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SC Court of Appeals

BRIEF OF APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
G. D. Morgan, Jr., Circuit Court Judge

Appellate Case No. 2023-001497

Ronald Carl Cox . . . . Appellant,

v.

Michael John Dimmagio . . . . .Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1) Was service of process on defendant satisfactorily achieved when Plaintiff followed Defendant's instruction to send legal documents discussed with Defendant over the phone to his attorney?

2) Was subsequent Service by Publication satisfactorily achieved when plaintiff's motion for service by publication was filed with the Circuit Court prior to the expiration of the normal period for service, although actually published, all be it with an error, soon after the expiration of that service period, and then again for a fourth, fifth and sixth consecutive week?

3) Is Plaintiff allowed relief under Rule 60 of the SCRCP, or the doctrine of Equitable Tolling, for falling short of exacting compliance in the service of process on a civil claim, particularly when there is evidence of defendant actively avoiding the same?

STATEMENT OF THE CASE

Plaintiff filed the present civil action on May 31st, 2022, concerning his violent assault by Defendant, on June 1st, 2019, after Defendant had followed Plaintiff and his date from a downtown Greenville restaurant, shouting obscenities, insults, and thereafter physically attacking Plaintiff as he respectfully asked him to stop harassing them.

During the several months that followed, Plaintiff began attempting service by seeking the current residence of Defendant through several sources. After Plaintiff's process servers went to several different addresses unable to find Defendant, Plaintiff resorted to finally to having a skip trace search done by a third party which provided Defendant's most recent address and phone number.

On September 1st, one of Plaintiff's process servers called and spoke to Defendant, notifying Defendant of legal documents to be delivered to him, and was instructed to send them to his attorney, who's name Defendant provided. However, the day after receiving Plaintiff's Summons and Complaint, Defendant's designee replied by email and suggested

that he did not have authority to accept service and would not be representing Defendant in this civil matter.

Over the next eight days, subsequent calls to Defendant from Plaintiff's process servers were not answered or answered briefly then the call was hung up and abruptly ended by Defendant. Plaintiff's process servers then visited Defendant's residence and knocked on his door, with no answer, although hearing keys being moved inside the residence near the front door, along with a dog barking, causing suspicion that the Defendant was inside his residence and refusing to answer the door. The process servers then spoke with multiple neighbors confirming that Defendant resided at the address, and spoke with his employer who confirmed that Defendant worked remotely from home.

On September 9th, 2022, although believing that service was effective pursuant to the instructions of Defendant, and out of an abundance of caution, Plaintiff filed a petition in Greenville County Circuit Court for service by publication, which was granted upon a showing of diligent efforts on October 6, 2020, by the Honorable Letisha Verdin.

The normal one hundred-twenty days for service of process was to run on September 30th, however with the Order timely filed and granted, Plaintiff completed his publication under the Order issued by the Circuit Court, and notice was published in the Greenville News for three consecutive weeks beginning October 27th, continuing the week of November 3rd and through the week of November 10, 2022.

As counsel for Plaintiff was out under a protection order by the Circuit Court, and recovering from what his surgeon called a severe cervical spinal fusion surgery, he was advised that there was an error in the Publication. Several weeks later, upon learning that in lieu of the Summons, the Court's actual Order of Publication was published, Plaintiff's counsel instructed his staff to re-publish the Summons for another three consecutive weeks, those being December 27th, January 3rd and January 10th, 2023.

Just days after the Plaintiff's second three-weeks of publication of notice of the action Defendant's motion to dismiss for failure to serve process was filed.

On July 24th, 2023, the Defendant's motion to dismiss was heard by the Honorable G.D. Morgan, Jr., who heard arguments of counsel and received affidavits and other related supporting documents, and ruled for Defendant, granting by order of September 19, 2023, his motion to dismiss for ineffective service of process. This appeal timely followed.

STANDARD OF REVIEW

An officer's return of process creates the legal presumption of proper service that cannot be impeached by the mere denial of service by the defendant. Delta Apparel, Inc. v. Farina (S.C.App. 2013) 406 S.C. 257, 750 S.E.2nd 615.

The Court's exercise of personal jurisdiction over a party will not be disturbed on appeal unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law. Ex parte South Carolina Dept. of Revenue (S.C.App. 2002) 350 S.C. 404, 566 S.E.2d 196.

ARGUMENTS

1) Was service of process on defendant satisfactorily achieved when Plaintiff followed Defendant's instruction to send legal documents discussed with Defendant over the phone to his attorney?

As to whether service of process on the defendant in the present case was satisfactorily achieved, the Appellant would submit the following.

Exacting compliance with the rules is not required to effect service of process; rather the Court must inquire whether the plaintiff has sufficiently complied with the rules such that

the Court has personal jurisdiction of the defendant and the defendant has notice of the proceedings. Mull v. Ridgeland Realty, LLC (S.C.App. 2010) 387 S.C. 479, 693 S.E.2nd 27.

The rule governing personal services of process serves at least two purposes; it confers personal jurisdiction on the Court and assures the Defendant of reasonable notice of the action. BB&T v. Taylor (S.C. 2006) 369 S.C. 548, 633 S.E.2d 501; Bage, LLC v. Southeastern Roofing Co. of Spartanburg, Inc. (S.C.App. 2007) 373 S.C. 457, 646 S.E.2nd 153, rehearing denied, certiorari granted.

The principal object of service of process is to give notice to the defendant of the proceedings against it. Mull v. Ridgeland Realty, LLC (S.C.App 2010)387 S.C. 479, 693 S.E.2nd 27.

In finding service was not perfected, the Court in BB&T v. Taylor (S.C. 2006), found that the record did not indicate that Debtor (defendant) was aware of process server and his attempts to serve her, process server never saw or spoke to anyone who resided in (defendant's) residence, and no one refused acceptance (before server attached the summons and complaint to debtor's front door)

Here, in the present case, Plaintiff's process server did the first two, making Defendant aware that he was a process server, and speaking to Defendant on the phone at his residence, along with leaving a voice message the following day, that his designee has attempted to refuse acceptance of the process delivered as instructed by the Defendant.

Defendant's counsel actually provided a transcription and recording of the voice message left for the Defendant, referring to the delivery of the Summons and Complaint to the person Defendant designated during their brief phone call the previous day; and the designee's attempt to avoid acceptance of the Summons and Complaint.

Additionally, the Court noted that the Plaintiff in BB&T was attempting to obtain a default judgment on her (defendant), which is not being sought in the present case, which further distinguishes that case from the present one.

Therefore, here, when Plaintiff's process servers spoke to Defendant twice on the telephone phone, being hung up on both times; then left a voicemail message the following day with Defendant, with no response; then appeared in person at Defendant's address, confirming with four (4) neighbors that the Defendant did reside there; then knocked on Defendant's door and heard keys being handled near the door, along with a dog barking, yet Defendant refused to come to the door; then staying at Defendant's residence for more than thirty (30) minutes to await him leaving his residence, then receiving a text the next day from two of the neighbors that Defendant had ordered groceries delivered which were sitting at his door; the circumstances are clearly distinguished from BB&T v. Taylor.

Defendant's production of the voice mail message again supports Plaintiff's position. The message left refers to the Process Server's delivery of the Summons and Complaint to the person Defendant had instructed him to sent it to the day before, and that this individual responded that he was not representing the Defendant on this civil action and therefore could not accept service. However, as argued herein, such service was complete upon receipt by Defendants specific designee. Following the Court's analysis in Sterns, Defendant admits he was aware of a process server contacting him who had legal documents for him and attempts to deliver them to him.

Secondly, Plaintff's process server's affidavit describes an initial phone call where he spoke with Defendant and notified him he had legal papers for him. And secondly Defendant admits, through production by Defense Counsel, that he received a second call the next day leaving a voice mail message confirming Defendants instructions to send to his attorney, who

claimed to deny acceptance of service of process and again notifying Defendant that legal documents were needing to be delivered to him.

Thirdly, by Defendant's own admissions contained in Defense Counsel's arguments, Defendant did not refuse to accept them, but *actually instructed* Plaintiff's process server to forward them to his attorney, then providing his attorney's name to allow the process served to locate his designee.

Defendant indeed received notice that there were legal documents to be delivered to him and directed process server to forward to his attorney.

Defendant in his own original argument admits he was notified there were legal documents for him, but claims he believed those documents related to a prior criminal matter, which would have been three years ago. This is irrelevant to whether he was notified of a pending legal matter with documents to be delivered to him.

The rules of service do not require an explanation of the nature of the legal process being served, nor does a Defendant get to review documents he's accepted or directed to be forwarded to his attorney, and then decide if he wants to accept them.

Defendant's counsel actually provided a transcription and recording of the voice message left for the Defendant, referring to the delivery of the Summons and Complaint to the person Defendant designated during their brief phone call the previous day; and the designee's attempt to avoid acceptance of the Summons and Complaint.

Additionally, the Court noted that the Plaintiff in BB&T was attempting to obtain a default judgment on her (defendant), which is not being sought in the present case, which further distinguishes that case from the present one.

Therefore, here, when Plaintiff's process servers spoke to Defendant twice on the telephone phone, being hung up on both times; then left a voicemail message the following day with Defendant, with no response; then appeared in person at Defendant's address,

confirming with four (4) neighbors that the Defendant did reside there; then knocked on Defendant's door and heard keys being handled near the door, along with a dog barking, yet Defendant refused to come to the door; then staying at Defendant's residence for more than thirty (30) minutes to await him leaving his residence, then receiving a text the next day from two of the neighbors that Defendant had ordered groceries delivered which were sitting at his door; the circumstances are clearly distinguished from BB&T v. Taylor.

The rules of service do not require an explanation of the nature of the legal process being served, nor does a Defendant get to review documents he's accepted or directed to be forwarded to his attorney, and then decide if he wants to accept them. Whether Defendant Dimaggio thought the legal papers Mr. Evatt referenced during his phone call with him were about a criminal matter, as he now claims, is irrelevant. Defendant Dimaggio expressly directed legal papers to be sent to his attorney, to whom they were the same day delivered. Service should be considered complete. Dimaggio's attorney, whose name he provided the process server, cannot refuse service when the party defendant has directed it to be received by that agent. Defendants are not given the opportunity to see what is being served and decide if he wishes to decline acceptance, particularly when those legal papers were delivered where defendant directed them to be sent.

The process server is not required to ram the documents down a defendant's throat and personal service of process "should not be a game of wiles and tricks." 62B Am.Jur.2d Process § 190 (2005). However, there must be something more than a mere suspicion of a defendant's refusal to accept the summons and complaint before we are willing to find a defendant was sufficiently served with process by a means other than strict compliance with Rule 4(d)(1), SCRCP. *BB& T v. Taylor,* 369 S.C. at 555, 633 S.E.2d at 504-505. *Service of Process in South Carolina* (SCBar) (2021 Ed. Miscellaneous Rules I. - B)

As exacting compliance with the rules is not required to effect service of process; here the Court was provided with a detailed description of the diligent efforts expended by Plaintiff and his staff in attempting service on the Defendant, which supported an Order of Service by Production, and allowed Plaintiff to exercise an abundance of caution by having the Defendant served again a second, and third time.

As the Court has stated, exacting compliance with the rules is not required to effect service of process; rather, a Court must inquire whether the Plaintiff has sufficiently complied with the rules such that the Court has personal jurisdiction of the defendant and the defendant has notice of the proceedings. BB&T v. Taylor (S.C. 2009) 369 S.C. 548, 633 S.E.2d 501

As our Supreme Court noted in BB& T v. Taylor, 369 S.C. 548, 633 S.E.2d 501 (2006), what constitutes delivery of a copy of the summons and complaint to the individual personally where the process server had repeatedly attempted to serve process and during the final attempt believed the individual was inside the residence but never saw or communicated with the individual.

The court in BB&T found the service was not proper, noting there was no evidence in the record to indicate the defendant was even aware of the process server and his attempt to serve her. The court held defendant was not properly served because the process server never saw or spoke to anyone who resided in defendant's residence nor did anyone refuse acceptance before the process server attached the summons and complaint to defendant's front door. The court added:

The process server is not required to ram the documents down a defendant's throat and personal service of process "should not be a game of wiles and tricks." 62B Am.Jur.2d Process § 190 (2005). However, there must be something more than a mere suspicion of a defendant's refusal to accept the summons and complaint before we are willing to find a defendant was sufficiently served with process by a means other than strict compliance with

Rule 4(d)(1), SCRCP. *BB& T v. Taylor,* 369 S.C. at 555, 633 S.E.2d at 504-505. *Service of Process in South Carolina* (SCBar) (2021 Ed. Miscellaneous Rules I. - B)

Further, instructions to have a Summons and Complaint delivered to another third party by a Defendant has been recognized as effecting proper service by our Courts for over thirty-five (35) years. In Humphries v. Spitz (1985, App) 284 SC 521, 327 SE2d 370, the Court obtained jurisdiction over a Defendant where the Summons and Complaint were given by the process server to the Defendant's sister (who had been authorized by Defendant to receive his mail), and was actually given by that sister to another of Defendant's sisters, who delivered it to him.

Here, Defendant Dimaggio explicitly directed and instructed Plaintiff's process server to email the legal papers to his attorney, even identifying his attorney by name. The fact that this agent was not yet hired, nor would be chosen to defend this civil action, has no bearing on whether the process server following Defendant's instructions was effective provided Defendant with reasonable notice of the action pending and established personal jurisdiction to the Court.

To conclude differently would allow Defendants to send process to his attorney, then decide together whether to honor his direct instructions to deliver a copy of the documents where Defendant instructed.

Authorizing a third party, particularly one's attorney, to accept legal documents known to being delivered, is proper service when those instructions are followed. Our Supreme Court has held that apparent authority suffices for an agent to accept service of process on behalf of the principal, and it is established based on manifestations by the principal, not the agent. Roberson v. Southern Finance of South Carolina (S.C. 2005) 365 S.C. 6, 615 S.E.2d 112.

This differs significantly from one a contacting another party's known counsel and asking if that attorney would accept service. Typically, that attorney would need to contact his client and get authority to accept service on their client's behalf. Here – client was contacted first by process server and instructed that the legal process be sent to his attorney. Service was effective and proper once those instructions were followed.

Rule 4(d)(1) of the South Carolina Rules of Civil Procedure provides that service of process on an individual is effective *by delivering a copy to an agent authorized by appointment or my law to receive service of process*. The Courts must look to the circumstances surrounding he relationship and find authority which is either *express* or implied from the type of relationship between the defendant and the alleged agent. Evidence that the defendant intended to confer such authority is binding. Hamilton v. Davis (1990, SC App) 389 SE2d 297.

Here, unlike the parties in BB&T v. Taylor, Plaintiff's process servers both spoke to Defendant over the phone at his residence and a subsequent message was left for Defendant the next day indicating that legal documents were delivered to his designee as instructed, which were being (ineffectively) refused, and that additional efforts were being made. Both that follow up message and the process server's subsequent in person attempt at Defendant's resident were ignored, while evidence of Defendant being at home, working remotely from home, and sounds of someone home but refusing to answer the door were presented to the Court. Subsequent efforts to accomplish Service by Publication, being done out of an abundance of caution, although necessitating some additional time, also provided reasonable notice of the pending litigation.

Further, as set out in Hamilton v. Davis, there is evidence, both direct and circumstantial, that the Defendant conferred authority on his agent or designee, by instructing

Plaintiff’s process server to send the Summons and Complaint to his attorney, identified and named by Plaintiff.

Such evidence would include affidavit testimony that Mr. Steve Evatt called and spoke with Defendant on September 1st, 2022, notifying him that he had legal papers for him; that it was Plaintiff counsel’s understanding that Mr. Evatt was told by Defendant to send those documents to Austin McDaniel, identified by Defendant as his attorney; transcription and an audio recording of a voice mail message left the next day by Mr. Evatt on Defendant’s phone line referencing and confirming Defendant’s instruction to have said legal documents delivered to his agent and attorney (along with said agent’s reply attempting to decline acceptance of service as directly authorized by Defendant the day before).

Defendant has argued that he believed the legal documents somehow related to a criminal charge he was involved with approximately three years before. The rules do not require a Plaintiff to describe and explain the nature of the Summons and Complaint attempting to be served, and do not give Defendants an opportunity to review said documents and decide whether to accept service thereof.

When a defendant is reasonably notified of legal documents assigned for service on the Defendant, it does not matter that he suspects them to relate to another matter, but whether Defendant gave binding authority to his designee or agent to accept those documents on his behalf.

Granting the relief Defendant seeks would allow defendants to receive or instruct delivery of a copy of the Summons and Complaint to a designee, review the nature and subject matter of the legal documents, likely obtain advice regarding the filed litigation, and then choose whether to accept service and then deny notice of the action. This would allow defendants to escape responsibility for tortious conduct without having to defend the allegations on their merits, simply by hiding, refusing to come to their door, and in this case,

having his agent contradict defendant's specific direction to send his copy of the pleadings to his designee after delivery had been completed. Clearly this is not what our Courts' rules contemplate as reasonable and in the interests of Justice.

Further, defendant had to have received actual notice of the pending action, since he retained counsel and sought dismissal of the action, just days after notice of the pending action was published for the sixth week on January 10th, 2023, with Defendant's counsel filing its Motion to Dismiss, with said Summons and Complaint included as an exhibit to Defendant's motion.

Defendant has appeared in our Circuit Court with unclean hands, and asked for strict prejudicial relief, while evidence indicates he made numerous efforts to avoid service in this matter. Once Defendant was told by his attorney the content of what was received, whom he had specifically directed the Summons and Complaint to be forwarded, his evasive measures included 1) Hanging up on process servers during subsequent phone calls, 2) ignoring voice mail messages, 3) refusing to come to the door of his residence when process servers came to his home, when evidence supported defendant being at home,
4) ignoring the published notice in the local newspaper, and 5) then over two months later, retaining defense counsel to move to dismiss the action after taking such evasive measures.

Further, as Defendant claims he did not actually receive the documents, all that is required is that reasonable notice is provided. Who did actually receive the Summons and Complaint was the individual to whom defendant directed the legal papers to be sent when described during Defendant's phone call on Sept 1, 2022, with Plaintiff's process server.

It is most unlikely that his attorney refrained from describing the nature of the pleadings that were received at Defendant's instruction. Nor is it relevant that defendant's designee decided subsequently that he'd rather not accept service. Or whether defendant

clearly understood the specific allegations contained in the documents. Or whether that designee attorney would be defending the new claim.

By way of example, the standard accepted publication of the Summons in any civil matter does not describe the basis for the action, only that an action is pending.

Further, as with a corporations' named registered agent, as typically found in the records of the Secretary of State, civil process that is delivered pursuant to that agent or designee's specific identification cannot then be declined by said agent or designee.

Again, under Roberson v. Southern Finance of South Carolina, the linchpin of authority is established based on manifestations by the principal, not the agent. Therefore, it's the direction and intent of the Principal, not the agent, that determines the validity of the agency.

Here, a copy of the Civil Process was delivered as defendant instructed Plaintiff's process server. Service was then complete under the law of South Carolina and its Rules of Court.

Defendants should not be rewarded for actively avoiding service, particularly when their designee has received the documents and reviewed the same. This consistent with the theory behind Service by Publication, which does not guarantee actual receipt, but is considered reasonable notice to a party after diligent personal service efforts have failed.

Here, defendant DiMaggio was served initially on Sept 1, 2023, when the Summons and Complaint was sent to his attorney, Austin McDaniel, as directed by the defendant himself, and supported by defendant's own submission of the voice mail message left by the process server the very next day.

Defendant's efforts to avoid additional attempts to serve him, after being initially told over the phone that there were legal documents for him, is quite revealing as to his

knowledge of the attempts at service of process and his evasive conduct after apparently learning the nature of the legal papers delivered.

Evidence presented by Plaintiff shows 1)Defendant ignoring a voice mail message left for Defendant the day following Mr. Evett's initial September 1st call to arrange delivery of the Summons and Complaint, and confirming that the legal papers were not related to a criminal matter; 2) Defendant subsequently hanging up on another of Plaintiff's process servers after identifying himself on the phone call on September 7th; 3) Defendant refusing to come to the door of his residence on September 8th when process servers knocked on his door and heard keys being moved near the front entrance and a dog barking; 4) Plaintiff's process servers talking with neighbors confirming that Defendant did in fact reside there; and 5) defendant's employer confirming he worked from home remotely.

Defendant's instructing the process server to deliver those documents to his attorney, then ignoring subsequent efforts for service once his attorney received and certainly reviewed those documents, identifying them in his reply email to Mr. Evett as civil matter on which he would not be representing Defendant, are clear attempts to avoid service of process after the nature of the legal papers was delivered as instructed by the Defendant himself.

Whether the designee to which defendant specifically directed delivery of the Summons and Complaint would be representing defendant in this new matter is not determinative. Nor is whether the designee chose not to accept the notice. Service is accomplished upon defendant's designee receiving civil process as instructed by Defendant.

2) Was subsequent service by publication satisfactorily achieved when plaintiff's motion for service by publication was filed with the Circuit Court prior to the expiration of the normal period for service; and although actually published soon after the expiration of that service period, all be it with an error, and then again published for a fourth, fifth and sixth consecutive week?

Plaintiff's Petition for Service by Publication was filed on September 9th, 2022, and granted by the Circuit Court on Oct 6th. Notice of the Action being filed was indeed published. And although Plaintiff's Order of Publication was published instead of the Summons, it provided clear notice that an action was pending, that Plaintiff had made diligent efforts to provide Defendant with a copy of the same.

In fact the Order of Service by Publication includes significantly more descriptive information, including both the existence of an action filed and the diligent efforts to deliver the Summons and Complaint to Defendant.

Out of an abundance of caution, Appellant's counsel submitted its Petition for Service by Publication on Sept 9th, within the established service period, illustrating the difficulty, despite diligent efforts, to serve defendant personally, along with defendant's evasive actions.

The Circuit Court's Order was issued on October 6th and notice of the pending action was then published the weeks of October 27th, November 3rd and November 10th.

Clearly Defendant Dimaggio received notice, as he proactively hired counsel to attempt to evade the litigation, ultimately (and conveniently) waiting another couple of months before filing his motion to dismiss, having had to receive the Summons and Complaint and Published Order of Publication to file his opposition to the same.

Plaintiff's counsel's staffs' attempts to secure service were made with diligent effort and in good faith, although admittedly with several errors and mistakes. Defendant Dimagio in fact did receive reasonable notice of the proceedings filed against him, and upon process

being delivered as the Defendant himself instructed (to his attorney), personal jurisdiction was achieved, despite Defendant's subsequent efforts to avoid the same.

A defendant in a meritorious civil claim, as set out clearly here in the filed pleadings, should not be allowed to avoid service and escape an adjudication of a dispute on its merits, particularly when our court rules and caselaw provide for relief from such errors in suvhc unique circumstances such as these.

Further, there is no prejudice to Defendant here with the appealed order of dismissal, only to Plaintiff. Plaintiff has not sought to hold Defendant in default, but to overcome defendant's attempts to avoid service after his learning what the pleadings were alleging. Defendant would simply be required to defend this action, of which he was made aware well within the established one hundred-twenty day service window. Plaintiff's Circuit Court Publication Order, undertaken out of an abundance of caution, after Defendant's direct instructions to provide him a copy of the Summons and Complaint were expeditiously followed, established Plaintiff's diligence in attempting to personally serve the Defendant, along with Defendant's efforts to avoid the same. Ruling otherwise would reward evasive conduct by a defendant in a pending litigation matter and ignore Plaintiff's diligent efforts to overcome Defendant's avoidance of his obligations to respond and defend a meritorious claim.

Subsequently then, out of an abundance of caution, additional reasonable notice was *twice* again then provided by publication pursuant to an Order of Publication issued by the Circuit Court on October 6th, 2022, although that Order being entered seven (7) days after the normal service period, providing reasonable and accepted notice that an action was pending and diligent efforts had been made to notify and serve Defendant personally.

Notice was then published for *two* separate three-consecutive weekly periods, instead of the one three week publication provided by the rules. Plaintiff's Affidavits of Publication show publication in the Greenville Newspaper for the weeks of October 27, November 3 and

November 10; and again the weeks of December 27th and January 3rd and January 10th, 2023. Although these publication dates were slightly past the ordinary one hundred-twenty day service window, those delays were due to defendants avoidance of personal service, along with Plaintiff awaiting the review and acceptance of its motion to serve by publication by the Circuit Court, the same Circuit Court that had granted protection to Plaintiff's counsel for the months in question due to a critical medical surgical condition that prevented him from maintaining ordinarily conscientious administration of his staff concerning Court deadlines.

Although staff mistakes, inadvertence and clerical errors are relied on by Defendant to attempt to avoid responsibility, and an adjudication of a meritorious claim, Plaintiff's good faith efforts attempting in multiple ways to secure service of process on defendant were sufficient according to our court rules and case law.

3) Is Plaintiff allowed relief under Rule 60 of the SCRCP, or the doctrine of Equitable Tolling, for falling short of exacting compliance in the service of process on a civil claim, particularly when there is evidence of defendant actively avoiding the same?

Rule 60 of our Rules of Civil Procedure allows for errors arising from oversight or omission, and due to mistake, inadvertence or excusable neglect, being allowed to be corrected. Plaintiff submits that justice calls for the correction of such errors in the present case, as not doing so would be fatal to a meritorious claim of damages due to Defendant's belligerent, insulting, and violent drunken behavior on the night in question in Plaintiff's case.

As counsel for Plaintiff was suffering from a critical cervical spine condition, with worsening symptoms both months leading to a fusion surgery on September 13, 2022, and a

tremendously difficult recovery for several months after, counsel placed trust in his staff to carry out instructions and to have service completed in this matter.

Also of note, is that Plaintiff's counsel was granted protection by the Circuit Court while recovering from cervical spine fusion surgery, described by his surgeon as a severe condition, for the months of September, October and November and December, while these service attempts were being done by his staff.

The good faith efforts by Plaintiff's counsel's staff, described herein and during arguments on Defendant's Motion to Dismiss, while counsel struggled with an extremely difficult recovery, show mistakes made, but clearly illustrate diligent efforts. Such errors, inadvertence or mistakes, if they caused any undue delays in Plaintiffs alternative attempts to serve defendant by Publication, should be considered excusable neglect in this unique set of circumstances. And further should be deemed duplicative and done under only an abundance of caution, as Plaintiff submits that service of process was accomplished when delivered to Defendants designee pursuant to his direct instructions.

As Plaintiff's counsel attempted to use every avenue available to ensure Defendant received reasonable notice of the filed pleadings, his subsequent efforts to serve defendant by publication illustrates good faith and further diligent efforts to duplicate service by an alternative method, even after following defendant's explicit instructions to deliver the Summons and Complaint to his designee, which Plaintiff submits perfected such service on its own.

Lastly, as to Defendant's assertion that the doctrine of equitable tolling does not apply to the present case, Plaintiff would submit the following.

Although a criminal case dealing with a Statute of Limitations issue, and not directly on point, Pelzer v. State, 662 S.E.2nd 618, 378 S.C. 516 (Ct. App. 2008), does illustrate how the Courts of our State, in the interest of Justice, make exceptions to even the most strict time

deadlines when not doing so would be unconscionable, and yield a gross injustice to a litigant.

Considering that the Courts have held that the rules of service of process are not required to be followed with exacting compliance, such relief should be more readily available on an issue of service, than the extension of the applicable Statute of Limitations provided for and recognized by the Court in Pelzer. Id at 523, 524.

Upon following Defendant's instructions to send legal documents to his attorney, and then being the victim of various evasive measures meant to avoid service, Plaintiff stands to lose his right to bring be made whole for the drunken, violent assault of the Plaintiff by the Defendant, as set out in the pleadings. Upholding the Circuit Court's ruling dismissing Plaintiff's case, by requiring strict adherence to the rules concerning service of process would lead to an unconscionable result, and yield a gross injustice to the Plaintiff.

CONCLUSION

For the reasons stated herein, this Court should reverse the ruling of the Circuit Court dismissing Plaintiff's action for lack of service.

Respectfully submitted,

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