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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY

Court of Common Pleas

H. Steven DeBerry, IV, Circuit Court Judge

Case No. 2024-000165

Latisha Wallace, individually, and as Parent and Natural Guardian of A.W. (minor under the age of fourteen years old) and Donald Wallace Jr., Appellants

v.

Jawar Hamin, Respondent.....

BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

- 1) *Whether the trial court erred when granting Respondent's Motion to Dismiss as to Latisha Wallace and Donald Wallace, Jr., where Appellants acted with all due diligence in attempting to effectuate service of the Complaint upon Respondent, despite not being able to do so within 120 days following the commencement of the lawsuit.*

STATEMENT OF THE CASE

The lawsuit commenced in the court below arose out of a motor vehicle collision that occurred on December 1, 2019. Appellants filed a Complaint on November 23, 2022, seeking recovery of damages they incurred, in excess of \$20,500, for injuries caused by the negligence of Respondent while operating a motor vehicle. See generally (Complaint). Although Appellants, through counsel, attempted to effectuate service of original process upon Respondent, they were unsuccessful as of April of 2023. Respondent filed a Motion to Dismiss the claims asserted by Latisha and Donald Wallace, Jr., on April 12, 2023. See (Docket Entry of 4/12/23). A virtual hearing was conducted by the court below on May 23, 2023 to consider Respondent's Motion to Dismiss. See generally (Hearing Transcript). On December 28, 2023, the court below issued an Order granting Respondent's Motion to Dismiss as to Latisha Wallace and Donald Wallace. See (Docket Entry of 12/28/23; Order Granting Respondent's Motion, dated 12/28/23). Appellants timely appealed that judgment. See (Docket Entry "Appeal/Notice of Appeals to Court of Appeals").

FACTS

Appellants sustained injuries in a motor vehicle collision that occurred on December 1, 2019, in Lexington County, South Carolina. See (Complaint ¶¶ 4-9). At the time of the above-referenced collision, Respondent Jawhar Hamin lived at 3418 Emanuel Church Road, #1, Lexington, South Carolina, 29073. See (Complaint ¶ 2) Appellants filed their Complaint, commencing the lawsuit in the court below, on November 23, 2022. See (Docket Entry “Summons & Complaint”). After filing, efforts were made to serve Respondent with the Complaint on multiple occasions.

First, the Lexington County Sheriff’s Department attempted to serve the Respondent at his last known address on December 20, 2022. See (Sheriff’s Affidavit of Non-Service). When that proved to be unsuccessful, Appellants retained the services of a private investigator at Palmetto Investigative Services, Inc., who also attempted service on the Respondent; service was attempted on February 1, 2023, February 4, 2023, and February 6, 2023. See (Steven Smith (Private Process Server) Affidavit of Non-Service). After the February 6th attempt proved unsuccessful, Appellants’ counsel filed a Motion for Service by Publication with the court below. See (Docket Entry, 4/24/03). Additionally, Respondent’s counsel and his insurer were provided copies of the Complaint, shortly after it was filed, and Respondent’s counsel filed an Answer to the Complaint. See (Docket Entry, 1/6/2023).

STANDARD OF REVIEW

The Court of Appeals is free to decide questions of law with no particular deference to the trial court. See *Proctor v. Steedley*, 398 S.C. 561, 573, (Ct. App. 2012) “This Court reviews questions of law *de novo*. When a trial court dismisses a lawsuit for lack of personal jurisdiction, the appellate court will not disturb that ruling unless it is entirely unsupported by the evidence or controlled by an error of law. *Ex parte S.C. Dept. of Revenue*, 350 S.C. 404, 407 (Ct. App. 2002) (“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.’”) (quoting *Indus. Equip. Co. v. Frank G. Hough Co.*, 218 S.C. 169, 173); *Bargesser v. Coleman Co.*, 230 S.C. 562, 567 (1957) (holding the exercise of personal jurisdiction over a party will not be disturbed on appeal unless unsupported by the evidence or influenced by error of law).

ARGUMENT

- I. *Respondent’s Motion to Dismiss was improvidently granted, as Appellants exercised due diligence trying to locate and effectuate service of original process upon Respondent, and they moved for service by publication in a reasonable amount of time.*

It has been established that the failure of a party to comply with procedural requirements does not affect the Court's subject matter. *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, (1994) (quoting *Bank of Babylon v. Quirk*, 192 Conn. 447, 472 A.2d 21, 22 (1984)), as cited in *Skinner v. Westinghouse Elec. Corp.*, 380 S.C. 91 (S.C. 2008). Proceeding from this, the Circuit Court had the authority to hear and determine the case, and it should have afforded Appellants an opportunity to serve processes beyond the 120-day period, or at a minimum, effectuate service by publication.

S.C. Code Ann. §15-9-710 provides that service by publication is appropriate when, after due diligence, the person to be served cannot be found within the state. S.C. Code Ann. §15-9-710(3) instructs that, an order for publication may be granted when the defendant is a resident of this state and after “diligent search” cannot be found. S.C. Code Ann. §15-9-740 requires that a plaintiff use “reasonable diligence” to locate the defendant. Here, when Appellants were informed that service could not be effectuated by the Lexington County Sheriff’s Office, they acted with due diligence in hiring a private investigator to determine the whereabouts of the Respondent and to effectuate such service. See (Sheriff’s

Affidavit of Non-Service; Steven Smith, Private Process Server's, Affidavit of Non-Service).

Further, South Carolina's courts concluded, in at least one instance, that service by publication five months after the commencement of a lawsuit was reasonable, although in another case, they concluded that service more than a year after filing was unreasonable. *Compare Ingle v. Whitlock*, 282 S.C. 391, (1984) with *Montgomery v. Mullins*, 325 S.C. 500, 506, (Ct. App. 1997). "Whether or not an action has been accomplished within a reasonable period of time depends on the circumstances of the case." *Montgomery* at 506. Thus, it is fair to conclude that service is made in a reasonable amount of time if service by publication is effectuated somewhere between 5 months and 12 months after a complaint has been filed if multiple attempts have been made to effectuate service.

Here, 4 attempts were made between the Sheriff's Office and a private process server hired by Appellants to obtain personal service on Respondent. See (Sheriff's Affidavit of Non-Service; Steven Smith, Private Process Server's, Affidavit of Non-Service). Moreover, Respondent's attorney filed an Answer to the Complaint in January of 2023 and both Respondent's attorney and insurer were had copies of the Complaint since shortly after it was filed. Moreover, it appears that Respondent was purposefully avoiding service; the Affidavit of the Private Process Server provides: 1) on February 1, 2023, the server actually made personal contact with Respondent's sister at Respondent's residence; 2) Respondent's sister advised the server that she would provide Respondent with the server's contact information and have Respondent contact him; 3) Respondent did NOT contact the server, despite additional attempts made by the server on February 4th and 6th of 2023. See (Steven Smith, Private Process Server's, Affidavit of Non-Service).

Appellants, through counsel, then filed a Motion for Service by Publication when neither the Sheriff nor the Process Server were able to obtain personal service of original process on Respondent. See (Docket Entry of 4/24/23). The Motion was filed approximately five months after the lawsuit was

commenced. (Id.). Had the court below denied Respondent's Motion to Dismiss, service by publication could have been effectuated, and if necessary, additional efforts at personal service of Respondent could have been made.

CONCLUSION

Appellants assert that the court below erred in granting Respondent's Motion to Dismiss the claims of Latisha Wallace and Donald Wallace, Jr, and in failing to permit Appellants to effectuate service by publication/personal service on Respondent beyond 120 days after the lawsuit had been filed. Appellants ask this Court to reverse the Order of the court below, dated December 28, 2023, and to remand this matter to the Court of Common Pleas for Lexington County with any further instruction as this Court deems to be just and proper.

RESPECTFULLY SUBMITTED, this 27th day of March, 2024,

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PROOF OF SERVICE

The undersigned hereby certifies that the Brief of Appellant was served on the following opposing counsel by e-mail pursuant to Rules 613 & 262(c)(3), SCACR on March 27, 2024.

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This 27th day of March, 2024.

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