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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge
Trial Court Case No. 2022-CP-42-01677

Appellate Case No. 2023-001360

Taylor Chasey Robertson,

Appellant,

v.

South Carolina Department of Public Safety, South Carolina Highway Patrol, and Trooper Patrick J. Goshorn,

Respondents.

FINAL REPLY BRIEF OF APPELLANT

Nicolas J. Baughman, Esq.
S.C. Bar No. 102186
Nicolas J. Baughman, Attorney at Law, LLC
600 North McDuffie Street
Post Office Box 2501
Anderson, South Carolina 29621 (29622)
Phone: (864) 332-9276
Fax: (864) 392-8276
Email: nick@baughmanlawsc.com
Attorney for Appellant

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I. ADDRESSING RESPONDENT'S STATEMENT OF THE CASE

Amending the Complaint For a More Succinct Pleading Should Be Allowed as the Argument was Made Pre-Final Order

On October 6, 2022, Respondents South Carolina Department of Public Safety and South Carolina Highway Patrol filed a Motion to Dismiss Appellant's Complaint because they believed Appellant failed to timely and properly serve them. On October 6, 2022, Respondent Trooper Patrick J. Goshorn also filed a Motion to Dismiss pursuant to Sections 15-78-60 and 15-78-70 of the South Carolina Tort Claims Act. The motions were heard on February 23, 2023. On March 21, 2023, a Form 4 Order—NOT a Final Order—was filed by the trial court judge and it indicated that a formal order was to be filed by the Respondents. (R. pp. 1-4)

On May 24, 2023, over two months later, having yet to see a Formal Order filed or signed, Appellant filed an admittedly premature and perhaps mis-titled Motion for Reconsideration (to be known henceforth as the "*Pre-Final Order MTR*") addressing the decisions Appellant anticipated would be made per the Form 4 Order. (R. pp. 55-185). A few weeks later, Respondents filed a proposed Final Order to the Court.

Over a month after the "*Pre-Final Order MTR*" was filed, the Trial Court granted Defendants' Motions by formal order filed on June 27, 2023 (which was three months after the Form 4 Order was issued). (R. pp. 5-13). On June 30, 2023, Appellant filed an (again, possibly mis-titled) Amended Motion for Reconsideration. (R. pp. 186-374). This was heard on August 14, 2023. By order filed on August 16, 2023, the Trial Court denied Appellant's Amended Motion for Reconsideration. (R. pp. 14-17). Appellant filed Notice of Appeal on August 25, 2023.

The point of reiterating this information (as this was previously stated in Appellant's Return to Respondent's Motion to Strike) is that, for whatever reason, Respondent completely

glosses over the fact that Appellant filed the "*Pre-Final Order MTR*" before the final order was signed. In fact, the contention that "[Appellant] should be allowed the opportunity to amend her Complaint to more succinctly plead these allegations against Goshorn" was made well before the Amended Motion for Reconsideration was filed (PLT's Motion for Reconsideration of Form 4 Order, R. p. 40)—as opposed to it having been addressed for "the first time", as indicated by the Respondents (Initial Brief of Respondents, p. 6).

Appellant acknowledges that she did not file any additional motions seeking leave to amend her Complaint to cure any deficiencies in her state law pleadings. Appellant's argument, made before the Final Order, was that if the Court disagreed with Appellant's position that the claims stated against Trooper Goshorn were sufficient, then Appellant should have been able to amend the complaint per Rule 15(a) and case law. (PLT's Motion for Reconsideration of Form 4 Order, R. p. 40). The Final Order did not address whether or not Appellant could amend—it simply dismissed the claims. (Formal Order granting DEFs' Motions to Dismiss, R. pp. 5-13).

Respondents Mischaracterized Appellant's Position as to "Who" can be Served

Additionally, Appellant takes issue with Respondents' characterization of Appellants' arguments at the August 14, 2023 hearing pertaining to "who" can be served when the entity to be served is a state agency. Specifically, Appellant believes that Respondents have not accurately described Appellant's position as to what is and is not acceptable. Respondents state:

> Plaintiff argued that because Rule 4(d)(5) does not specify a specific employee of every state agency for purposes of accepting service on behalf of the agency, Plaintiff should be permitted to accomplish service on SCDPS by delivering a copy of her Complaint to anyone present at 10311 Wilson Boulevard. ([August 14, 2023 Hearing TRANSCRIPT]. at 8:3-5; 10:2-6, 19-22.)

(Initial Brief of Respondent, p. 7)

In order to properly address Respondents' allegations, Appellant begins by restating the cited sections below, with added context **in bold**. *To wit*:

> **4(d)(1), 4(d)(3), 4(d)(4), and 4(d)(6) all indicate, you know, a specific type of person that should be receiving service on behalf of that entity that is -- that is to be served, whereas (5) --** Rule 4(d)(5) just -- it basically says deliver to the agency, and it does not specify any type of person.
>
> **[W]ith the other subparts of Rule 4(d) where they specify these -- these types of persons that are allowed to take service,** why did the legislature not ever specifically note a person in 4(d)(5) to -- to be able to accept service? And I don't know the answer to that, but the fact of the matter is they did not. They simply indicated it should be delivered. **Another point I want to make on [. . .] Rule 4(d)(5) [. . .] service on a state agency has never been addressed by a South Carolina appellate court [. . .], zero case law on it.**
>
> But going -- but going back to delivery at this address, the -- we have no doubt that this summons and complaint was delivered at that particular address, and this leads into an argument that's been made on sufficient compliance.

(August 14, 2023 Hearing TRANSCRIPT 7:25-8:5; 9:25-10:10, 19-22, R. pp. 403-406, 415-418).

The point of these statements is NOT to suggest that anyone at this address could accept service. It was primarily to illustrate the differences between each subsection of Rule 4(d) in terms of appropriate persons to be served depending on the entity and to highlight the fact that there is no appellate case law in this state addressing the same. Further, the particular facts of this case are such that there is an unmarked desk in the lobby of the building located at this address, a desk seemingly meant to serve anyone entering the building. The desk does not advertise which agency controls it. In fact, the desk is on the same side of the wall where the entrance to the SCDPS hallway is located. By contrast, the SCDMV entrance is located on the other side of the lobby. Accordingly, if service was in fact made in the lobby to a person sitting at the desk, and that person who gives the impression that they can accept service for the SCDPS—which is what occurred—

then yes, Appellant does believe that delivery occurred, and service was accomplished.[1] (Also see Email from Process Server regarding experience at SCDPS address).

II. SERVICE OF PROCESS

The Trial Court INCORRECTLY Determined that Plaintiff Failed to Properly Serve SCDPS and Therefore did not Timely Commence this Action.

Respondents are correct that "service of process must be correctly made." (Respondents Initial Brief, p. 11, citing *Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003)[2]). Of course service of process must be correctly made. It is axiomatic that service of process must be correctly made. And, as stated multiple times in multiple ways in her initial brief, sufficient compliance is a way in which service of process may be correctly made. As the South Carolina Supreme Court stated,

> Rule 4, SCRCP serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action. We have never required exacting compliance with the rules to effect service of process. Rather, we 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.

Roche v. Young Bros., Inc. of Florence, 456 S.E.2d 897, 318 S.C. 207 (S.C. 1994) (internal citations omitted).

In the same vein, Respondent points to multiple cases addressing authority to accept service, but all of those cases involve various subsections of Rule 4(d) that apply to the particular facts of those particular cases—none of which involve Rule 4(d)(5). *Hamilton v. Davis,* 300 S.C.

[1] Appellant would reiterate her previous request that this Court take judicial notice of the description of the lobby as provided in the preceding paragraph.

[2] *Bakala* involves service of process attempted on a person living in the Czech Republic under the rules of the Hague Service Convention.

411, 389 S.E.2d 297, 298 (Ct. App. 1990), involved service on individuals, which is governed by Rule 4(d)(1). *Moore vs. Simpson,* 322 S.C. 518, 523-24, 473 S.E.2d 64, 67 (Ct. App. 1987), involved service on an individual and a corporation, which are governed by Rules 4(d)(1) and (3), respectively. *Graham Law Firm, P.A. v. Makawi,* 369 S.C. 290, 297, 721 S.E.2d 430, 434 (2012), involved service by certified mail, which is governed by Rule 4(d)(8)—and 4(d)(8) is only applicable to "any class referred to in [Rule 4(d)] (1) or (3)."

As previously noted, both Rules 4(d)(1) and (3) indicate "who" may accept service on behalf of the individual or corporation. Rule 4(d)(5), by contrast, does not. It only states that "delivery" occurs upon the state agency (which, again, is neither an individual nor a corporation). Further, Respondent acknowledges Rule 4(5)(d) is applicable in the present matter (Respondents Initial Brief, p. 11). Accordingly, Respondents' assertion that *"[t]o personally serve SCDPS, Plaintiff was required to demonstrate that she delivered the Summons and Complaint to an employee of SCDPS who was authorized to accept such service on behalf of SCDPS"* is not based in any substantive law but is simply a legal conclusion based on cherry picking the most favorable elements from the other Rules. As stated multiple times, Rule 4(d)(5) says the Summons and Complaint had to be delivered to the agency, but it does not say "how".

Appellant Should be Excused from Non-Existent Exacting Compliance Service Rules (Because that's what the South Carolina Supreme Court Has Done)

Appellant is not asking to be "excused" from failing to properly serve the SCDPS; rather Appellant believes service was proper based on her substantial compliance with the Rule. Further, Respondents once again appear to misconstrue Appellant's position pertaining to the nuances of the Service of Process rules, stating *"[Appellant] cites a number of cases to support her argument that attempted compliance is sufficient, none of which support her position."* When used as a verb,

as it is by the Respondents, the word "attempted" is often associated with an unsuccessful effort. Appellant's position is not that she attempted to comply with the Rule, but that she substantially and sufficiently complied—and the cases cited support that.

Keeping in mind that none of the cases address service under Rule 4(d)(5) (because there are none), Respondents' analysis of Appellant's cited cases attempts to undermine the fact that the summons and complaint was delivered to the address listed by the Respondent agency. Further, those cases cited all spoke at some length about substantial compliance and not requiring exacting compliance.

Curiously, Respondents didn't include an analysis of *White Oak Manor, Inc. v. Lexington Ins. Co.*, which also talks about substantial compliance by addressing the service to a moniker not provided for in a service of suit clause found in an applicable insurance contract. 407 S.C. 1, 10–11, 753 S.E.2d 537, 542 (2014) ("The circuit court determined White Oak substantially complied with the service-of-suit clause set forth in the insurance policy. The court found that although the pleadings were not addressed to "Counsel," because the clause allowed for service on counsel's "representative," White Oak addressing the pleadings to the legal department constituted substantial compliance."). Arguably, this is analogous to the summons and complaint in the present case being delivered to the exact address listed by the state agency on its website. Further, the SCDPS did receive a copy of the summons and complaint, another similar aspect of the *White Oak Manor* case. *Id*. ("The court also found it significant that Lexington acknowledged the complaint was received by its claims counsel.").

Respondents are correct that *Maybin v. Northside Correctional Center*, a federal case, ruled that delivery to any employee of a state entity is not sufficient. 891 F.2d 72 (4th Cir. 1989). First of all, this case is in no way binding on the present case. Secondly, and more importantly, that

ruling was based on an inaccurate interpretation of another case which involved service on individuals—not a state agency. *See Jensen v. Doe*, 292 S.C. 592, 593, 358 S.E.2d 148, 148 (Ct. App. 1987); *also* s*ee* Appellant's Initial Brief, pp. 10-12. Even if Maybin had the "right" decision, the foundation for it is wholly wrong and Rule 4(d)(5) doesn't address it.

Appellant touched on this last point in her Initial Brief, but believes it bears rehashing. Respondents state, *"Plaintiff did not comply with Rule 4(d)(5) because she did not deliver the Summons and Complaint to the named defendant SCDPS, but instead to a person not in its employ."* Respondents have used the requirements for serving corporations under Rule 4(d)(3) throughout this entire case to justify their position that Rule 4(d)(5) was not complied with. If using other rules to justify our respective positions is allowed, then Appellant looks to Rule 4(d)(1), which says service of process is effective by "delivering a copy of the summons and complaint [] or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein." The SC Department of Public Safety is not an individual, but it's also not a corporation. However, and for the sake of this exercise, 10311 Wilson Blvd. in Blythewood, SC would be tantamount to *the dwelling house or usual place of abode* of the SCDPS. The Summons and Complaint was initially left with an employee of the SCDMV (who also "resides" at the same address) or in other words, *some person of suitable age and discretion then residing therein*. Accordingly, if effective service of process is drawn from cherry-picking other favorable rules, service of process was proper when an employee of the SCDMV, the SCDPS's roommate, received a copy of the Summons and Complaint.

Respondents Opened the Door to a Personal Jurisdiction Analysis

Respondents also argue that "the plaintiff has the burden to establish that the Court has

personal jurisdiction over the defendant." (Respondents Initial Brief p. 11, citing *Yarborough and Co. v. Schoolfield Furniture Industries, Inc*., 275 S.C. 151, 268 S.E.2d 42 (1980)). Since Respondents bring this point up in their Reply, Appellant addresses it the same.

Personal jurisdiction is a court's authority to rule and enforce a decision over the parties of a lawsuit. *Limehouse v. Hulsey*, 404 S.C. 93, 104, 744 S.E.2d 566, 572 (2013). Pursuant to Rule 4(d) of the South Carolina Rules of Civil Procedure, "[v]oluntary appearance by defendant is equivalent to personal service." South Carolina courts have held that where a defendant appeared and asserted claims which went to the merits, in addition to his jurisdictional objection, the defendant had waived personal jurisdiction. *Smalls v. Weed*, 291 S.C. 258, 353 S.E.2d 154 (Ct. App. 1987). Rule 12(h)(1), SCRCP, provides a defense is waived if "it is neither made by motion under this rule or included in a responsive pleading or an amendment." No South Carolina case has squarely addressed whether personal jurisdiction is waived if a party continues to participate in litigation after challenging personal jurisdiction in their initial responsive pleading to a court. However, the language of Rule 12(h)(1) is substantially similar to the Federal Rules of Civil Procedure. In construing the South Carolina Rules of Civil Procedure, our Court looks for guidance to cases interpreting the federal rules. *Gardner v. Newsome Chevrolet–Buick, Inc*., 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

A number of federal courts have determined "a delay in challenging personal jurisdiction by motion to dismiss may result in waiver, even where the defense was asserted in a timely answer.'" *Hamilton v. Atlas Turner, Inc*., 197 F.3d 58, 60 (2d Cir. 1999) (citation omitted) (internal quotation and alteration marks omitted); see also *Peterson v. Highland Music, Inc*., 140 F.3d 1313, 1318 (9th Cir. 1998) ("Rule 12(h)(1)[, FRCP,] specifies the minimum steps that a party must take in order to preserve a defense."); *Continental Bank, N.A. v. Meyer*, 10 F.3d 1293, 1296–97 (7th Cir.

1993) (finding waiver of personal jurisdiction defense by defendant's conduct, though acknowledging the waiver specifically provided for by Rule 12(h), FRCP, did not occur); *Yeldell v. Tutt*, 913 F.2d 533, 538 (8th Cir. 1990) (finding Rule 12(h), FRCP, "'sets only the outer limits of waiver; it does not preclude waiver by implication.'" (quoting *Marquest Med. Prods. v. EMDE Corp*., 496 F.Supp. 1242, 1245 n.1 (D. Col. 1980))).

Taking a quasi-totality of the circumstances approach by considering a variety of factors, South Carolina courts have found that engaging in discovery, and specifically the act of requesting discovery for purposes non-related to issues of jurisdiction, constitutes a voluntary appearance under Rule 4(d). In *Maybank v. BB&T Corp.*, our supreme court determined a trial court acted within its discretion when it found an appellant, BB&T, a banking corporation, waived its personal jurisdiction defense. 416 S.C. 541, 566, 787 S.E.2d 498, 511 (2016). In its answer, BB&T reserved its objection to the exercise of personal jurisdiction and subsequently moved for removal to federal court. There, the parties engaged in litigation and discovery. *Id*. BB&T's participation in the usual course of discovery, i.e., both responding to and requesting discovery from Respondent was a significant factor in determining that BB&T had waived its personal jurisdiction defense. *Id.*

In another case decided just over a year ago (and after this Court filed its Form 4 Order), the SC Court of Appeals affirmed the trial court's ruling that the Respondent did not waive its personal jurisdiction defense under *Maybank*. *Abdulla v. S. Bank*, 439 S.C. 391, 887 S.E.2d 138 (Ct. App. 2023). Unlike BB&T in the *Maybank* case, "(Respondent) Southern Bank responded to Abdulla's discovery requests to expedite the case, depositions were conducted to determine the jurisdictional issue, and Southern Bank did not submit any discovery requests of its own." *Id*. (emphasis added) For these reasons, the Court of Appeals determined the personal jurisdiction defense was not waived. *Id.*

The common thread between these two cases is that even if a party asserted a personal jurisdiction defense in its responsive pleadings, the submission of discovery requests for non-jurisdictional purposes (i.e. on the merits) acted as a waiver of the party's right to contest personal jurisdiction.

Appellant acknowledges that Respondents raised the personal jurisdiction defense in its initial pleadings on October 6, 2022. Further, Respondents did in fact make Appellant aware of its intention to move to dismiss the case on those grounds. On October 17, 2022, Respondents filed a Motion to Allow a Delayed Filing (See R. pp. 53-54) when they apparently believed that the 12(b) Motion to Dismiss was not actually filed, even though it was.[3] On November 17, 2022, while the Motions were still pending, Respondents' attorney mailed to Appellant discovery requests that had been signed by Attorney Harter on the same date as he answered on behalf of the Respondents. (See Defendants' Discovery Requests to Plaintiff, R. pp. 444-458). On March 3, 2023 two weeks after the hearing for Defendants' Motion to Dismiss, Attorney Harter contacted Appellant's counsel inquiring as to the status of the discovery responses. (See Email from Defendants Regarding Discovery Responses, R. p. 459). Unlike the Respondents in *Abdulla*, the Respondents in the present case submitted discovery requests to the Appellant—requests that were not exclusively based on jurisdictional issues—and later inquired as to when the discovery would be produced.

Additionally, these discovery requests seek information pertaining to the merits of the case, just as the *Smalls* court warned against. Further, the last line of each particular request (i.e.,

[3] Upon closer review of the filed documents located on the Public Index, Appellant has realized that Respondents did in fact file a 12(b) Motion to Dismiss prior to filing its Answer, and it was timestamped on October 6, 2022-14:39. (See DEFs' Rule 12(b) Motion to Dismiss, R. pp. 44-50). Accordingly, Appellant WITHDRAWS any arguments she may have made that suggest or imply that this document was not filed contemporaneous with the Answer.

However, despite the fact that Respondents had no reason to file the Motion to Allow a Delayed Filing, the act of filing that document is evidence of waiver of personal jurisdiction by submitting to the court's authority.

Interrogatories and Requests for Production) included the declarations that "These Interrogatories shall be deemed continuing so as to require supplemental responses up until and prior to trial" and "These Requests for Production of Documents shall be deemed to be continuing in nature and require supplemental response prior to trial". (Defendants' Discovery Requests to Plaintiff, R. pp. 451, 458). Appellant did not submit discovery requests to the Respondents prior to or since this Appeal, nor would doing so have influenced this analysis in any way. See *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) ("[A] party may not complain on appeal of error ... which his own conduct has induced.").

Respondents' timely Answer, communications prior to filing the Answer, and voluntarily undertaking of discovery all indicate a waiver of personal jurisdiction, thereby making the issue of whether or not service was proper moot.

Whether by substantial compliance with service of process rules or by waiver, all steps taken should have been sufficient to confer personal jurisdiction over a South Carolina state agency in a South Carolina Court of Common Pleas. Accordingly, Appellant asks this Court to find that service was proper, and thus timely—or in the alternative, that Respondents waived personal jurisdiction—and reverse the trial court's dismissal of the case.

III. SCTCA CLAIMS AGAINST TROOPER GOSHORN

Appellant first reiterates the point made at the beginning of this Reply Brief, which is that she should have been allowed the opportunity to amend her Complaint to more succinctly plead her allegations against Trooper Goshorn, per Rule 15(a) and case law. *See supra* p. 2. Secondly, in reference to Respondents' suggestion that Appellant somehow consented to unlawful imprisonment by offering to take a breath test is asinine and incredible. (See Respondents Initial

Brief, p. 17). Taking a test to prove one's innocence is consenting to take a test to prove one's innocence. It is not consenting to be placed under arrest and having one's freedoms taken away. Additionally, and as alleged in the Complaint, had the officer properly conducted the HGN test, he would have known that Appellant was not under the influence without the need for further testing. (Compl., ¶ 22-28, R. pp. 23-24). Accordingly, there was no need for Appellant to even feel the need to volunteer to take tests to prove her innocence.

CONCLUSION

For the reasons stated in Appellant's Initial Brief and this Reply, Appellant asks this Court to Reverse the Dismissal against SCDPS and to Reverse the finding that Trooper Goshorn was entitled to immunity. In other words, the Appellant asks this Court to reverse the judgment of the circuit court.

Respectfully submitted,

September 10, 2024

s/ Nicolas J. Baughman
Nicolas J. Baughman, Esq.
S.C. Bar No. 102186
Nicolas J. Baughman, Attorney at Law, LLC
600 North McDuffie Street
Post Office Box 2501
Anderson, South Carolina 29621 (29622)
Phone: (864) 332-9276
Fax: (864) 392-8276
Email: nick@baughmanlawsc.com
Attorney for Appellant