

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No. 2013-001295

Randolph M. James, P.C.Appellant,

v.

Oconee County, South Carolina, a political
Subdivision of the State of South Carolina
d/b/a Oconee County Regional Airport (KCEU).....Respondent.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF THE ISSUES ON APPEAL

- I. Did the Circuit Court abuse its discretion in determining that Appellant first effected proper service on Oconee County on September 7, 2012?
- II. Did the Court err in ruling that Plaintiff failed to timely commence this action within the limitations period set forth in S.C. Code Ann. § 15-78-110?

STATEMENT OF THE CASE

This case arises out of an incident (the “Incident”) in which an Airplane owned by Appellant struck a deer at Oconee County Regional Airport (the “Airport”). It is undisputed that the Incident occurred on April 23, 2010. (See Amended Complaint, dated September 5, 2012, pp. 7-9, ¶ 23, ¶¶ 26 -27.) The Airport is owned and operated by Oconee County, a body politic and corporate and a political subdivision of the State of South Carolina, (hereinafter “Oconee County”). (See Amended Complaint, dated September 5, 2012, p. 3, ¶ 7.)

Appellant filed its first civil action related to the Incident in the U.S. District Court for the District of South Carolina, Anderson Division, on May 27, 2011. (See Respondent’s Brief in Support of Motion to Dismiss, dated August 30, 2012, Exhibit B, p. 1.) This complaint asserted causes of action against “Oconee County, South Carolina, a political subdivision of the State of South Carolina, d/b/a Oconee County Regional Airport” for negligence and negligence per se. (See Respondent’s Brief in Support of Motion to Dismiss, dated August 30, 2012, Exhibit B, pp. 8 – 12.) Appellant voluntarily dismissed this civil action, bearing C.A. File No. 8:11-CV-01290.

On July 29, 2011, Respondent filed a second civil action in the U.S. District Court for the District of South Carolina, Anderson Division, asserting claims related to the

Incident, bearing C.A. File No. 8:11-CV-01855-HMH. (See Respondent's Brief in Support of Motion to Dismiss, dated August 30, 2012, Exhibit C, p. 1.) This action named the defendant as "Oconee County Aeronautics Commission, d/b/a Oconee County Regional Airport (KCEU), and it asserted claims against that defendant for negligence and negligence per se. On September 22, 2011, Oconee County filed a Motion to Dismiss this Complaint, stating that Oconee County was the proper party, and that Appellant's Complaint was subject to dismissal pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6), because the U.S. District Court lacked subject-matter jurisdiction to hear the dispute and because Respondent's Complaint failed to state a claim upon which relief could be granted. (See Respondent's Brief in Support of Motion to Dismiss, dated August 30, 2012, Exhibit D, pp. 1 – 2.) On November 28, 2011, Judge Henry M. Herlong, Jr., issued an Opinion and Order finding that Oconee County was the owner and operator of the Oconee County Regional Airport, and finding the S.C. Ann. § 15-78-100(b) deprives the U.S. District Court of subject-matter jurisdiction for claims against Oconee County. (See Respondent's Brief in Support of Motion to Dismiss, dated August 30, 2012, Exhibit E, pp. 6 -7.) Appellant did not appeal Judge Herlong's Opinion and Order.

On April 3, 2012, Appellant filed its third Complaint related to the Incident, this time in the Court of Common Pleas for Oconee County. This action bore C.A. File No. 2012-CP-37-319, and it named "Oconee County, South Carolina, a political subdivision of the State of South Carolina, d/b/a Oconee County Regional Airport" as Defendant. (Complaint, filed April 3, 2012, p. 1.) Appellant attempted to effect service via Certified Mail, even though the South Carolina Rules of Civil Procedure do not allow for service

upon counties via Certified Mail. On May 2, 2012, Respondent filed a Motion to Dismiss, pursuant to Rule 12(b)(5), SCRCF. In that Motion, Respondent stated that “service must be made on [a governmental subdivision of South Carolina] by ‘delivering a copy of the summons and complaint to the chief executive officer or clerk [of the governmental subdivision], or by serving the summons and complaint in the manner prescribed by statute for the service of summons and complaint or any like process upon such defendant.’ ” (See Oconee County’s Motion to Dismiss, dated May 2, 2012, p. 1, *quoting* Rule 4(d)(6), SCRCF.) Following receipt of Respondent’s Motion to Dismiss, Appellant attempted service on Oconee via process server. Process Server Tony Finley delivered copies of the Summons and Complaint to Reginald Dexter, whom Finley asserted was Chairman of the Oconee County Council. (See Affidavit of Service of Tony Finley Regarding Dexter, dated May 11, 2012.) While Dexter previously served as Oconee County Council Chair, he was not Chair at the time of the attempted service. (See Testimony of Oconee County Administrator Scott Moulder, Transcript of September 4, 2012 Motion Hearing, p. 26, l. 1 – p. 27, l. 7; see also Complaint, filed April 3, 2012, p. 2, ¶ 3.) Process Server Finley also submitted an Affidavit stating that he served Council Clerk Elizabeth Hulse by delivering a copy of the Summons and Complaint to Glenn Breed, who was identified as Oconee County’s “Assistant Administrator for E&E Services.” (See Affidavit of Service of Tony Finley Regarding Hulse, dated May 11, 2012.) The affidavit regarding Hulse made it clear that Finley did not personally serve Hulse with the Summons and Complaint.

On September 4, 2012, Judge Alexander Macaulay conducted a hearing on Oconee County’s Motion to Dismiss. Because the judge, rather than the jury, is required

to resolve questions of fact related to a Motion to Dismiss based on improper service, Judge Macaulay considered affidavits and testimony presented by both parties. For the live testimony presented by Oconee County at the September 4, 2012 hearing, counsel for Appellant was afforded an opportunity to cross-examine witnesses. (See, *e.g.*, Transcript of September 4, 2012, Hearing, p. 24, l. 22 – p. 25, l. 10.) Prior to the September 4, 2012, hearing, Appellant submitted a supplemental affidavit from Tony Finley, regarding the purported service on Messrs. Dexter and Breed. In the August 28, 2012, Affidavit Regarding Service, Finley continued to erroneously testify that Reginald Dexter was Chairman of the Oconee County Council. (See Affidavit of Tony Finley, dated August 28, 2012, ¶¶ 4 - 5.) Further, Finley offered extensive testimony regarding the substance of communications had in the Oconee Administrative Offices on May 10, 2012. (See Affidavit of Tony Finley, dated August 28, 2012, ¶¶ 6 – 8.) At the September 4, 2012 hearing, Judge Macaulay received testimony and took judicial notice that Oconee County's Administrative Offices were not open on May 10, 2012, because that date is Confederate Memorial Day, which is an official County Holiday in Oconee County. (See Testimony of Glenn Breed, Transcript of September 4, 2012 Motion Hearing, p. 22, ll. 12 – 18.) In his testimony, Glenn Breed disputed Finley's account of events, and Breed stated that he had no authority to accept service of process on behalf of Oconee County. (See Testimony of Glenn Breed, Transcript of September 4, 2012 Motion Hearing, p. 23, l. 5 – p. 24, l. 12.) At the conclusion of the September 4, 2012 hearing, Judge Macaulay stated a preliminary intent to grant Oconee County's Rule 12(b)(5) Motion to Dismiss, and the Court requested for Oconee County's Counsel to draft a proposed order granting the Motion. (Transcript of September 4, 2012 hearing, p. 45, l. 16 – p. 46, l. 7.)

Before the Court issued a final order on the Motion to Dismiss, Appellant filed an Amended Complaint on September 7, 2012. (See Appellant's Amended Complaint.) On that date, Appellant personally served Elizabeth Hulse, Clerk of the Oconee County Council with the Amended Summons and Amended Complaint. (See Affidavit of Tony Finley, dated September 12, 2012.) Judge Macaulay did not issue a final order, and Oconee County's Rule 12(b)(5) Motion to Dismiss remained under advisement at that time.

On September 17, 2012, Oconee County filed a Motion to Dismiss Appellant's Amended Complaint with Prejudice, pursuant to Rule 12(b)(6), SCRPC, based on Appellant's failure to comply with the two-year limitations period set forth in S.C. Code Ann. § 15-78-110. (See Oconee County's Motion to Dismiss, dated September 17, 2012.) Simultaneously, Oconee County filed an Answer to Appellant's Amended Complaint, which also asserted Oconee County's right to dismissal of Appellant's claims pursuant to Rule 12(b)(6), SCRPC. (See Answer to Appellant's Amended Complaint, dated September 17, 2012.)

On November 2, 2012, Judge Macaulay entered an Order consolidating Oconee County's pending Motions to Dismiss for hearing. (See Order of Consolidation, dated November 2, 2012.) The Motions were scheduled for hearing on November 5, 2012; however, that hearing was cancelled by the Court.

On December 11, 2012, the parties appeared before Judge R. Lawton McIntosh for a hearing on Oconee County's consolidated Motions to Dismiss. Judge McIntosh considered the entire record to-date, including the transcript of testimony from the September 4, 2012, hearing. (See Transcript of Hearing on December 11, 2012, p. 3, ll. 2

- 16.) At the hearing, counsel for Appellant conceded that a two-year limitations period was applicable to the claims at issue in this case. (See Transcript of Hearing on December 11, 2012, p. 8, ll. 11 – 13.) Following the hearing, Judge McIntosh took the Motions under advisement. (Transcript of December 11, 2012 Hearing, p. 19, ll. 16 – 18.) On March 25, 2013, Judge McIntosh entered an Order granting Oconee County’s Motions to Dismiss, and the Order dismissed Appellant’s claims with prejudice; however, the Clerk of Court did not serve the Order on the parties until April 5, 2013. (See Order of Judge McIntosh Granting Oconee County’s Motion to Dismiss, dated March 25, 2013, Form 4 Cover.) In the Order, the Court found that Appellant did not properly serve Oconee County until September 7, 2012, the date on which Elizabeth Hulse was served with a copy of the Amended Summons and Amended Complaint. (See Order of Judge McIntosh Granting Oconee County’s Motion to Dismiss, dated March 25, 2013, p. 14.) The Court found that Appellant’s first proper service on Oconee County occurred 157 days after the original filing; therefore, Appellant’s action was commenced on September 7, 2012, outside the applicable limitations period set forth in S.C. Code Ann. § 15-78-110. (See Order of Judge McIntosh Granting Oconee County’s Motion to Dismiss, dated March 25, 2012, p. 16.)

On April 22, 2013, Appellant moved to reconsider the Order of Judge McIntosh. (See Appellant’s Motion to Reconsider.) Judge McIntosh denied the Order via Form 4 Order on May 7, 2013. (See Form 4 Order from Judge McIntosh, dated May 7, 2013.) Appellant filed its Notice of Appeal in this Matter on May 29, 2013.

ARGUMENT

I. The Circuit Court Correctly Held That Appellant Failed to Effect Service Upon Oconee County Prior to September 7, 2012.

The Circuit Court properly found that Appellant failed to effect service upon Oconee County prior to September 7, 2012. Rule 4(d)(6), SCRCF, sets specific guidelines for persons authorized to receive service on behalf of counties, and Appellant repeatedly failed to comply with those guidelines. The Circuit Court did not abuse its discretion in making its findings of fact regarding service.

A. Standard of Review for Questions Regarding Service of Process.

The plaintiff has the burden to demonstrate that service of process was correctly made. *Jensen v. Doe*, 292 S.C. 592, 594, 358 S.E.2d 148, 148-49 (Ct. App. 1987). A plaintiff must demonstrate compliance with the civil rules of service to obtain a presumption of proper service. *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996).

“Questions of fact arising on a motion to quash service of process for lack of jurisdiction over the defendant are to be determined by the court [rather than by a jury]. The findings of the circuit court on such issues are binding on the appellate court unless wholly unsupported by evidence or manifestly influenced or controlled by error of law.” *Brown v. Carolina Emergency Physicians, P.A.*, 348 S.C. 569, 583 S.E.2d 624, 631 (Ct. App. 2001) (internal citations omitted). Stated more succinctly, “[t]he trial court’s findings of fact regarding validity of service of process are reviewed under an abuse of discretion standard.” *Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 294-95, 721 S.E.2d 430, 432 (2012).

The Circuit Court’s ruling was supported by live testimony given by Glenn Breed

and Scott Moulder, and Appellant was given an opportunity to cross-examine these witnesses. (See Transcript of September 4, 2012 Motion Hearing, p. 21, l. 6 – p. 44, l. 8.) Accordingly, the Circuit Court’s decision was supported by evidence and existing case law, and the Circuit Court did not abuse its discretion in rendering its ruling.

B. Glenn Breed Is Not Authorized By South Carolina Law to Effect Service Upon Oconee County in This Matter.

Rule 4(c), SCRCF, expressly states who is authorized to effect service of the summons and complaint in a civil action, limiting service to “the sheriff, his deputy, or ... any other person not less than eighteen (18) years of age, not an attorney in **or a party to an action.**” Rule 4(c), SCRCF (emphasis added). Appellant attempted to comply with this rule by hiring Tony Finley, a private investigator, to effect service upon Oconee County. Following Finley’s attempted service, Appellant filed affidavits of service stating that service on Elizabeth Hulse was complete when papers were delivered to Glenn Breed. (See Affidavit of Service of Tony Finley Regarding Hulse, dated May 11, 2012.) In that affidavit, Finley averred that he served Elizabeth Hulse by delivering documents to Glenn Breed, a Deputy Administrator of Oconee County. (See Affidavit of Tony Finley Regarding Hulse, dated May 11, 2012.) Appellant never filed a Notice of Service with the Clerk of Court demonstrating that Mr. Breed effected service on Oconee County, presumably because Appellant did not believe Mr. Breed was capable of effecting legal service on his employer.

Now that Mr. Finley’s efforts to effect service have been ruled insufficient by the Circuit Court, Appellant contends that Glenn Breed effected service by delivering the Summons and Complaint to Elizabeth Hulse, Clerk of the Oconee County Council. It is

undisputed that Glenn Breed is an employee and executive officer of Oconee County, which is a party defendant to this action. (See Testimony of Glenn Breed, Transcript of September 4, 2012 Motion Hearing, p. 21, l. 15 – p. 22, l. 6.) Because he is an executive officer of Oconee County, Mr. Breed is a party to the action, and he is not able to effect service in this case. Had Mr. Breed committed a tort within the scope of his employment, Oconee County would be liable for his actions, provided that the S.C. Tort Claims Act afforded a remedy. *See* S.C. Code Ann. § 15-78-200 (stating S.C. Tort Claims Act is exclusive and sole remedy for torts committed by employees of governmental entity while acting within scope of employee's official duty); *see also Parker v. Spartanburg Sanitary Sewer Dist.*, 262 S.C. 276, 607 S.E.2d 711 (Ct. App. 2005) (affirming that governmental sewer district can be liable for automotive tort of employee acting within scope of employment).

Counsel for Appellant would not have been allowed to contact Glenn Breed to discuss this case outside the presence of Oconee County's counsel, because as Deputy Administrator of Oconee County, he is deemed to be a "represented party" as a result of Oconee County's representation by counsel. *See* Rule 4.2, RPC, Rule 407, SCACR (Comment 7) (stating that in case of represented organization, Rule 4.2 prohibits attorneys from communicating with person who regularly consults with organization's attorney regarding matter at issue or whose act or omission in connection with matter may be imputed to represented organization). If Appellant's counsel cannot communicate with Mr. Breed regarding this matter, Appellant's counsel certainly cannot use Mr. Breed to effect service upon the represented organization.

Based on the liability provisions of the S.C. Tort Claims Act and the provisions of

Rule 4.2 of the Rules of Professional Conduct, all employees of Oconee County are barred from effecting service on Oconee County, with the sole exception of officers of the Oconee County Sheriff's Department. Those Sheriff's Department officers are authorized to effect service, because Rule 4(c), SCRPC, expressly authorizes them to effect service on all persons and entities within Oconee County.

Moore v. Simpson, supra, is illustrative of the unavailability of employees of an organization to effect service on that organization. In that matter, a private process server attempted to serve an attorney and a law firm by delivering the summons and complaint to a secretary at the firm. Ultimately, the attorney who was the firm's registered agent received the suit papers in his intra-office mail box on the same date the papers were delivered by the process server. *Id.* at 521, 473 S.E.2d at 65. As in the present case, the factual accounts of the process server and the person who received the papers differed significantly in *Moore*. The Court of Appeals affirmed the trial court's ruling quashing service, finding there was no evidence that the receptionist was authorized to receive process on behalf of the attorney and firm. *Id.* at 524, 473 S.E.2d at 67. Had delivery by an employee of the defendant firm been sufficient to constitute binding service, the Court of Appeals would have reversed the trial court's finding in *Moore*.

Were the Court to adopt Appellant's position in this case, South Carolina would have "tag" process, meaning that as long as a defendant received suit papers, the courts of this state would have personal jurisdiction. This contradicts the Supreme Court and legislature's clear intention to have process served upon individuals appointed by law.

The Circuit Court properly found that "[i]t is clear that [Appellant] failed to comply with the rules of service for a county; therefore, [Appellant] does not receive any

presumption of proper service.” (Order of Judge McIntosh Granting Oconee County’s Motion to Dismiss, dated March 25, 2012, p. 12.) The Circuit Court properly noted that a holding in line with Appellant’s position would reverse the holdings of current South Carolina law, and it would render meaningless South Carolina’s current law regarding service of process. (Order of Judge McIntosh Granting Oconee County’s Motion to Dismiss, dated March 25, 2012, p. 12.) Accordingly, the Circuit Court did not abuse its discretion in determining that Breed was unable to effect process on Oconee County.

C. Glenn Breed Did Not Possess Agency Authority to Accept Service on Behalf of Oconee County.

The South Carolina Rules of Civil Procedure clearly identify who is authorized to receive process on behalf of a governmental subdivision, stating:

[Service shall be made u]pon a municipal corporation, county or other governmental or political subdivision subject to suit, by delivering a copy of the summons and complaint to the chief executive officer or clerk thereof, or by serving the summons and complaint in the manner prescribed by statute for the service of summons and complaint or any like process upon any such defendant.

Rule 4(d)(6), SCRPC. Throughout the pendency of this action, Appellant has failed to identify any statute which allows it to serve a County by delivering the summons and complaint to a deputy administrator or to an employee vested with apparent authority to receive service of process. The express language of Rule 4(d)(6), SCRPC, does not allow for appointment of an agent for service of process for a County through the principles of agency authority.

Appellant apparently contends that Glenn Breed has authority to receive service of process on behalf of Oconee County, because he works in the same office building as

Elizabeth Hulse. Such a contention is not supported by centuries of agency law in South Carolina. Appellant has not identified any South Carolina statute or case which allows for service of process upon a County based on the application of principles of apparent authority. In fact, all cases cited by Appellant in support of their apparent authority argument involve service upon corporations or individuals. *See Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009) (evaluating service of process on corporation where papers left with receptionist); *see also Moore v. Simpson*, 322 S.C. 518, 473 S.E.2d 64 (Ct. App. 1996) (finding no service on individual and professional association where papers left with secretary for individual/registered agent); *see also Graham Law Firm, P.A. v. Makawi*, 396 S.C. 290, 721 S.E.2d 430 (2012) (evaluating service of process on individual and corporate entity based on certified mailings separately accepted by bookkeeper and office manager); *see also Burriss Chem., Inc. v. Daniel Constr. Co.*, 251 S.C. 483, 163 S.E.2d 617 (1968) (evaluating, under prior rule, service of process on corporation via delivery to project superintendent). The difference between service of process upon a county and that upon an individual and/or corporation is clear. Rules 4(d)(1) and 4(d)(3), which govern service upon individuals, corporations, and partnerships, allow individuals, corporations, and partnerships to be served by delivering a copy of the summons and complaint by delivery to an agent authorized by appointment or law; however, Rule 4(d)(6) contains no such provision. *See* Rule 4(d)(1), SCRCF; *see also* Rule 4(d)(3), SCRCF; *see also* Rule 4(d)(6), SCRCF. Accordingly, the apparent authority case law cited by Appellant is not applicable to this case.

Appellant also erroneously contends that there is no reason that requirements for service upon governmental subdivisions should be stricter than the requirements for

service upon corporations, completely ignoring the sovereign immunity that has traditionally been afforded to governmental subdivisions and further ignoring that the S.C. Tort Claims Act limits liabilities and venues for governmental entities in a manner different from the liabilities and venues available for suits against corporations and individuals. *C.F. McCall v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985) (discussing and abolishing doctrine of sovereign immunity); *see also* S.C. Code Ann. § 15-78-20 (contrasting liability for private corporations and individuals with that afforded to the State and its political subdivisions). The Rules of Civil Procedure provide stricter rules for service of process on governmental subdivisions, and Appellant cannot abrogate those rules in favor of the less restrictive rules governing service of process on individuals, corporations, and partnerships, simply because Appellant finds the existing rules to be inconvenient, or has failed to comply with them.

Assuming, *arguendo*, that a County could be served via an agent with apparent authority to receive process, there is evidence in the record to support the trial court's conclusion that Oconee County did not hold out Glenn Breed as its agent for service of process. In its Order Granting Oconee County's Motion to Dismiss, the Circuit Court found that "there is no evidence that Oconee [County], the principal, ever made any representation to any person or entity that Breed was authorized to accept service on Oconee's behalf." (See Order of Judge McIntosh Granting Oconee County's Motion to Dismiss, dated March 25, 2013, p. 10.) Further, Oconee County Administrator Scott Moulder testified that no person other than himself and Council Clerk Elizabeth Hulse were authorized to receive process on Oconee County's behalf, and Moulder stated that Oconee County never designated any further officials to receive process on Oconee

County's behalf. (See Testimony of Oconee County Administrator Scott Moulder, Transcript of September 4, 2012 Motion Hearing, p. 30, ll. 10 – 17.) Additionally, Glenn Breed testified that he never believed or represented that he had authority to receive process on behalf of Oconee County. (See Testimony of Glenn Breed, Transcript of September 4, 2012 Motion Hearing, p. 23, l. 19 – p. 20, l. 2.) To-date, Appellant has not identified any representations by Oconee County, the principal, that Mr. Breed had authority to receive process on Oconee County's behalf, other than that Breed was the only person near Ms. Hulse's office during the lunch hour. As the Supreme Court of South Carolina noted in *Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 11, 615 S.E.2d 112, 115 (2005), apparent authority must be established by representations of the principal, rather than the agent. *Id.* Accordingly, the Circuit Court did not abuse its discretion in determining that Mr. Breed did not possess agency authority to receive process on Oconee County's behalf.

D. Oconee County's Objections Are Substantive in Nature, Rather Than Mere Technicalities.

Appellant claims that its efforts to effect service were "close enough," and that Oconee County's objections to service of process mere technicalities. A review of the South Carolina cases finding mere technical issues reveals that Appellant's argument is misplaced. To obtain a presumption of proper service, a plaintiff must comply with the rules regarding service, and the record in this case clearly demonstrates that Appellant regularly and repeatedly failed to comply with the rules governing service on governmental subdivisions.

In *Patel v. Southern Brokers, Ltd.*, 277 S.C. 490, 289 S.E.2d 642 (1982), the

plaintiffs obtained a default judgment against real estate brokers, when they effected service upon those brokers via certified mail, pursuant the long-arm statute. The defendants refused the certified delivery. Further, the plaintiffs failed to have their affidavit of service notarized. The Supreme Court held that a defendant may avoid service by refusing certified delivery. *Id.* At 492-93, 289 S.E.2d at 644. There is no evidence in this case that Elizabeth Hulse or Scott Moulder ever refused service or attempted to duck delivery of the summons and complaint. The only evidence in the record is Elizabeth Hulse was not present at the Oconee County Administrative Offices when Tony Finley arrived at 1:05 pm, because she was on her lunch break. (See Affidavit of Tony Finley, dated August 28, 2012; see also Testimony of Glenn Breed, Transcript of September 4, 2012 Motion Hearing, p. 23, ll. 5 – 10.) Accordingly, the facts of the Patel case are not comparable to those of the present case.

In *Patel*, the plaintiffs complied with the rules of service. In the present case, Appellant has repeatedly failed to comply with the rules for service upon a county. In fact, Appellant failed to effect service on the proper Oconee County officials, even after Oconee County's May 2, 2012, Motion to Dismiss expressly stated that "[p]ursuant to Rule 4(d)(6), SCRPC, service must be made on [governmental subdivisions of South Carolina] by 'delivering a copy of the summons and complaint to the chief executive officer or clerk thereof, or by serving the summons and complaint in the manner prescribed by statute for the service of summons and complaint or any like process upon such defendant.'" (See Oconee County's Motion to Dismiss, dated May 2, 2012, p. 1, *quoting* Rule 4(d)(6), SCRPC.) Even after receiving notice from Oconee County of the requirements for service upon a county, Plaintiffs failed to properly effect service on

Oconee County by serving Elizabeth Hulse for 126 additional days. (See Order of Judge McIntosh Granting Oconee County's Motion to Dismiss, dated March 25, 2012, p. 14) (finding no proper service on Oconee County until September 7, 2012.)

Similarly, Appellant's reliance on *McCall v. IKON*, 363 S.C. 646, 611 S.E.2d 315 (Ct. App. 2005), is misplaced. In that case, a defendant in default challenged the name under which it was sued. The defendant challenged the name used in the complaint against it, even though the name mirrored the trade name used in that defendant's contract with the plaintiff. Accordingly, the Court of Appeals ruled it was proper to deny a motion to vacate a default judgment, based on the use of an improper name in the complaint. By contrast, in the present case, Oconee County has always used the same name in pleadings, both in the U.S. District Court and the S.C. Circuit Court. Oconee County's objection is that Appellant failed to effect the service pursuant to the procedure expressly set forth in the South Carolina Rules of Civil Procedure, and Oconee County clearly stated what service was required under the Rules.

The record is replete with evidence of Appellant's failure to comply with rules applicable to this action, and Appellant's failures have failed to subject Oconee County to the jurisdiction of the Circuit Court. As noted above, Appellant twice filed suit against Oconee County in the U.S. District Court, even though the Tort Claims Act limits jurisdiction and venue to the Circuit Court for Oconee County. *See* S.C. Code Ann. § 15-78-100(b). Appellant first attempted to serve Oconee County via certified mail, even though there is no provision for serving a governmental subdivision via certified mail. Rule 4(d)(6), SCRCPP; *see also* Rule 4(d)(8), SCRCPP. After receiving notice from Oconee County of the officials required to be served under Rule 4(d)(6), SCRCPP,

Appellant failed to effect service on the proper officials, and such failure is clear from the Notice of Service filed with the Clerk of Court by Plaintiff. (See Affidavit of Service of Tony Finley Regarding Dexter, dated May 11, 2012; see also Affidavit of Service of Tony Finley Regarding Hulse, dated May 11, 2012.) Even after filing a Notice of Appeal in this case, Appellant's Initial Brief failed to make citations in accordance with Rule 208(b)(4), SCACR.

Based on review of the record in this matter, it is clear that the Circuit Court did not abuse its discretion in finding the objections to service of process to be substantive, rather than merely technical.

II. Based on the Date of Effective Service, the Circuit Court Properly Held That Appellant's Amended Complaint Failed to State a Claim Under Which Relief Can Be Granted.

Once the Circuit Court properly concluded that service was not effected until September 7, 2012, the only reasonable ruling on Oconee County's Rule 12(b)(6) Motion was that Appellant's Amended Complaint failed to state a claim on which relief could be granted, because Appellant's claims were time-barred.

A. Standard of Review for Rule 12(b)(6) Motions.

"In reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP, the appellate court applies the same standard of review as the trial court." *Cricket Cove Ventures, LLC v. Gilliland*, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct. App. 2010). "In deciding whether the trial court properly granted the motion to dismiss, the appellate court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief."

A defendant may move for a dismissal pursuant to Rule 12(b)(6), SCRCP, where the claims brought are barred under an applicable Statute of Limitations. *See Spell v. South Carolina Dep't of Highways and Pub. Transp.*, 292 S.C. 228, 355 S.E.2d 860 (1987)(affirming Rule 12(b)(6) dismissal of claims against Highway Department where claims were not brought within statutory claims period).

B. Appellant's Amended Complaint Demonstrates That Appellant Failed to Timely Commence This Action.

Appellant has never raised any objection stating that the Circuit Court considered improper evidence in ruling upon Oconee County's Rule 12(b)(6), SCRCP; therefore, any objections in that regard have been waived. Even if such an objection had been raised by Appellant, there is no evidence that the Circuit Court considered any improper evidence in ruling upon Oconee County's Rule 12(b)(6), SCRCP, Motion to Dismiss.

Appellant's Amended Complaint asserts that Oconee County is a political subdivision of the State of South Carolina. (Amended Complaint, p. 2, ¶ 2.) Appellant asserted its right to pursue this action in the Court of Common Pleas for Oconee County under the S.C. Tort Claims Act. (Amended Complaint, p. 2, ¶ 5.) Appellant's Amended Complaint clearly states that the Incident occurred on April 23, 2010. (Amended Complaint, pp. 7 – 9, ¶¶ 23 -29.) Coupled with the Circuit Court's ruling that service was not effected on Oconee County until September 7, 2012, the only conclusion upon review of Appellant's Amended Complaint is that Appellant failed to timely commence this action.

As counsel for Appellant conceded at the December 11, 2012, hearing on Oconee County's Motion to Dismiss, the Tort Claims Act sets a two-year limitations period for

claims, and the two-year period is the period that is applicable in this case. (*See* S.C. Code Ann. § 15-78-110; *see also* Transcript of December 11, 2012 Motion Hearing, p. 8, ll. 11 – 13.) Accordingly, Appellant must have commenced this action on or before April 23, 2012, to comply with the applicable limitations period.

South Carolina's Supreme Court has recently determined, by jointly interpreting Rule 3(a), SCRCP, and S.C. Code Ann. § 15-3-20, that: (1) an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, and (2) if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days of *filing*. *Mims v. Babcock Center, Inc.*, 399 S.C. 341, 346, 732 S.E.2d 395, 397-98 (2012) (emphasis in original).

Appellant filed its original Complaint within the applicable limitations period; however, Appellant did not properly serve Oconee County within 120 days of that filing. Appellant's service of the Amended Complaint on Elizabeth Hulse on September 7, 2012, came 157 days after the filing of Appellant's Complaint on April 4, 2012. Accordingly, all claims asserted by Appellant in its Amended Complaint are time-barred, pursuant to operation of S.C. Code Ann. § 15-78-110 and S.C. Code Ann. § 15-3-20.

C. Appellant's Filing of an Amended Complaint Did Not Provide Appellant With an Additional 120 Days to Serve Oconee County.

In its Notice of Appeal and Initial Appellate Brief, Appellant did not argue that the filing of an Amended Complaint provided Appellant with an additional 120 days to effect service on Oconee County, under the doctrine of relation back. Accordingly, this argument is waived for the purposes of this appeal.

To the extent this argument is deemed not to be waived, the argument does not

accurately reflect existing South Carolina law, and it should therefore be rejected. Plaintiff's first Complaint in this action was filed on April 3, 2012. (See Appellant's Complaint, filed April 3, 2012.) Rule 15(c), SCRCF, states that "[w]henver the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the amendment in the original pleadings, the amendment relates back to the date of the original pleading." Rule 15(c), SCRCF. Based on application of this rule, Appellant's Amended Complaint should be treated as being filed on April 3, 2012.

There is no provision in Rule 15, SCRCF, or otherwise, which states that a plaintiff gets a new 120-day period to serve an amended complaint once it amends pleadings. In fact, the Supreme Court, with the assent of the legislature has directly contradicted Appellant's argument, in enacting revisions to Rule 3, SCRCF, in 2004. "In amending Rule 3(a), SCRCF, [the Supreme Court of South Carolina] clearly stated the 120-day period [for service of process] begins running from the *filing* of the complaint, not after the end of the statute of limitations period[.]" *Mims, supra*, 399 S.C. at 347, 732 S.E.2d at 398. "When service is occurs outside of the statute of limitations it must occur within 120 days of filing the complaint. *Id.*

In this case, Appellant filed the Complaint on April 3, 2012, within the limitations period. Under Rule 15(c), SCRCF, the Amended Complaint is treated as being filed on that date. Service did not occur until September 7, 2012, 157 days after filing, and outside of the limitations period, which undisputedly ended on April 23, 2012. Appellant has not cited any provision of law stating that it should receive 120 days from filing the Amended Complaint to effect service, because there is no case, statute or rule in South

Carolina that states such a principle. Accordingly, Appellant did not timely commence this action, and the Circuit Court's Order dismissing this action with prejudice pursuant to Rule 12(b)(6), SCRCPP, should be affirmed.

CONCLUSION

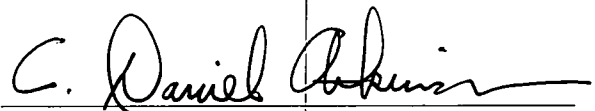
The Circuit Court properly held that Appellant first effected service on Oconee County on September 7, 2012. This Court is required to review that finding using an abuse of discretion standard, and Appellant has failed to identify any abuses of discretion by the Circuit Court. There is evidence in the record to support a determination that Glenn Breed is a party to this action as an executive officer of Defendant Oconee County. Accordingly, he is not a person qualified to effect service of process in this case under Rule 4(c), SCRCPP. Further, existing South Carolina law demonstrates that a plaintiff cannot use an employee of a defendant entity to serve that entity. Appellant failed to effect service on persons qualified to receive service on Oconee County's behalf until September 7, 2012.

Rule 4(d)(6), SCRCPP, does not allow a plaintiff to serve a governmental subdivision via an agent with apparent authority to receive process, and there is no South Carolina statute that allows for such service. Even if such service was allowed under the Rules of Civil Procedure or statute, there is evidence in the record, including the testimony of County Administrator Scott Moulder and Mr. Breed himself, which indicates that Oconee County did not represent to any third parties that Mr. Breed had authority to receive civil service on Oconee County's behalf. Accordingly, the Circuit Court did not abuse its discretion in determining that Glenn Breed did not possess apparent agency authority to receive service of process on Oconee County's behalf.

Once the Circuit Court properly determined that Appellant failed to effect service on Oconee County prior to September 7, 2012, the only reasonable inference to be drawn from the facts alleged in Appellant's Amended Complaint was that all of Appellant's claims were time-barred, pursuant to operation of S.C. Code Ann. § 15-78-110. The Amended Complaint states that the events giving rise to these claims occurred on April 23, 2010, and Appellant has conceded that there is a two-year limitations period applicable to this action. Although Appellant filed its Complaint within the two-year period, Appellant failed to effect service within 120 days of the filing of its Complaint; therefore, Appellant failed to commence its action within the limitations period. Accordingly, Appellant's claims are "forever barred" because the action was not commenced within the two-year period allowed under the S.C. Tort Claims Act. S.C. Code Ann. § 15-78-110.

For the above reasons, Respondents respectfully request that this Court affirm the Circuit Court's dismissal with prejudice of Appellant's Amended Complaint.

Respectfully Submitted,



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*Attorneys for Oconee County, a body politic
of the State of South Carolina*

August 30, 2013

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas
R. Lawton McIntosh, Circuit Court Judge

Case No. 2013-001295

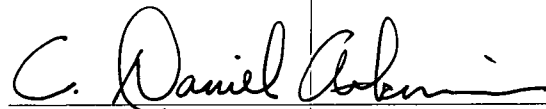
Randolph M. James, P.C.Appellant,

v.

Oconee County, South Carolina, a political
Subdivision of the State of South Carolina
d/b/a Oconee County Regional Airport (KCEU).....Respondent.

PROOF OF SERVICE

The undersigned counsel for Respondent Oconee County, a body politic of the State of South Carolina certifies that he has served *Respondent's Initial Brief* on counsel for Appellant Randolph M. James, P.C., Tracy L. Eggleston, Cozen O'Connor, One Wells Fargo Center, Suite 2100, 301 South College Street, Charlotte, North Carolina 28202 by depositing a copy of same in the U.S. Mail, postage prepaid, on this 30th day of August, 2013.



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**DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL**

Pursuant to Rule 209, SCACR, Respondents propose the following to be included in
the Record on Appeal:

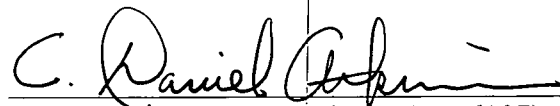
- 1) The Summons issued for service on Oconee County dated April 3, 2012;
- 2) The Complaint filed April 3, 2012;
- 3) Defendant's Motion to Dismiss dated May 2, 2012;
- 4) The Affidavit of Service of Tony Finley regarding Dexter dated
May 11, 2012;
- 5) The Affidavit of Service of Tony Finley regarding Hulse dated
May 11, 2012;
- 6) The Affidavit of Tony Finley dated August 28, 2012;
- 7) Defendant's Brief in Support of Motion to Dismiss dated August 30, 2012, with
all exhibits included;

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SC Court of Appeals

- 8) The Entire Transcript of the September 4, 2012 Hearing before Judge Alexander S. Macaulay;
- 9) Plaintiff's Amended Complaint dated September 7, 2012;
- 10) The Affidavit of Tony Finley dated September 12, 2012;
- 11) Defendant's Motion to Dismiss with Prejudice dated September 17, 2012;
- 12) Defendant's Answer to Plaintiff's Amended Complaint dated September 17, 2012;
- 13) Judge Macaulay's Order Consolidating Defendant's Motion to Dismiss dated November 2, 2012;
- 14) Brief in Support of Motion to Dismiss, Pursuant to Rule 12(b)(6), SCRPC, dated November 5, 2012;
- 15) The Entire Transcript of the Hearing conducted December 11, 2012 before Judge R. Lawton McIntosh;
- 16) Form 4 Order stating Judgment dated December 11, 2012;
- 17) Judge McIntosh's Order Granting Oconee County's Motion to Dismiss dated March 25, 2013, including Form 4 Order;
- 18) Plaintiff's Motion for Reconsideration dated April 22, 2013;
- 19) Plaintiff's Memorandum in Support of Motion for Reconsideration dated April 22, 2013;
- 20) Judge McIntosh's Form 4 Order of May 13, 2013 denying Plaintiff's Motion for Reconsideration; and
- 21) Plaintiff Appellant's Notice of Appeal dated May 29, 2013.

I certify that this designation contains no matter that is irrelevant to this appeal.

August 30, 2013



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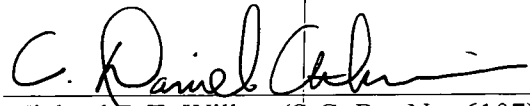
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