¶ 1.) Plaintiff owned a Piper aircraft, which allegedly struck a deer while attempting to take off from Oconee County Regional Airport, on April 23, 2010. (Amended Complaint, ¶ 23 and ¶ 27.) In its Amended Complaint, Plaintiff alleges that Oconee acted negligently in failing to prevent deer from gaining access to the Oconee County Regional Airport Runway.

Oconee is a governmental subdivision of the State of South Carolina. (Amended Complaint, ¶ 2.) Oconee owns and operates the Oconee Regional Airport. Oconee operates under a Council-Administrator form of government, and the Chief Administrative Officer of Oconee is the County Administrator. *See* Oconee County Code §2-2. Scott Moulder is the present Oconee County Administrator. Glenn Breed serves as Deputy Administrator.

Oconee also has a Clerk of the County Council. *See* Oconee County Code §2-271. Elizabeth Hulse presently serves as Oconee's Clerk of County Council. The current chair of the County Council is Joel Thrift.

As reflected in the Affidavits of Service filed on April 16, 2012, Plaintiff attempted to serve Oconee by delivering suit papers via Certified Mail to Elizabeth Hulse, Scott Moulder and Reginald Dexter. On or around May 2, 2012, Oconee filed its Rule 12(b)(5), SCRCF, Motion to Dismiss, based on improper service of process. In that Motion, Oconee explicitly stated that "service of process [against Oconee] must have been made by personal service of a copy of the

complaint to the chief executive officer or clerk of Oconee County.” (See Oconee’s Motion to Dismiss, p. 2.) After receipt of Oconee’s Motion to Dismiss, on or around May 11, 2012, Process Server Tony Finley, acting on Plaintiff’s behalf, personally delivered copies of the Summons and Complaint to Reginald Dexter, a member of the Oconee County Council. (See Finley’s Affidavit of Service of Reginald Dexter, filed May 18, 2012). Mr. Finley also attempted to personally serve Elizabeth Hulse, but instead delivered the papers to Glenn Breed, Deputy Administrator of Oconee. (See Finley’s Affidavit of Service of Elizabeth Hulse, filed May 25, 2012). Finley never delivered the Summons and Complaint to Council Chair Joel Thrift. Plaintiff never personally delivered copies of the Summons and Complaint to either County Administrator Scott Moulder or to County Council Clerk Elizabeth Hulse. There is a clear error in the August 28, 2012, affidavit executed by Finley, in that it states that Finley delivered suit papers to the Oconee County Government offices on Confederate Memorial Day, a date on which the offices were not open for business.

Mr. Finley avers that he attempted to personally serve the Summons and Complaint upon Elizabeth Hulse at the Oconee County administrative offices, but upon arrival learned that she was not present. (See, August 28, 2012, Affidavit of Tony Finley, ¶¶ 7-8.) Mr. Finley claims that Mr. Breed advised that he could accept service of the Summons and Complaint on Ms. Hulse’s behalf. (*Id.*) On September 4, 2012 during his live testimony, Mr. Breed acknowledged that he told Mr. Finley that he could accept the papers for Ms. Hulse, and that he did accept them; however, he denied that Finley advised he was delivering suit papers, and Breed further denied stating he could accept service of suit papers upon her behalf. Mr. Breed testified that he had no authority to accept process on Oconee’s behalf. Mr. Breed testified that he later handed the papers to Elizabeth Hulse upon her return and that he is over the age of eighteen (18) years.

On September 4, 2012, Circuit Judge Alexander Macaulay conducted a hearing on Oconee's Rule 12(b)(5), SCRCF, Motion to Dismiss. After that hearing but prior to Judge Macaulay's ruling on that Motion, Plaintiff filed an Amended Summons and Amended Complaint with the Clerk of Court for Oconee County on September 7, 2012. Plaintiff had the Amended Summons and Amended Complaint personally delivered to Elizabeth Hulse on September 7, 2012. On September 21, 2012, Oconee filed its Motion to Dismiss with Prejudice, pursuant to Rule 12(b)(6), SCRCF, based on application of S.C. Code Ann. §15-78-110. On November 2, 2012, Judge Macaulay issued an Order Consolidating Oconee's pending Motions to Dismiss, for hearing at the next non-jury term. From that Order, the Court conducted a hearing on the consolidated motions on December 11, 2012.

CONCLUSIONS OF LAW

Prior to September 7, 2012, Plaintiff has failed to comply with the rules governing service upon a county in its efforts to effect service upon Oconee. The first proper service upon Oconee occurred on September 7, 2012, 157 days after Plaintiff first filed a Summons and Complaint in this action on April 4, 2012. The final date for commencement of this civil action was April 23, 2012, based on application of the two-year limitations period set forth in the South Carolina Tort Claims Act. Based on the date of the first proper service in this case, Plaintiff failed to commence this action within the applicable limitations period; therefore, the action is subject to dismissal pursuant to Rule 12(b)(6), SCRCF, for failure to state a claim upon which relief can be granted.

1. Pursuant to S.C. Law, Oconee Is Not Subject to Service Via Certified Mail.

Based on the language of Plaintiff's Amended Complaint, Oconee is a political or governmental subdivision of the State of South Carolina. (Amended Complaint, ¶ 2.)

Accordingly, service on Oconee is governed by Rule 4(d)(6), SCRPC, which states service can be effected upon a county “by delivering a copy of the summons and complaint to the **chief executive officer or clerk** thereof, or by serving the summons and complaint in the manner prescribed by statute for the service of summons and complaint or any like process upon any such defendant.” *Id.* (emphasis added). Oconee notified Plaintiff of the requirements for service upon a county in its May 2, 2012, Motion to Dismiss. Neither Plaintiff nor Oconee have identified any statutes which expand Oconee’s agents for service of process beyond those identified in Rule 4(d)(6), SCRPC.

According to Rule 4(d)(8), SCRPC, service by certified mail is only available for use against defendants within the categories of “individuals,” “minors, incompetents, and persons confined,” and “corporations and partnerships.” *Id.* There is no provision for service upon a county or governmental subdivision by certified mail. Accordingly, Plaintiff’s efforts to serve Oconee through certified mail constitute insufficient service of process, and they also constitute a failure to comply with the South Carolina Rules of Civil Procedure governing service of process on political subdivisions.

2. Prior to September 7, 2012, Plaintiff Failed to Effect Service Upon Any Person Authorized to Receive Service On Behalf of Oconee.

After Oconee objected to service upon Oconee via certified mail, Plaintiff attempted personal service upon agents authorized to receive service on Oconee’s behalf; however, Plaintiff did not properly serve any person authorized by law to receive service on Oconee’s behalf prior to September 7, 2012. As stated by the plain language of Rule 4(d)(6), SCRPC, Plaintiff could have served one of two people to effect service on Oconee: (1) the Clerk of the Council, Elizabeth Hulse; or (2) Oconee’s chief executive officer. At the December 11, 2012,

hearing, counsel for Plaintiff conceded that Plaintiff never effected service on Oconee's chief executive officer. Accordingly, the only remaining question is whether Plaintiff served Council Clerk Elizabeth Hulse prior to September 7, 2012.

Plaintiff did not effect service on Elizabeth Hulse by delivering papers to Oconee's Deputy Administrator Glenn Breed. It is undisputed that Elizabeth Hulse is the Clerk of Oconee's County Council. Further, it is undisputed that Plaintiff failed to effect service directly and personally upon Elizabeth Hulse, prior to September 7, 2012.

At the December 11, 2012, hearing, Plaintiff contended that it served Elizabeth Hulse by delivering a Summons and Complaint to Glenn Breed, a man who serves as Deputy County Administrator and works in the same office building as Ms. Hulse.¹

Rule 4(d)(6), SCRCF, which governs service on counties and political subdivisions, contains no provisions provision allowing for substitute service on a county employee working in the same office building as the council clerk or the chief executive officer. Rule 4(d)(1) is the provision of the Rules of Civil Procedure allowing service by delivery to someone else, and that rule, which governs service on individuals, requires delivery at the individual being served's "dwelling house or usual place of abode." There is no provision for substitute service upon a County, by delivery to someone other than the Clerk of the Council or the County's Chief Executive Officer. The only persons who can receive service for a County are the Chief Executive Officer and the Clerk of the County Council. See Rule 4(d)(6), SCRCF.

Plaintiff contends, through its affidavit of service, that Glenn Breed was authorized to accept service on Hulse's behalf; however, this contention is not supported by South Carolina law. In *Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 615 S.E.2d 112 (2005), the Supreme Court of South Carolina addressed the authority of a non-registered, non-

¹ Breed is a Deputy Administrator; therefore, it is clear he is not the chief executive officer of Oconee.

designated agent to receive service on behalf of a corporation. In *Roberson*, the Court considered the trial court's denial of Southern's motion to set aside default. Southern's Motion to Set Aside Default was premised upon the argument that Southern was not properly served with the Summons and Complaint in the matter. The trial court ruled that Plaintiff properly served Southern by certified mail, when the letter was accepted by Amy Jones Bair, a clerical employee of Southern's registered agent, Charles Brooks. Although Southern unarguably authorized Brooks to accept process on its behalf, by listing him as the company's registered agent, Southern argued that Bair was not so authorized. *Id.* at 9. The plaintiff argued that Bair was authorized to accept service on behalf of Southern because Bair had accepted service on behalf of Southern in other cases. *Id.* Essentially, the plaintiff argued that prior dealing cloaked Bair with apparent authority to accept service on Southern's behalf.

In evaluating Bair's authority, the court noted "[a]n agent's authority is composed of his or her actual authority, whether express or implied, together with the apparent authority which the principal by his or her conduct is precluded from denying." *Id.* at 10. The Supreme Court noted that Southern Finance never authorized Bair to accept service on its behalf. *Id.* at 11. As a result Bair had no express authority. Furthermore, there was no evidence that the plaintiff knew that Bair had accepted service in the past. Therefore, the plaintiff could not claim that Bair was impliedly authorized to accept service on Southern's behalf. Accordingly, the Court found Bair unauthorized to accept service on behalf of Southern pursuant to Rule 4(d)(8), SCRCP, and held the default judgment void. *Id.* at 11-12.

At the September 4, 2012, hearing on Oconee's Rule 12(b)(5) Motion, Breed testified that he has never knowingly accepted service on behalf of Oconee. Breed further testified that the process server never identified himself as a process server, and the process served never

stated that he was attempting to serve Oconee with a Summons and Complaint. Both Moulder and Breed testified that Breed was never authorized by Oconee to receive service of process for Oconee. Further, there is also no evidence that Oconee, the principal, ever made any representation to any person or entity that Breed was authorized to accept service on Oconee's behalf. As a result, the *Roberson* precedent is directly applicable.

The Court of Appeals also refused to allow for substitute service upon a corporate entity in *Moore v. Simpson, supra*. In *Moore*, the Court of Appeals reviewed a trial court's order quashing service upon a law firm, based on a finding that delivery to a secretary within the firm did not constitute valid service upon the law firm. In that case, there was no Motion to Set Aside Default. The Motion considered was simply to dismiss for improper service of process, largely because dismissal would render the plaintiffs' claims barred under the applicable Statute of Limitations. In *Moore*, the Court of Appeals determined that "SCRCP 4(d)(1), like its federal counterpart, Rule 4(d)(1) of the Federal Rules of Civil Procedure, provides for service upon an agent only if authorized by appointment or by law." *Moore, supra*, 322 S.C. at 523, 473 S.E.2d at 66. Further, for a person to be deemed an entity's agent for the purpose of receiving service of process, "[a]ctual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process." *Id.* As with any issue of agency, a person's status as an agent must be determined through manifestations of the principal, rather than those of the purported agent. Accordingly, "[c]laims by one to possess authority to receive process or actual acceptance of process [, where such claims are made,] by an alleged agent will not necessarily bind the defendant. Rather there must be evidence the defendant intended to confer such authority." *Id.* at 523, 473 S.E.2d at 67. "Without specific authorization

to receive process, service is not effective when made upon an employee of the defendant, such as a secretary.” *Id.* at 523-24, 473 S.E. at 67. In *Moore*, the Court of Appeals affirmed the trial court’s ruling quashing service, where the process server delivered suit papers to a law firm secretary, rather than to a member of the firm.

The *Moore* precedent is directly applicable to the present case. At the hearing, Glenn Breed denied that he ever stated to the process server that he had authority to accept process on Oconee’s behalf. Further, Breed denied that the process server made any representations that he was attempting to effect service on Oconee. Even if the allegations of the process server’s affidavit are all deemed true, there still is no basis for legal service. Plaintiff has provided no evidence indicating that Oconee ever represented that Glenn Breed was authorized to receive service of process on behalf of Oconee. As in *Moore*, even if Breed had previously received deliveries for Ms. Hulse, such previous course of action is insufficient to make Breed a legal agent for receipt of process for Oconee.

Plaintiff has failed to provide any evidence, by affidavit, brief or any citation of law, to demonstrate that Mr. Breed was authorized to accept service on Oconee’s behalf. Accordingly, Plaintiff has failed to demonstrate that it complied with the service requirements for counties under Rule 4, SCRCF, prior to the delivery of the Amended Summons and Amended Complaint to Elizabeth Hulse on September 7, 2012.

At both the September 4 and December 11, 2012 hearings, Plaintiff argued alternatively that when Mr. Breed agreed to accept the papers from Mr. Finley and give them to Ms. Hulse, Mr. Breed, who testified that he is over the age of eighteen (18), became the agent for service of process. Plaintiff argued that South Carolina does not require any specific words to be stated when suit papers are delivered and further argued that Rule 4(c), SCRCF, allows service of

process to be made by any person over the age of 18 who is not an attorney in or party to the action. By agreeing to give the papers to Ms. Hulse, Plaintiff argues that Mr. Breed who is neither an attorney in the action nor a party to it and who admitted he gave Ms. Hulse the papers that same day, accomplished service of process within the statutory period.

Essentially, Plaintiff argues that it is not required to comply with Rule 4's service requirements regarding service upon a County, provided that a wrongly-served County employee delivers papers to one of the County's legal agents for service of process. It is clear that Plaintiff failed to comply with the rules of service for a county; therefore, Plaintiff does not receive any presumption of proper service. Were Plaintiff's position vis-à-vis Breed the actual law of South Carolina, the *Roberson* and *Moore* cases would not remain good law, because delivery to a secretary would constitute good service, provided the secretary delivered papers to the principal. The Rules of Civil Procedure clearly establish who can receive service for a County, and Mr. Breed is not within any category that can receive service. Plaintiff's contention that subsequent delivery constitutes service would render our service rules, which allow for substitute service only when delivered to an individual defendant's dwelling place, meaningless; therefore, Plaintiff's contention that Breed's delivery of papers to Hulse constitutes service does not reflect current South Carolina law on service of process.

Plaintiff's reliance on *Mull v. Ridgeland Realty, LLC*, 387 S.C. 489, 693 S.E.2d 27 (Ct. App. 2010), as well as *Roche v. Young Brothers, Inc.*, 318 S.C. 207, 456 S.E.2d 897 (1995), is misplaced. Both cases dealt with service of process upon corporate entities by certified mail, as allowed by Rule 4(d)(8), SCRPC. Both found service acceptable where the certified mailing was mailed to the registered agent. In *Mull*, the pleadings were mailed to a registered agent at an address other than that listed for the registered agent. In *Roche*, the documents were received by

another company executive than the registered agent.² The key difference between *Mull/Roche* and the case at bar is that in those cases, the plaintiffs complied with applicable rules for service of process – the divergence from the rules related to who received the mail or where the agent received the mail. By contrast, in this case, Plaintiff failed to comply with the rules by failing to effect service upon Oconee with the method specified in Rule 4(d)(6), SCRCF. As noted above, Rule 4(d)(8), SCRCF, does not allow for service upon a county or governmental subdivision via certified mail; therefore, the *Mull/Roche* precedents are not applicable to this case.

Plaintiff contends the errors in service are insignificant and insufficient to constitute grounds for granting a Rule 12(b)(5) Motion, because Oconee received notice of suit within time to answer the Complaint. This ignores the precedent of *Moore v. Simpson, supra*. In *Moore*, the defendant lawyer and firm received the pleadings, but not via proper service. The Court found service inappropriate and quashed service. Plaintiff has failed to introduce any evidence demonstrating that Oconee intended to grant Glenn Breed authority to accept service on Oconee's behalf. As a result, Plaintiff's service on Mr. Breed fails to meet the requirements of Rule 4(d)(6), SCRCF.

Through *Roche, supra*, and *Moore, supra*, South Carolina's courts have clearly stated that a plaintiff only receives a presumption of proper process, where that plaintiff complies with the rules for service of process upon a defendant. In this case, Plaintiff has failed to demonstrate that it complied with the rules of service for a county – Plaintiff never served the chief executive office or Council Clerk of Oconee personally with process. Plaintiff has failed to prove that the persons served were authorized to receive process on Oconee's behalf; therefore, Plaintiff has

² Had that officer received who received the certified mail received process through personal service, the corporation would have been properly served, under Rule 4(d)(3)'s provision that a corporation or partnership can be served by delivering a copy of the summons and complaint to an officer of the corporation.

failed to meet its burden of proving it properly served Oconee, sufficient to subject Oconee to the personal jurisdiction of this Court.

Oconee concedes that Elizabeth Hulse was served with the Amended Summons and Amended Complaint on September 7, 2012; however, this Court finds that there was no proper service upon Oconee prior to that date.

3. Plaintiff Failed to Commence This Action Within the Applicable Statute of Limitations; Therefore, Plaintiffs Claims Are Subject to Dismissal for Failure to State a Claim Upon Which Relief Can Be Granted.

At the December 11, 2012, hearing on the pending motions, Plaintiff conceded that its claims against Oconee were governed by the two-year limitations period set forth in S.C. Code Ann. §15-78-110. Based on application of the two-year limitations period, Plaintiff must have commenced its action, as defined in Rule 3, SCRCF, and S.C. Code Ann. §15-3-20(A) by April 23, 2012, to comply with the applicable limitations period. Although Plaintiff first filed a Summons and Complaint within the applicable limitations period, Plaintiff failed to commence the action within the applicable limitations period, because Plaintiff first properly served Oconee with process 157 days after filing its Summons and Complaint.

Pursuant to S.C. Code Ann. §15-3-20(A), “[c]ivil actions may only be commenced within the time periods prescribed [within Title 15 of the S.C. Code] after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.” S.C. Code Ann. §15-3-20(A). Further, “a civil action is commenced when the summons and complaint are filed with the clerk of court **if actual service is accomplished within one hundred twenty days after filing.**” S.C. Code Ann. §15-3-20(B) (emphasis added). As noted above, Plaintiff failed to properly serve Oconee with a Summons and Complaint within 120 days of filing.

Based on the plain language of the Amended Complaint, Oconee is a governmental entity, and a political subdivision of the state of South Carolina. (Amended Complaint, ¶ 2.) In the Amended Complaint, Plaintiff asserts two causes of action: (1) negligence, and (2) negligence *per se*. Both causes of action constitute claims based in tort. Pursuant to S.C. Code Ann. §15-78-20, political subdivisions of South Carolina “are only liable for torts within the limitations of [the Tort Claims Act] and in accordance with the principles established [therein].” *See* S.C. Code Ann. §15-78-20. As Plaintiff conceded at the December 11, 2012, hearing, the Tort Claims Act sets a two-year limitations period for claims. *See* S.C. Code Ann. §15-78-110. Accordingly, Plaintiff must have commenced its action within two years of the Incident, which occurred on April 23, 2010, to possess a claim upon which relief can be granted. The last day to commence an action under the applicable limitations period was April 23, 2012.

South Carolina’s Supreme Court has recently determined, by jointly interpreting Rule 3(a), SCRPC, and S.C. Code Ann. §15-3-20, that:

- (1) an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, and
- (2) if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days of *filing*.

Mims v. Babcock Center, Inc., 732 S.E.2d 395, 397-98 (2012). In *Mims*, a defendant challenged the propriety of commencement of an action, where that defendant was first served with an Amended Complaint one year after the plaintiff filed the original complaint. As in the case at bar, the plaintiff never properly served the defendant with the original Complaint. The Supreme Court found commencement to be acceptable, because service of the Amended Complaint came within the applicable limitations period. In the present case, unlike *Mims*, it is undeniable that Plaintiff’s service of the Amended Complaint occurred outside the two-year limitations period.

Further, the evidence (and the time stamp) on the Amended Complaint clearly demonstrate that the Amended Complaint was served 157 days after the April 4, 2012, date of original filing of Plaintiff's Complaint. Accordingly, the action was commenced on September 7, 2012.

At the December 11, 2012, hearing, Plaintiff argued that, based on Rule 15, SCRCPP, it had 120 days to serve Oconee from the date of filing the Amended Complaint. This contention is clearly erroneous. Rule 15(c), SCRCPP, states that an amended pleading relates back to the date of the original pleading. Accordingly, the date of filing for the Amended Complaint is treated as April 4, 2012. As noted above, Plaintiff first properly served Oconee with process in this case on September 7, 2012, which is 157 days after original filing, and outside the applicable limitations period. The action was therefore not commenced within the applicable limitations period. Plaintiff did not obtain an additional 120 days to serve Oconee, based on the amendment of a pleading outside the applicable limitations period.

By failing to properly serve Oconee within the applicable limitations period or within 120 days of original filing, Plaintiff has failed to commence its civil action within the time set forth in S.C. Code Ann. §15-78-110. Accordingly, Plaintiff cannot state a claim on which relief can be granted, and Oconee is entitled to dismissal of Plaintiff's claims pursuant to Rule 12(b)(6), SCRCPP.

CONCLUSION

Under Rule 4(d)(6), SCRCPP, only two people are authorized by law to receive service of process on behalf of Oconee: (1) Oconee's Chief Executive Officer; and (2) the Clerk of the Oconee County Council. Plaintiff has failed to serve either the Chief Executive Officer or the Clerk of the County Council prior to September 7, 2012. Accordingly, Plaintiff failed to

properly commence this action within the time period set forth in S.C. Code Ann. §15-78-110, and Plaintiff's claims against Oconee are therefore time-barred.

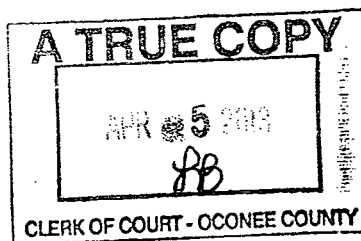
Oconee's Motion to Dismiss with Prejudice, pursuant to Rule 12(b)(6), SCRCPP, is hereby GRANTED. This order constitutes a final judgment in this matter.

IT IS SO ORDERED.

Mad
January 15, 2013
Walhalla, South Carolina
Anders

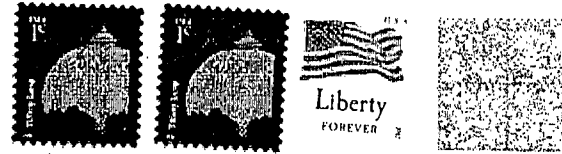
[Signature]

Judge R. Lawton McIntosh
Resident Judge
Tenth Judicial Circuit



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