

PETTUS

FARNSWORTH

Reginald Hoffman Pettus (1920-2000)
John Wright Farnsworth (1941-1997)
Daniel Joseph Farnsworth (Of Counsel)

Daniel J. Farnsworth, Jr.*

*Member of the South Carolina and Virginia Bar

Attorneys and
Counselors at Law

211 Pettigru Street
Greenville, South Carolina 29601

201 King Street
Keysville, Virginia 23947

September 29, 2023

Via E-Mail

The South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

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Sep 29 2023

SC Court of Appeals

Re: Ronald Carl Cox, III vs. Michael John Dimaggio
Appellate Case No.: 2023-001497

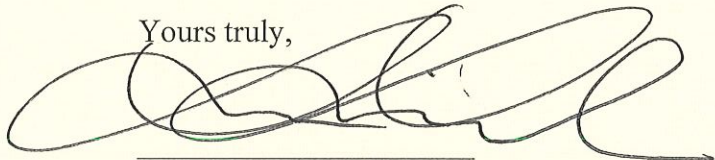
Dear Clerk of Court,

Please find enclosed Transcript for the above-referenced case that was received by our office on September 28, 2023.

Thank you for your attention to this matter. Please do not hesitate to contact our office should you have any questions.

With kind regards, I remain

Yours truly,



Lauren O. Lipscomb
Senior Paralegal to
Daniel J. Farnsworth, Jr. #6922
PETTUS / FARNSWORTH, LLC
Greenville, South Carolina
Phone (864) 250-9119
Fax (864) 250-9120

/lol

Enclosures

Cc: John Kirman Moorhead

www.FarnsworthLawOffices.com

South Carolina Office 864.250.9119

Virginia Office 434.736.8171

State of South Carolina)
)
County of Greenville) Circuit Court
) 2022CP2302830

Ronald Carl Cox, III)
)
 vs.) Transcript of Record
)
Michael John Dimaggio)

July 24, 2023
Greenville, South Carolina

B E F O R E:

The Honorable G.D. Morgan, Jr., Judge.

A P P E A R A N C E S:

Daniel J. Farnsworth, Jr., Esquire
Attorney for the Plaintiff

Kirk Morgan, Esquire
Attorney for the Defendant

Amanda J. Orlando
Transcriber



1 THE COURT: All right. Cox v. Dimaggio, 2022CP2302830.
2 This is motion to dismiss.

3 Mr. Morgan, this is your motion. I'll hear from you.

4 MR. MORGAN: Yes, Your Honor. Your Honor, Kirk Morgan
5 for the defendant, Mr. Dimaggio. Your Honor, this matter
6 arises out of an incident that occurred on June 1st of 2019 in
7 downtown Greenville. The plaintiff, Mr. Cox, is alleged an
8 action for assault and battery against Mr. Dimaggio, as well
9 as the negligence and gross negligence. The statutes of
10 limitation for both of those causes of action are three years.

11 Your Honor, in the allegations, Mr. Cox alleges that Mr.
12 Dimaggio was intoxicated, that he was harassing of Mr. Cox and
13 his date that evening, and that they ultimately ended up in an
14 altercation where Mr. Cox received a laceration above his left
15 eye. The allegations go on to state that at some later time,
16 shortly thereafter, that Mr. Dimaggio placed Mr. Cox in a
17 chokehold and that Mr. Cox's brother and friend came to his
18 aid at that point.

19 I will tell you, at that point, I know that Mr. Dimaggio
20 was kicked fully in the face, was rendered unconscious, and
21 was boot-stomped on his head by Mr. Cox's brother. The reason
22 I tell you that is that is a -- I think it's significant
23 because the cause of the summons, the complaint, was filed
24 literally within an hour and 45 minutes of the statute of
25 limitations running on May 31 of 2022 at about 10:15 at night.

1 I suspect that was related to the fact that Mr. Dimaggio
2 probably had a pretty good counterclaim against Mr. Cox's
3 brother. But the statute of limitations would have been
4 running for that claim.

5 Nonetheless, the summons complaint was filed at a very
6 late date. And based on the -- we're making a motion to
7 dismiss for failure to commence the action. So in order to
8 commence an action in South Carolina, the civil action, you
9 have to file your summons and complaint, and then actual
10 service must be accomplished within 120 days of filing. And
11 that's pursuant to 15-3-20 of South Carolina Code.

12 No actual service was ever effected in this case. And if
13 you -- I've provided you with a paper copy of the Court's
14 record. There's really nothing new in here. It's just the
15 Court's record.

16 THE COURT: Yeah, I've read the file.

17 MR. MORGAN: Okay. Just to make it a bit easier to
18 review. But on review of that record, there's an affidavit.
19 There's an affidavit from a process server that sort of sets
20 out what had happened. And it appears that the first attempt
21 to serve Mr. Dimaggio with a summons complaint was August
22 31st. Now, that would have been the 91st day after filing.
23 There's no evidence in the record of any attempt to serve the
24 summons and complaint prior to August 31st. So there's
25 already been a huge amount of time elapsed before there's any

1 evidence of an attempt to service.

2 There was a second attempt to serve -- and that service
3 on August 31st was at a former address for Mr. Dimaggio.
4 Interestingly, the affidavit sets out that the reason they
5 were serving at a former address is because the person that
6 performed the skip trace didn't give all the information to
7 the process server. And he had the current address, but he
8 failed to provide it to him.

9 A second attempt was made on September 1st, which would
10 have been the 92nd day after service, and it was unsuccessful.
11 Thereafter, Mr. Farnsworth, on September 9th, filed a motion
12 for publication. And if you look in the documents I've
13 provided you, it says Bates stamp 9. And that September 9
14 motion for publication didn't comply with the statute.

15 And the Court -- because it didn't have any affidavit
16 setting forth the due diligence that had been exercised to
17 attempt to obtain service. So the Court did not act on that
18 September 9 motion, and a subsequent motion for publication
19 was filed on September 30th. Now, September was at least 121
20 days after the filing of the summons and complaint. And of
21 course, the statute of limitations ran in the day or two after
22 the summons and complaint was filed.

23 The September 30 motion did include affidavits. And on
24 October 6th, Judge Verdin issued an order allowing publication
25 of the summons for purposes of service. There was a

1 publication done, and there was publication by The Greenville
2 News on October 27th, November 3rd, and November 10th.
3 However, what was published was not the summons as per the
4 rule. What was published was the order granting the right for
5 publication. The order of publication was what was published
6 by The Greenville News. And so that, obviously, was likewise
7 incorrect.

8 We filed our motion to dismiss in this matter on January
9 17th. That's approximately eight months after the filing of
10 the summons and complaint, and there had been no filing. Even
11 the incorrectly published order wasn't filed in the Court's
12 record until April 25th, which was 329 days after the filing
13 of the summons and complaint.

14 So Your Honor, based on the failure to comply with Rule
15 3(a), which requires service within 120 days of a case where
16 the statute of limitations has run, and the service within 120
17 days of filing, and based on 15-3-20, where there's also a
18 requirement that the that the suit must be served, we would
19 move to dismiss this action for failure to properly commence
20 the action.

21 THE COURT: All right.

22 All right. Mr. Farnsworth?

23 MR. FARNSWORTH: Thank you, Honor. Your Honor, as far as
24 the background and things go, this extremely watered-down
25 version you heard of this assault, not only did this

1 defendant, we think, and our evidence and witnesses would
2 show, followed, heckled, insulted my client and his girlfriend
3 all downtown through several bars; found out he had did the
4 same thing to some other females there at a bar they all
5 attended. He then strikes my client in the face and then
6 grabs him into a chokehold.

7 And it's on video where he was on the sidewalk holding
8 him and choking him out, which I don't know if you know, Your
9 Honor, that can kill you within seconds if you don't let go.
10 That's when his brother, my client's brother, happened to walk
11 up with another friend and started defending his brother. And
12 then those two, the Cox boys, got arrested, charged with
13 serious crimes, felonies, had to spend a bunch of money to try
14 to get all that resolved. They did. Got it all dismissed
15 through a PTI program. But our --

16 THE COURT: So who got arrested?

17 MR. FARNSWORTH: Both my client and his brother. So my
18 client is -- so this was a serious assault that caused a whole
19 lot of other damages and losses and harms. Here's the thing.
20 We had difficulty serving this defendant because he was
21 avoiding us, Judge. I had people, and they're both here to
22 testify. Steve Evett, who was working -- who actually, once
23 we filed this case -- and I don't think it matters whether we
24 filed it the day before or 100 days before, Your Honor.

25 But I also want to point out, Judge, back in the time

1 where this service was being attempted, in the months leading
2 up to it, I was dealing with a spinal issue and had spinal
3 fusion surgery on September 13th. I was out and protected by
4 the courts through the rest of the year. I was relying on my
5 staff to help. They made a few mistakes, Your Honor.

6 But what I will tell you and what Mr. Evett and Ms.
7 Lipscomb are here to testify to today, if necessary, is that
8 the first attempt at service was Steve Evett called Dimaggio
9 because we had gotten his number, we had gotten what we
10 thought was his current address, and explained to him we have
11 a summons and complaint for you. Do you want us to bring it
12 to you, can you come get it? Just like the sheriff's
13 department does every day.

14 And he said, what is it? He was told what it was, what
15 it was about. He said, Your Honor, send it to my lawyer.
16 Here's my lawyer's name. Here's the email. So Mr. Evett
17 emailed it to his lawyer. So we're following directions of
18 this client. He knows about it. He knows what it is.
19 Obviously, service is --

20 MR. MORGAN: For the record, Your Honor, that was his --
21 that was a different lawyer from me. That was a --

22 MR. FARNSWORTH: It's a different lawyer, different
23 lawyer.

24 We got a call back within a day or so from that lawyer.
25 Steve Evett can tell you that he said, oh, I can't accept

1 service of this. Well, his client had already told us to send
2 it to him, so that's what we did. So when he said we can't
3 accept service, we went ahead and tried to attempt it again.
4 We went out -- I think, Ms. Liscomb and Mr. Evett went out two
5 different times to his home, heard people inside moving
6 around, I think maybe even a dog barking or something;
7 wouldn't come to the door. Talked to neighbors. They said
8 yes, he lives here. He has groceries delivered to his door a
9 lot. He walks his dog every morning at 8:30 or so.

10 We attempted to serve him again; weren't able to find
11 him. Clearly, he's avoiding us, Judge. He knows what this
12 is. He knows not only that there's a lawsuit, but that --
13 what it's about, because he was told. And again, we can put
14 the testimony up if you need to hear that.

15 So in the affidavit -- so then we decided, well, let's go
16 ahead and try to do publication since he's avoiding us. We
17 can fix this. Again, I'm out recovering from double fusion in
18 my cervical spine, and my staff was trying to accomplish all
19 this. The affidavit of publication was put in. I was told,
20 okay, it's put in right. There was a mistake as far as what
21 was actually put in. So the order allowing publication that
22 references the affidavits and all that were put in was done.
23 That was a mistake, instead of an actual copy of the summons,
24 as usually happens.

25 And then we did it again. And again, at this point, the

1 time has gone over 120 days, but we're trying from, I guess,
2 in the 80th or 90th day. We're well within our 120 days.
3 Again, it's not like we sat down and did nothing. We were
4 trying to find where he was. We had to hire a skip trace
5 person to get his number; didn't have that. So we were doing
6 these things and trying to attempt to serve, Your Honor.

7 I understand personal service is required. But when a
8 defendant is avoiding you, knowingly avoiding you, Judge, the
9 rules all change -- well, they don't change, but it allows us
10 some leeway as far as service. But Your Honor, I understand
11 that lawyers don't have to accept service of pleadings. But
12 when the client, when the defendant himself, the party says,
13 oh, this is what this is about, send it to my lawyer, we email
14 it to his lawyer, and then that should be service, Judge.

15 At this point, he -- at that point, he's avoiding
16 service. And I can, again, put up witnesses to establish all
17 this, too. But much of it is in the affidavits already filed
18 with the Court back then, Judge. So as you know, Judge, if
19 someone wants to try to avoid service, it's really difficult
20 to get them served. The service of publication was attempted.
21 There were some errors. We did it again and paid for it again
22 just to make sure that it's there.

23 Your Honor, he knows what this is about. He was told
24 from the start, instructed us where to send the copy instead
25 of having him -- instead of placing it in his hand, Judge, and

1 that's what we did.

2 THE COURT: All right.

3 Mr. Morgan?

4 MR. MORGAN: I would like -- I do have to say that, first
5 of all, all of the information about what was allegedly told
6 to -- I know it would be a lawyer in Anderson, Austin
7 McDaniel. You may know Austin. I don't know. But all of
8 this information that my client was told what this was and so
9 forth is not in the affidavit, not presented to the Court
10 before today, not presented to me.

11 My client has related to me that he was told that he was
12 being contacted by a victim's advocate. He thought it was a
13 victim's advocate. And we've got a -- he's got a criminal
14 lawyer in Anderson who would deal with that. So I mean, when
15 you get into this he-said-she-said, it creates a real problem
16 in this case. The fact is, and as Mr. Farnsworth has already
17 conceded, there was no service for 120 days.

18 What he's talking about, I believe, in suggesting that my
19 client was avoiding service, which we absolutely deny he was
20 avoiding service, is he's talking about, essentially, an
21 equitable tolling argument. And there's plenty of law in
22 South Carolina on equitable tolling. I say plenty. There is
23 law on it. And I'm going to read -- this is a criminal case,
24 but it involved a civil action for post-conviction relief.
25 And this is Helzer v. State, and the --

1 THE COURT: What's the cite?

2 MR. MORGAN: Pelzer, P-E-L-Z-E-R v. State. I'll give you
3 the cite. It's 662 S.E.2 618. And the Court of Appeals notes
4 that any invocation of equity to relieve the strict
5 application of a statute of limitations must be guarded and
6 infrequent, lest circumstances of individualized hardship
7 supplant the rules of clearly drafted statutes. To apply
8 equity generously would loose the rule of law to whims about
9 the adequacy of excuses, divergent responses to claims of
10 hardship, and subjective notions of fair accommodation. We
11 believe, therefore, that any resort to equity must be reserved
12 for those rare instances where, due to circumstances external
13 to the party's own conduct, it would be unconscionable to
14 enforce the limitation period against the party and gross
15 injustice would result.

16 Now, that's a statute of limitations case, but the other
17 equitable tolling gets applied in the cases of service. And
18 this is how they -- but this is how they read. It is very
19 rare. And the fact that -- I mean, we had, in this case,
20 error after error after error. And I am sympathetic to Mr.
21 Farnsworth in running an office and the difficulties running
22 the office. However, those are subjective problems over which
23 we have no control.

24 And so there's an allegation of avoidance. But if you
25 look at the affidavits, the only allegation in the affidavit

1 is that they called him and said, we want to meet you. And
2 then they -- which I've already explained what we understood
3 from that -- and then that they went to his house, thought
4 they heard somebody inside, maybe a dog, and that he lived
5 there. Those simply are not the kind of allegations -- I
6 mean, that happens all the times in service of process. It's
7 not unusual at all.

8 And Mr. Farnsworth alleges that my client's avoiding
9 service. There was one attempt at the correct address per the
10 affidavit. One to serve this summons and complaint before
11 they went for -- before they sought an affidavit of
12 publication, incorrectly the first time, and frankly, never
13 obtained service within 150 days, 160 days.

14 So I think this is -- it's a very clear case of a failure
15 to properly file and serve a summons and complaint, and
16 therefore the action is improperly commenced. I would note
17 that, at some date, there was actual publication of the
18 summons in the 160-, 165-day range. But there's still no
19 filing in the Court's file of any proof of that. At that
20 point -- at that point, I had begun tracking the case, but the
21 120 days had long since run.

22 I just think this is a very, very clear case of, if you
23 take a chance and you wait until the bitter end to file, for
24 whatever reason, you know that. If you don't make attempts to
25 serve for 91 days prior -- after the filing, you know that.

1 And if it -- and if you then make error after error
2 thereafter, that's not on me. That's not on Mr. Dimaggio.
3 And so this case was not properly commenced and hasn't.

4 THE COURT: Mr. Farnsworth, let me ask you. Other than
5 that one time on September the 8th, was any other effort made
6 by the process server, other than that one time on September
7 the 8th?

8 MR. FARNSWORTH: Judge, I --

9 THE COURT: It looks like from his testimony and his
10 affidavit, Mr. Evett says that he went on September the 8th,
11 and I don't see anywhere else in the affidavit that he
12 attempted service at that address or anywhere else.

13 MR. FARNSWORTH: Judge, I think they went twice on that
14 day. If I can read this correctly and remember. They
15 interviewed -- they went back, either that same day -- and
16 again, they can clear this up, Judge, if it's not as clear in
17 the affidavit as it needs to be. But they spoke to neighbors.
18 They were told that he was there. They told he still lived
19 there.

20 Judge, it was clear to us he was avoiding us. He told
21 us -- I think what solves this, Judge -- this is not very
22 clear at all, and I beg to differ with Kirk. He and I were in
23 school together. We've been friends and haven't really seen
24 each other much over the years. But Judge, his own case law
25 provides me relief.

1 He's talking about this criminal case that deals with
2 statute of limitations, which he alleges deal with service
3 also. I think statute of limitations is a different issue.
4 There's some more strict issues than service, particularly
5 when we have clear evidence, by affidavit and otherwise, of
6 avoiding service by the defendant.

7 When his case he's just cited says circumstances of
8 individualized hardship would provide relief, Judge, I'm not
9 sure what else could happen when I literally can't use my
10 right arm. I'm in and out of being able to even comprehend
11 certain things with a couple months leadings up to this
12 surgery I had. The surgery, evidently, was much worse than
13 they imagined. And I was granted relief by this Court and
14 General Sessions for the rest of the year. And I still
15 managed to try to, from my bed at home, try to run the law
16 office and have my staff do this.

17 Sure, they made mistakes, Your Honor, but I think from
18 the phone call from the beginning, when he told the -- Steve
19 Evett tells the defendant what this is and what's it about, he
20 instructs us -- we have an email showing where the email was
21 emailed to the lawyer for him at his instruction. And I don't
22 know how -- and that's not required to be filed, but we have
23 it. We can provide that to --

24 THE COURT: So the lawyer was served with the summons and
25 complaint?

1 MR. FARNSWORTH: Yes, sir. It was emailed to him, as
2 instructed by the defendant. And so he gets it, and then we
3 hear later, I guess the same day or the next day, that, oh,
4 wait a minute, I'm not going to handle this --

5 THE COURT: And that was going to be my next question.
6 So once the summons and complaint was emailed to the lawyer,
7 did the lawyer respond and say, I cannot accept service?

8 MR. FARNSWORTH: He said, I won't be handling this. I
9 don't know what kind of -- whether he didn't do civil work or
10 not, but he said I'm not going to be able to accept service.
11 So that's when we decided --

12 THE COURT: That was the next day?

13 MR. FARNSWORTH: I think it was the next day --

14 THE COURT: Or --

15 MR. FARNSWORTH: -- or the same day, Judge, that he was
16 emailed.

17 THE COURT: And what day was that?

18 MR. FARNSWORTH: That was --

19 MR. MORGAN: August 31st (indiscernible) --

20 MR. FARNSWORTH: It was the same day that he --

21 THE COURT: August 31st, 2022?

22 MR. MORGAN: August 31st.

23 MR. FARNSWORTH: It must have been September 1st, Judge,
24 because we had already -- that's what we had talked to
25 Dimaggio, who had -- or Steve Evett did, who had told him --

1 given the instructions to send it to him. So whether that --

2 THE COURT: Let me ask. So if that's September the 1st,
3 then apparently, your process server was put on notice about
4 that, because then on September the 8th, you tried to serve
5 him.

6 MR. FARNSWORTH: Yes, sir.

7 THE COURT: So it seems to me that the process server
8 understood that the lawyer may not have been able to accept
9 service because he got the email on September the 1st saying
10 that he couldn't accept. And then, so they did an attempt to
11 serve him on September the 8th.

12 MR. FARNSWORTH: I think what we did is we instructed Mr.
13 Evett to go ahead and try to serve him since we got that, just
14 to be safe, Judge. We were trying our best to serve this, as
15 you can see all the attempts, the publication, the mistakes
16 that were made while I was recovering from the surgery.

17 Judge, I think what's important here is notice of it to
18 the defendant. Clearly, he got notice. He instructed us
19 where to send it. Despite whether this attorney was going to
20 handle the case or could officially accept service, I don't
21 think that matters when the defendant tells us where to send
22 it. I think we're off the hook there. I think it's proper
23 service.

24 THE COURT: He told him where to send it. But he told
25 him to send it to the lawyer, and the lawyer said, no, I

1 cannot accept service.

2 MR. FARNSWORTH: He said I'm not going to be handling
3 this and not (indiscernible).

4 THE COURT: So I think that pretty much ends that part of
5 it.

6 MR. FARNSWORTH: I don't think it does, Judge.

7 THE COURT: Why's that?

8 MR. FARNSWORTH: Because the defendant himself is --

9 THE COURT: I mean, where in the rules is it -- or the
10 case law that says that, though?

11 MR. FARNSWORTH: Judge, I don't think there's any
12 specific case on this. I've looked for it. It's part of what
13 I was going this morning before I came in, trying to find
14 cases up to the time --

15 THE COURT: I can tell you I'm familiar with that area.

16 MR. FARNSWORTH: All right.

17 THE COURT: There's no case law --

18 MR. FARNSWORTH: I know you are, Judge.

19 THE COURT: -- that says that you can do that.

20 MR. FARNSWORTH: But I believe that the rules get
21 relaxed, or at least exceptions, when you have evidence that
22 the defendant was trying to avoid you, Judg.

23 THE COURT: All right. Let me ask you about that, then.
24 The avoidance, sending this September the 8th effort by the
25 process server to go over there, is there any other effort

1 after that, as far as the avoidance is concerned? I mean,
2 that is sort of a normal thing that defendants -- well, let me
3 rephrase that. It may not necessarily be normal, but it's not
4 an unusual thing where defendants do take some steps sort of
5 to avoid -- that's when you just kind of keep tracking them
6 down.

7 MR. FARNSWORTH: That's what we were trying to do, Judge,
8 but I think the fact -- and I've had this come up before. I
9 think, if you have evidence that they're trying to avoid you,
10 and also that they've actually indicated to tell you where to
11 send it -- I don't think the -- I don't think the fact that
12 that this lawyer initially said, oh, wait, I don't handle --
13 I'm not going to be handling this, I'm not going to be able to
14 accept service, I don't think that's valid, Judge, when the
15 client tells us --

16 THE COURT: Yeah, but the --

17 MR. FARNSWORTH: -- where to send it.

18 THE COURT: But the lawyer, though, is saying, I cannot
19 accept service. And I think that part of it, it ends right
20 there. I think that once the lawyer says, I can't accept
21 service, then you got to go to other steps. And that's why I
22 was asking the question, were there any other additional
23 efforts, other than the two -- one or two on September the
24 8th?

25 MR. FARNSWORTH: I think there were two there, Judge.

1 When we got information that he was -- that they believed he
2 was in there, talked to neighbors that the was -- that he did
3 live there, that they see him walking his dog in the mornings,
4 I think I instructed my staff to go out and try to catch him
5 again in the mornings. And that didn't work. I believe
6 Lauren Lipscomb did that, and she can testify to that, Judge,
7 one of my staff members.

8 But Judge, not only did -- it's not like there was just
9 some communication to this lawyer that Dimaggio instructed us
10 to send it to and he said, oh, sorry. He got a copy of it,
11 Judge. They got a copy of it. I'm sure he had a copy of it.
12 And in fact, Steve Evett explained to him what he had for him
13 and what was involved.

14 And so I don't think the Court can -- I don't think it's
15 fair, equitable, or proper for the Court to dismiss a case
16 when we're showing all these efforts. And I know there were
17 some mistakes, Judge. But the purpose of this, of the
18 service, is to give notice and a chance to respond. And he
19 had notice from the very first phone call and a copy of it to
20 email. It was not just an email, hey, we were told to send
21 you this summons complaint. It was attached to it. It was
22 there. So his lawyer had it.

23 And if that lawyer is not going to be -- I just don't
24 think his communication to us that, oh, I won't be handling
25 this case and I can't accept service -- typically, that

1 happens where someone would call you or me (indiscernible)
2 practicing law and say, hey, can you accept service? And I
3 say, I'm going to have to ask my client. It's always, I have
4 to ask my client.

5 And sometimes the client will say no, so I've had to do
6 it. You've probably had to do it. Your Honor, Kirk may have
7 done it, where you say, hey, sorry, Phil or Bob, whoever I've
8 been practicing law with on the other side of the courtroom
9 for years, I can't accept it, my client won't let me. So then
10 you know, okay, well, that's not going to be valid. I'm going
11 to have to do something else.

12 In this case, it's the opposite. The client tells us
13 where to send it. And so whether that attorney was going to
14 defend him or not or the case, he's still served, Judge. He
15 has it. The whole purpose of serving is notice of the
16 pleadings, what you're being accused of --

17 THE COURT: Well, I mean, I don't think that's
18 necessarily the rule, because otherwise, I mean, look at all
19 the national lawsuits who get service on the paper the day it
20 gets filed and such and such sued for such and such. I don't
21 think that, just because you're on notice of a lawsuit, which
22 you would be on notice of a lawsuit with the headlines in the
23 paper that you just got sued, you still got to -- you still
24 got to serve them.

25 MR. FARNSWORTH: Sure. No, no. I don't think that's

1 what we have here, Judge. What we're --

2 THE COURT: You're talking about notice. See, the --

3 MR. FARNSWORTH: Sure. Well, I --

4 THE COURT: The issue is notice, and the key is notice.

5 MR. FARNSWORTH: I don't think it's notice --

6 THE COURT: I don't think that is it.

7 MR. FARNSWORTH: -- with the service of publication,
8 which is allowed, and which we attempted to do. And there was
9 in there -- it was in there, Judge, for him to -- there was an
10 acknowledgment that there was something there being filed.

11 And really, the notice that's usually put in there, the
12 summons, it doesn't read out the summons and complaint. It
13 just says, hey, there's a summons and complaint in the
14 courthouse file. It's up to you to go get it and answer it,
15 Judge. So the fact that there were some errors in the -- that
16 the affidavit granting the publication, it was mistakenly put
17 in in the newspaper for three weeks, that still gives notice
18 that, hey, there's something here for you to respond to.

19 And I think what's -- again, relying on Kirk's own case
20 law that he's presented, Judge, if that's not a unique
21 circumstance where the attorney in charge of doing this within
22 the time allowed has gotten -- it's filed, is trying to make
23 service, all these attempts we've talked about, we've actually
24 personally talked to the defendant who instructs us where to
25 send it -- we wouldn't have known what lawyer to send it to

1 and what email address to use.

2 So at that point, when he tells us that, he understands
3 what it is and where it's going, tells us where to take it,
4 and that should be service. And so the other attempts were
5 just -- my instructions to them, to let's just make sure we
6 can get this done because I knew there may be a question,
7 Judge. I just think that the --

8 THE COURT: Wait a minute. Did I hear you right, that
9 when a party tells somebody to send it to my lawyers, are you
10 saying that is service under the rules?

11 MR. FARNSWORTH: I would think that would qualify, Judge.

12 THE COURT: How's that?

13 MR. FARNSWORTH: Because it's as if you had -- it's as if
14 he said, oh, my sister's -- send it to my sister or my
15 sister's coming by to get it.

16 THE COURT: Let me ask you this. And because, as you
17 know, the rules, they require you to file your proof of
18 service. So let's assume that you did ask a party, let's say
19 the defendant, and he says, send it to my lawyer. How do you
20 file a proof of service of that?

21 MR. FARNSWORTH: Well, you would file it -- you would
22 file it -- I guess you'd file an affidavit of service just we
23 had -- we filed one. And it was a late filed, Judge. Another
24 mistake we found, that Mr. Evett did attempt to file it in an
25 electronic filing system, the affidavit of service, and it got

1 rejected. That's something they missed. And that's why we
2 had -- we saw that last week and ended up sending that in.
3 And I know that's late, Judge.

4 My point is this. This is a serious lawsuit about this
5 defendant, in our opinion, causing serious harm. And to
6 let -- to dismiss a case with merit, or arguably merit -- we
7 have it. And I think, Judge, once Kirk knows more about it,
8 he would maybe not concede. But my point is, this is a case
9 with merit. We've shown all these attempts to serve him.
10 It's not like we've blindsided him and sandbagged and
11 haven't -- and are trying to trick him, Judge.

12 He was aware of this well within 120 days. He instructed
13 us where to send it. We made these other attempts, Judge. In
14 the meantime, I'm not able to even to really command this
15 ship, doing the best we can over those last several months,
16 especially leading up to September and then after.

17 And I don't think it's fair for my client to lose his
18 chance at this action because I had a serious medical issue,
19 which falls right under the case law that Kirk mentioned,
20 circumstances of individualized hardship. Judge, if that's
21 not it, going into your neck and taking out your disk and
22 doing all that they did right in your spinal cord and
23 rendering me unable to do much of anything for months. I'm
24 still not healed completely.

25 But I don't know what else we could have done, Judge,

1 unless we could have done -- sent out people again, the same
2 people three and four and five and six times. But I knew he
3 would -- but I gathered -- pretty sure he was trying to avoid
4 us. We decided to switch gears and try to do the publication.
5 And that ended up having some errors, but it was done.

6 I think if you show that the attempts we were making
7 within the 120 days all the way through -- and it's not
8 like --- Judge, I think the 120 days is to give them notice of
9 the -- notice of the lawsuit. And it doesn't mean in the
10 newspaper, Judge. I mean, obviously, there's other ways to
11 find out about things, but as far as a news article, like you
12 mentioned.

13 But Judge, the only equitable result on this motion of
14 Kirk's is to allow us to go forward, Judge, that we've shown
15 the attempts we've tried to make. It's not my client's fault
16 that I was in surgery and out most of the last year. And it's
17 not his fault -- and if that's not extenuating circumstances,
18 Judge -- and I know that these service rules, there's case law
19 that provides for if you're showing efforts or if there's
20 efforts of avoiding your service, I mean, there's ways to --
21 in other words, if it's a tie, it goes to the plaintiff,
22 Judge.

23 I think it's not something that is as strict as the
24 statute of limitations. I think the service, obviously, the
25 statute of limitations, we filed within the time, and then

1 made all these attempts, Judge. And I think that the fact
2 that when he was told on the phone by Mr. Evett what this was
3 about and told us where to send it, that's effective. We're
4 following his instructions. And basically, Judge, I think
5 that's good. I think that's good service.

6 I think the service rules -- clearly, the rules are
7 strict, but most all the rules show you there's exceptions to
8 make under different circumstances, Judge. And this is not
9 neglect. I mean, my staff, obviously, they didn't sit around
10 and not do anything. You see all the number of five or six
11 different things that Kirk mentioned that were attempts,
12 although with some errors.

13 But I think it's enough, Judge, to show service and let
14 us proceed with this case and let him defend it. If he
15 doesn't think it has any merit, then that's good. A summary
16 judgment could take care of it within months. But that's not
17 going to happen, Judge. I just don't think so.

18 THE COURT: All right.

19 Mr. Morgan?

20 MR. MORGAN: Your Honor, I think this situation's a great
21 example of why we have rules and why we have structure to the
22 system, because I'm holding my tongue the whole time Mr.
23 Farnsworth is talking because I disagree with about everything
24 he's saying. And I disagree with how the factual events
25 transpired.

1 I do want to point out, in the affidavit of Mr. Evett,
2 they relayed one single attempt at service on the proper
3 address. The reason they didn't have the proper address
4 previously is because the skip trace -- gentleman that ran
5 that skip trace didn't give all the addresses to Mr. Evett,
6 the processor. That's not us. That's them.

7 One single attempt on September 8th. And that's the
8 event where we heard noise and there might have been a dog.
9 But they also said -- and I thought significantly -- they also
10 say they neighbors confirmed he live there, he walks his dog,
11 and he receives grocery deliveries there. Yet there is never
12 a second attempt set forth in the affidavit or by Mr.
13 Farnsworth in just speaking today to serve at that address.
14 There's one attempt, one failed attempt, never a second
15 attempt.

16 And then they start the process of trying to do a
17 publication. Your Honor, I'm at a little bit of a loss. I
18 mean, Austin McDaniel was his criminal defense lawyer. I know
19 Austin very well because one of the reasons I know Austin, he
20 sends all of his civil cases to me because he doesn't do them.

21 If you read the affidavit again -- let's read what Mr.
22 Evett says under oath. I attempted calling Mr. Dimaggio. He
23 answered the phone and confirmed who he was. My
24 (indiscernible) doing this was to confirm we were essentially
25 tracking the right individual using the skip trace software

1 through (indiscernible) Recovery Services. I (indiscernible)
2 had some legal papers for him, at least (indiscernible).

3 Now, that's -- either omits a great deal of information
4 that's been relayed to the Court today or that's the truth.
5 And if that's the truth and he had some legal papers for him
6 and my client believes that victim's advocate information,
7 that does go to his criminal attorney. Your Honor, I'm
8 sympathetic to Mr. Farnsworth. I wouldn't want to be in this
9 situation. But this is not -- this situation is not one that
10 is nearly as muddy as he's relaying to you.

11 THE COURT: All right.

12 MR. FARNSWORTH: I'm happy to put up Steve Evett to
13 testify.

14 THE COURT: No, I'm --

15 MR. FARNSWORTH: (Indiscernible).

16 THE COURT: Yeah, and I've heard enough arguments and I
17 reviewed the file. I'm going to review it again from y'all,
18 and I'll just take it under advisement. I'll have a decision
19 this week for you, but I'll take a look at it and I'll let you
20 know.

21 MR. MORGAN: Thank you, Your Honor.

22 MR. FARNSWORTH: Thank you, Your Honor.

23 THE COURT: Thank you both.

24 (End of Transcript of Record)

25

