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SC Court of Appeals

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 Dimaggio ..... Respondent.

FINAL BRIEF OF RESPONDENT

MOORHEAD LeFEVRE PA

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2) Did the Appellant fail to properly commence its civil action against the Respondent pursuant to S.C. Code Ann. §15-3-20 and SCRCivP 3(a) where Appellant timely filed its Summons and Complaint but, after the running of the applicable Statute of Limitations, did not timely complete service by publication, if it was completed at all, due to a series of substantive errors attributable to the Appellant?

3) Where the Appellant fails to timely comply with the requirements of S.C. Code Ann. §15-3-20 and SCRCivP 3(a) regarding time for service of process after the running of the applicable Statute of Limitations, is the Appellant allowed relief under Rule 60 SCRCP, or the doctrine of Equitable Tolling?

STATEMENT OF THE CASE

The Summons and Complaint in this matter were filed by the Appellant on May 31, 2022. (R. PP. 25-30). The Complaint alleged causes of action against the Respondent for Assault and Battery, Negligence, and Gross Negligence and arose from an incident occurring June 1, 2019 which involved, generally, a physical altercation between the Appellant and Respondent. (R. pp. 25-30).

There is no evidence in the record of any attempts to serve the Summons and Complaint upon the Respondent until August 31, 2022, the 92d day after filing of the Summons and Complaint. (R. P. 85, 2d Paragraph). At that time, the Appellant went to two prior residential addresses of the Respondent provided to him by Appellant's investigator utilizing skip trace software. (R. p. 85, 2d Paragraph).

On September 1, 2022, the process server for the Appellant served the Summons and Complaint upon the criminal defense attorney for the Respondent *via email*. (R. pp. 67, 85, 3d Paragraph, 94). On September 2, 2022, the criminal defense attorney for the Respondent advised the process server that he did not represent the Respondent in the captioned civil matter and he was therefore not authorized to accept service in a civil matter. (R. p. 94)

On September 8, 2022, the Appellant's process server, having realized that he did not have all of the information previously obtained by Appellant's investigator, attempted personal service of the respondent at an additional address that proved to be the current residential address of the Respondent. (R. p. 85, 4th Paragraph) Service was unsuccessful that day, but the Appellant's process server was able to confirm the address as the current address of the respondent. (R. p. 85, 4th Paragraph). Despite confirming the Respondent's address, the process server never made any additional attempts at personal service at the Respondent's confirmed address.

On September 9, 2022, the Appellant filed a Motion for Publication alleging that the "Defendant should be served by publication due to the failure of reasonable attempts to serve the Summons upon Defendant." (R. pp. 35-36). The Motion failed to include affidavit required by the §15-9-710 S.C. Code of Laws Ann. (1976, as amended). The Lower Court took no steps in response to the filing, presumably

because no affidavits were attached.

On September 30, 2022, a Petition for Publication was filed by the Appellant, alleging, among other things, that the "current place of residence of the Defendant…cannot be ascertained after the exercise of reasonable diligence." (R. pp. 37-38). This time the Petition was accompanied by two affidavits, although only one was illegible. (R. pp. 37-38). The Petition for Publication was made on the 122d day after filing of the Summons and Complaint. (R. pp. 25, 37).

The lower Court issued an Order for Publication on October 6, 2022 allowing for service of process via publication pursuant to §15-9-710 *et seq.* S.C. Code of Laws. (R. p. 17).

On October 27th, November 3d and November 10th, 2022, the Greenville News Classifieds published a copy of the *Order for Publication*. (R. p. 43 l.2; R p. 84). The Appellant had erroneously submitted the Court's *Order for Publication* instead of a Copy of the Summons, as required by §15-9-710 S.C. Code of Laws Ann. (1976, as amended). (R. p. 84).

On January 17, 2023, the Respondent filed a Motion to Dismiss the Summons and Complaint for failure to properly commence an action pursuant to S.C. Code Ann. §15-3-20 and SCRCivP 3(a). (R. pp. 32-34). The Respondent alleged that the Appellant had failed to serve the Summons and Complaint in this matter prior to the expiration of the Statute of Limitations or, after the expiration of the Statute of Limitations, within 120 days of the filing of the Summons and Complaint. (R. pp. 32-34).

On April 25, 2023, proof of service of publication of the *Order of Publication* on October 27, November 3 and November 10, 2023 was filed with the Court.

Again, this was not proof of the publication of the *Summons.* (R. p. 84).

No proof of service by publication has ever been filed with the Court to date reflecting publication of the Summons, as required by to Rule 5(d) S.C.R.Civ.P.

The lower Court held an in-person hearing on the Respondent's Motion to Dismiss on July 24, 2023 and heard arguments of counsel for the Appellant and the Respondent. (R. pp. 4-12). The lower Court took the matter under advisement and in the days after the hearing allowed the submission by the parties of additional argument and other evidence.

On August 21, 2023, the lower Court enter a Form 4 Order granting the Respondent's Motion to Dismiss. (R. p. 14). A formal Order was entered granting the Respondent's Motion to Dismiss on September 19, 2023. (R. pp. 4-12)

On September 20, 2023, the Appellant filed its Notice of Appeal. The Appellant did not seek reconsideration of the lower Court's Order.

On September 21, 2023, The Appellant filed its Amended Notice of Appeal.

STATEMENT OF FACTS

This matter arose out of a physical confrontation between the Appellant and the Respondent on June 1, 2019. (R. pp. 24-31).

The Appellant filed the Summons and Complaint in this matter on May 31, 2022, alleging Assault and Battery, Negligence and Gross Negligence by the Respondent. (R. pp. 24-31). The incident alleged by the Appellant occurred June 1, 2019. (R. p. 25, Paragraph 4). The Statute of Limitations for these causes of action are three years, running on June 1, 2022. [1]

[1] § 15-3-510. General rule

Because the Appellant filed, but did not serve, the Summons and Complaint prior to the expiration of the applicable Statute of Limitations, the Appellant is required to serve the Summons and Complaint within One Hundred and Twenty (120) days of the filing of the Summons and Complaint. S.C. Code Ann. §15-3-20 and SCRCivP 3(a).

After filing of the Summons and Complaint on May 31, 2022, the Appellant's first documented attempts to serve the Respondent took place on August 31, 2022, the 92d day after the filing of the Summons and Complaint. (R. pp. 85-86). On that day, the Appellant attempted service on two former residences of the Respondent which appeared in a skip trace performed by the Appellant. (R. pp. 85-86). The skip trace also identified the current residence of the Respondent, but no attempt at personal service was made on August 31, 2022 on that address by the Appellant due to the failure of Appellant's investigator to provide the address to the Appellant's process server. (R. pp. 85-86).

On September 1, 2022, the 93d day after filing of the Summons and Complaint, the process server called the Respondent on the telephone. (R. pp. 85-86). There are disputes between the parties regarding the substance of this call. The Appellant argues that his process server advised the respondent that he wished to

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The periods for the commencement of actions other than for the recovery of real property shall be as prescribed in the following sections." SC Code 15-3-510 General rule (South Carolina Code of Laws (2024 Edition))

§ 15-3-530. Three years

Within three years:
…
(5) an action for assault, battery, or any injury to the person or rights of another, not arising on contract and not enumerated by law, and those provided for in Section 15-3-545;...
SC Code 15-3-530 Three years (South Carolina Code of Laws (2024 Edition))

§ 15-3-535. Limitation on actions commenced under Section 15-3-530(5)

Except as to actions initiated under Section 15-3-545 [pertaining to Medical Malpractice], all actions initiated under Section 15-3-530(5) must be commenced within three years after the person knew or by the exercise of reasonable diligence should have known that he had a cause of action.
SC Code 15-3-535 Limitation on actions commenced under Section 15-3-530(5) (South Carolina Code of Laws (2024 Edition))

serve a Summons and Complaint on him (R. p. 45, ll. 10-11), however, there is no evidence in the record where this is substantiated and rather the evidence supports that the process server did not advise the Respondent that he was attempting service of a Summons and Complaint. Instead, the Appellant's process server was vague and offering misleading information to the Respondent in an attempt to achieve service. (R. p. 85, Paragraph 3).

The affidavit of the Appellant's process server states only that "I advised him that I had some legal papers for him." He provides no further details of their discussion. (R. p. 85, Paragraph 3).

The Respondent advises that Appellant's process server called him while he was driving his dog to the veterinarian. (R. p. 88, Paragraph 2). He relates that Appellant's process server represented to the Respondent that he was with the "victims' fund". (R. p. 87, Paragraph 2; R. p. 88, Paragraph 2). Respondent had received funds from the South Carolina Victim's Compensation Fund for the payment of medical bills he incurred after having been rendered unconscious by a kick to his face and a stomp with the boot heel of the Appellant's brother in the June 1, 2019 incident. (R. p. 87, Paragraph 3). The Appellant and his brother were directed to reimburse the South Carolina Victim's Compensation Fund as a condition of dismissing felony charges against them. (R. p. 87, Paragraph 4). Because of this both the Appellant and Respondent were aware of the South Carolina Victim's Compensation Fund's involvement in the criminal case involving the Respondent, the Appellant and the Appellant's brother. Respondent denies that Appellant's process server ever explained that he had a civil summons and complaint to serve upon him. (R. p. 88, Paragraphs 2-3).

Given this history, the Respondent believed the call to be related to the South

Carolina Victim's Compensation Fund and instructed the Appellant's process server to contact his criminal attorney. (R. p. 88, Paragraph 3). The Respondent did not instruct the Appellant's process server that his criminal attorney was authorized to accept service of a Summons and Complaint. (R. p. 88, Paragraphs 1-2). At that time, he was unaware of any civil action against him. (R. p. 88, Paragraph 2).

After the Appellant's process server ended his September 1, 2022 call with the Respondent, the Appellant's process server attempted service of the Summons *only* on the Respondent's criminal attorney via *email* on September 1, 2022. (R. p. 67), On September 2, 2022, the Respondent's criminal attorney advised the process server via email that he represented the Respondent in a criminal matter and was not authorized to accept service in a civil matter. (R. p. 45, l.24 to p. 46, l. 3).

There is no evidence the Appellant attempted service of the Summons and Complaint again until September 8th, 2022, the 100th day after filing of the Summons and Complaint. By this time the process server had determined that Appellant's investigator had an additional address for the Respondent that the Appellant's investigator who performed the skip trace failed to provide to him. (R. p. 85). The Appellant's process server went to the address to attempt personal service. (R. p. 85). The Appellant's process server relates that no one answered the door despite his hearing noises within the residence. (R. p. 85). The Appellant's process server did not, however, leave a copy of the Summons and Complaint at the residence nor speak to anyone at the residence. (R. p. 85). While there, Appellant's process server consulted with four neighbors who confirmed that the Respondent lived at the address. (R. p. 85).

On the following day, September 9, 2022, the Appellant's process server received a text message from one of the neighbors relating that the Respondent had

received a delivery of groceries that day. (R. p. 85). Despite having finally confirmed the Respondent's address through the neighbors and having good evidence that the Respondent actively lived at the address by virtue of the grocery delivery, the Appellant curiously never again attempted personal service of the Respondent at the confirmed address.

Instead, on September 9, 2022, the 101st day after filing of the Summons and Complaint, the Appellant filed a Motion to allow Service by Publication. (R. pp. 35-36). However, the Appellant failed to include an affidavit with the Motion testifying that service of the Summons could not be made after due diligence as required by S.C. Code Ann. §15-9-710. (R. pp. 35-36). No action was taken on the Motion by the Court.

On September 30, 2022, the 122d day after filing of the Summons and Complaint, and after the time limitations for service of process set forth in §15-3-20 S.C. Code of Laws Ann. And Rule 3(a) S.C.R.Civ.P, a new "Petition for Service by Publication" was filed by the Appellant, this time including one legible and one illegible affidavit. (R. p. 37). In the Petition, the Appellant represented that "…Service of the Summons by mail [should] be waived because the current place of residence of the [Respondent], Michael John Dimaggio, cannot be ascertained after the exercise of reasonable diligence." (R. p. 37). This representation was made despite the Appellant having confirmed the address of the Respondent. (R. p. 85). An Order allowing service by Publication was entered by the Court on October 6, 2022, the 128th day after filing of the Summons and Complaint. ((R. pp. 17-18).

Twenty-one days later, the Appellant erroneously caused to be published in the Greenville News Legal Classifieds section the Court's *Order for Publication* instead of the Summons as required by S.C. Code Ann. § 15-9-740. (R. p. 84). The

Order for Publication was published on October 27, November 3 and November 10 of 2022, the 149th, 156th and 163d days after filing of the Summons and Complaint on May 31, 2022. (R. pp 24-31; R. p. 84).

There is no evidence that the Summons was mailed to the Respondent's residence of the Respondent in accordance with §15-9-740 S.C. Code of Laws Ann. (1976, as amended).

On January 17, 2023, the Respondent moved to Dismiss the Appellant's Complaint for failure to properly commence an action pursuant to S.C. Code Ann. §15-3-20 and SCRCivP 3(a). (R. pp. 32-34).

A hearing was held On July 24, 2023 where the Court heard arguments of Counsel and reviewed the Court record. (R. pp. 4-13). The Court thereafter allowed additional written argument and submission of additional evidence. The Court Dismissed the Complaint of the Appellant by formal Order dated September 19, 2023. (R. pp. 4-13). No Motion for Reconsideration was requested. This appeal followed.

STANDARD OF REVIEW

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.

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 circuit court. Brown v. Carolina Emergency Physicians, P.A., 348 S.C. 569, 583, 560 S.E.2d 624, 631 (Ct. App. 2001). "The findings of the circuit court on such issues are binding on the

appellate court unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law." Id.

"The 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).

“An abuse of discretion occurs either when the court is controlled by some error of law or where the order, based upon findings of fact, lacks evidentiary support." Miller v. Miller, 375 S.C. 443, 452, 652 S.E.2d 754, 759 (Ct. App. 2007) .

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ARGUMENT

The Appellant failed to properly commence its civil action against the Respondent pursuant to S.C. Code Ann. §15-3-20 and SCRCivP 3(a) where Appellant timely filed its Summons and Complaint but attempted service (1) only of the Summons (2) via email (3) on Respondent's attorney in a separate *criminal* matter, who promptly advised he did not have authority to accept service in the civil matter.

"Section 15–3–20 of the South Carolina Code governs the commencement of actions. In 2002, the General Assembly amended the statute to its current form, and it now provides:

(A) Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.

(B) A civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing. S.C.Code Ann. § 15–3–20 (2005).

In 2004, in direct response to the legislative change in section 15–3–20(B), this Court amended Rule 3(a) of the South Carolina Rules of Civil Procedure to read as follows:

(a) Commencement of civil action. A civil action is commenced when the summons and complaint are filed with the clerk of court if:

(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or

(2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

As stated in the official notes to the rule, [the South Carolina Supreme] Court amended Rule 3, SCRCP in 2004 "to reflect the legislative intent expressed in § 15–3–20 as amended

by 2002 S.C. Act No. 281, § 1."

Mims v. Babcock Ctr., Inc., 399 S.C. 341, 732 S.E.2d 395 (S.C. 2012)

The legislative intent in amending §15–3–20(B) in 2002 was to provide a safety net for cases where filing of the summons and complaint occurs near the end of the statute of limitations and service is made after the limitations period has run. The statute and the rule, read together, provide 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. Id.

The Appellant filed the Summons and Complaint in this matter on May 31, 2022, alleging Assault and Battery, Negligence and Gross Negligence against the Respondent for an incident occurring June 1, 2019. COMPLAINT

The statute of limitations for Assault and Battery and for Negligence and Gross Negligence in South Carolina is three years. S.C. Code Ann §§ 15-3-530(5), 15-3-535.

Therefore the Statute of Limitations for all causes of action alleged by the Appellant expired on June 2, 2022, just two days after filing by the Appellant. Thereafter, pursuant to §15-3-20 and Rule 3 S.C.R.Civ.P. the Summons and Complaint were required to be served upon the Respondent within 120 days of filing or, in this case, on or before September 28, 2022. Because the Summons and Complaint was filed within the Statute of Limitations, the question for the Court is whether the respondent was ever properly served on or before September 28, 2022.

The Appellant failed to properly serve the Respondent by emailing the Summons to the respondent's attorney for matters of a criminal nature because the attorney was not authorized to accept service of matters of a civil nature.

There are no provisions in South Carolina Rules or Law which allow emailing to serve as proper service for an initial Summons and Complaint in the absence of voluntary acceptance of service or appearance by a Defendant. Therefore emailing of the Summons to the criminal attorney of the Respondent is insufficient to effect service. This is especially so when the criminal attorney promptly notifies that party attempting service that he is not authorized to accept service. This attempt by the Appellant at service is made further insufficient because the Appellant emailed *only the Summons.*

The plaintiff has the burden to establish that the court has personal jurisdiction over the defendant. Jensen v. Doe, 292 S.C. 592, 358 S.E.2d 148 (Ct.App.1987). The plaintiff need only show compliance with the rules. Roche v. Young Bros., Inc., of Florence, 318 S.C. 207, 456 S.E.2d 897 (1995). When the civil rules on service are followed, there is a presumption of proper service. Id. Rule 4, S.C.R.Civ.P. serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action. Id. Exacting compliance with the rules is not required to effect service of process. Rather, inquiry must be made as to 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. Id.

Moore v. Simpson, 322 S.C. 518, 473 S.E.2d 64 (S.C. App. 1996)

Rule 4 S.C.R.Civ.P. governs the manner of service of the initial pleadings.

> RULE 4. Process
> …
> (d) Summons: Personal Service. The summons and complaint must be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Voluntary appearance by defendant is equivalent to personal service; and written notice of appearance by a party or his attorney shall be effective

> upon mailing, or may be served as provided in this rule. Service shall be made as follows:
>
> (d)(1) Individuals. Upon an individual other than a minor under the age of 14 years or an incompetent person, by delivering a copy of the summons and complaint to him personally 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, or by delivering a copy to an agent authorized by appointment or by law to receive service of process.
>
> …
>
> "(j) Acceptance of Service. No other proof of service shall be required when acceptance of service is acknowledged in writing and signed by the person served or his attorney, and delivered to the person making service. The acknowledgement shall state the place and date service is accepted." S.C. R. Civ. P. 4 Process (South Carolina Rules of Civil Procedure (2022 Edition))
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> S.C. R. Civ. P. 4 Process (South Carolina Rules of Civil Procedure (2022 Edition))

SCRCP 4(d)(1), like its federal counterpart, Rule 4(d)(1) of the Federal Rules of Civil Procedure, provides for service upon an agent only if authorized by appointment or by law. Hamilton v. Davis, 300 S.C. 411, 389 S.E.2d 297 (Ct.App.1990). Actual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process. Id. The courts must look to the circumstances surrounding the relationship and find authority which is either express or implied from the type of relationship between the defendant and the alleged agent. Id. Claims by one to possess authority to receive process or actual acceptance of process by an alleged agent will not necessarily bind the defendant. Rather, there must be evidence the defendant intended to confer such authority. Id. This

provision was intended to cover the situations where an individual *actually appoints an agent* for the purpose of receiving service.

> Moore v. Simpson, 322 S.C. 518, 473 S.E.2d 64 (S.C. App. 1996)(*emphasis added).*

There is no evidence that the Respondent's criminal Attorney was authorized to accept service for the Respondent. To the contrary, the evidence is that Respondent believed that Appellant's process server had contacted him about a matter involving the victim's compensation fund, which is a matter that Respondent's criminal attorney may have handled. (R. pp. 87-88).

At argument, Appellant's counsel, advises that his process server called the Respondent and explained that he had a Summons and Complaint for delivery to him. (P. 45, Paragraph 1st full). The affidavit of Respondent advises that Appellant's process server represented he was with the "victims' fund". (R. pp. 87-88). Respondent denies that Appellant's process server ever explained that he had a civil summons and complaint to serve upon him, therefore he could not have been avoiding service of which he was unaware. (R. pp. 87-88). In contrast the sworn representations of Appellant's counsel, the affidavit of Appellants process server advised that he told the Respondent that he had "legal papers" for him and makes no mention of a Summons and Complaint. (R. pp. 85-86). Besides the self-serving arguments of Appellant's counsel during argument, there is no evidence in the record that the Respondent was ever told of a Summons and Complaint by the Appellant.

The idea that the Respondent did not know that the initial contact by the Appellant was related to a civil matter was reinforced subsequent to the attempts of the Appellant to serve process through the criminal attorney by a voicemail left by the Appellant's process server on the voicemail of the Respondent. (R. p. 8; R. p. 107)

The voicemail, verbatim, is as follows:

> *"Yes, Mr. Dimaggio, this is Steve, we spoke yesterday. Uh, you, uh, you gave me your attorney's information however your attorney does not, or he says he is not your attorney, he doesn't rep you, represent you in any matter. Uh, I need you to call me back as soon as possible or I'll just, ah, have to go up and talk to your, your, your employer or something, so, um I'd like to get this taken care of. This has nothing to do with, um, with uh, criminal charges. So, thank you."*

This voicemail helps to establish several points. First is that Appellant's process server was promptly notified by the criminal attorney that he could not accept service. Second, Appellant's process server advises his contact "this has nothing to do with…criminal charges." A logical reason for him to explain this is that Appellant's process server understood that Respondent had reason to believe that Appellant's previous call to Respondent concerned criminal matters. This lends further credence to Respondent's representation in his affidavit that he believed that the call from Appellant's process server involved a criminal matter. (R. pp. 87-88). Therefore Respondent would not have been on notice of a civil complaint against him.

Given that this series of event occurred September 1st and 2d, the conclusion that any referral of the Appellant's process server by the Respondent to Respondent's criminal attorney was not to accept service of a Summons and Complaint, but was because Respondent genuinely believed that Appellant's contact with him concerned a criminal matter. (R. pp. 8, 87-88, 107). The Respondent cannot seek to avoid what he does not understand to exist.

The Appellant has likewise provided no proof that the Respondent's criminal attorney made a voluntary acceptance.

"No other proof of service shall be required when acceptance of service is acknowledged in writing and signed by the person served or his attorney, and delivered to the person making service" SCRCivP Rule 4(j). No such writing was

delivered or alleged to have been delivered in this case.

Importantly, even if Respondent's criminal attorney was a proper agent for service as a result of authority to accept service, the service by the Respondent would still have been insufficient because it failed to include the Complaint.

Pursuant to Rule 4 S.C.R.Civ.P. "[t]he summons and complaint must be served together. The plaintiff shall furnish the person making service with such copies as are necessary."

The filed Certificate of Service pertaining to Appellant's attempts to serve the Respondent's criminal attorney relates that "[t]he Undersigned certifies that a copy of the Summons was served…". (R. p. 67) The Certificate of service makes no mention of the Complaint. Even the first Motion for publication relates that the Respondent "should be served by publication due to the failure of reasonable attempts to serve the Summons on the [Respondent]." (R. pp. 35-36).

The Appellant has failed to produce any evidence that the Respondent's criminal attorney had express authority to accept service of process in a civil case. A factual issue existed as to whether the Respondent indicated that Respondent's criminal attorney was authorized to accept service. The record is devoid of any written acceptance of service by Respondent's criminal attorney.

The lower Court resolved this factual issue against the Appellants, finding that the Respondent's criminal attorney did not accept service of the Civil Summons and Complaint nor was designated as the agent for the Respondent to accept the Civil Summons and Complaint. (R. pp. 4-13). Because such a finding is supported by the evidence of record, it is binding on this court. There simply is no evidence Respondent intended to confer authority, either express or implied, upon the Respondent's criminal attorney to accept service of process. Because Appellants failed to show compliance with the rules by serving an agent authorized to accept service,

the Order dismissing the Appellants Complaint for failing to properly commence the action should be affirmed.

Moore v. Simpson, 322 S.C. 518, 473 S.E.2d 64 (S.C. App. 1996)

The Appellants further failed to comply with the Rules for service by attempting service via email and by failing to include a copy of the Complaint, in compliance with Rule 4(d) S.C.R.Civ.P.

Last, the Respondent has produced no written document signed by an agent noting the date and time of service and expressly accepting service of the Summons and Complaint, therefore there is no evidence of records of acceptance of service pursuant to Rule 4(j) S.C.R.Civ.P.

For the above reasons, this Court should find that there is evidence in the record to support the decision of the lower Court, that therefore the lower Court did not abuse its discretion and the dismissal of the Appellants complaint should be affirmed.

The Appellant failed to properly commence its civil action against the Respondent by publishing the Summons in a timely manner via publication within the time period established by pursuant to S.C. Code Ann. §15-3-20 and SCRCivP 3(a).

The Appellant concedes in its brief that ALL attempts at service by publication in this case took place only after the expiration of the 120 day time period allowed for service of a Summons and Complaint by SCRCivP 3(a). (Appellant's Initial Brief, Statement of the Case p. 2). The Appellant further argues that publication of the *Order of Publication* instead of the Summons is sufficient, and even superior, notice of the existence of a civil action against the Respondent. Appellant's Initial Brief, p. 21 ll. 7-18). The Appellant also argues that he has a meritorious civil claim and good faith efforts to serve the Respondent by publication should relieve the Appellant of the errors that they made during attempts at service by publication. (Appellant's Initial

Brief p. 23, ll. 4-9).

The Appellant filed a Motion for Publication in this matter on September 9, 2022. (R. pp. 35-36). That Motion did not include affidavits required by §15-9-710 and no action was taken on the Motion by the Court. On September 30, 2022 a second Motion for Publication, this one captioned a "Petition" was filed with the Court by the Appellant. (R. pp. 37-38). September 30, 2022 was the 122d day after filing of the Summons and Complaint, and is two days after the limitations on time for service of process established by §15-2-30 and Rule 3 SCRCivP. The Court granted the Appellant authority to serve the Respondent by Publication in its *Order for Publication* dated October 6, 2022. (R. pp. 17-18). The Appellant then erroneously caused to be published the *Order for Publication* instead of the Summons, as is required by §15-9-740. (R. p. 59 ll. 19-24, p. 84, Appellants Initial Brief, Statement of the Case p.2). Apparently recognizing that the incorrect document was published, the Appellant eventually caused the Summons to be published over the course of three week, with the last day of publication on January 10, 2023. January 10, 2023 was the 224th day after filing of the Summons and Complaint. (R. p. 46, l. 25 to p. 47, l. 6; R. p. 47, ll. 20-22, R. P.90, Paragraph 4).

The Appellant's contention that the publication of the *Order of Publication* should constitute sufficient notice to the Respondent that he was required to answer the Appellant's Complaint is without merit.

> The Rules allow for service by publication,
>
> RULE 4. Process
> …
> (d) Summons: Personal Service.
> …
> Service shall be made as follows:
>
> (d)(1) Individuals.
> …

(d)(7) Statutory Service. *Service upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule is also sufficient if the summons and complaint are served in the manner prescribed by statute*.

S.C. R. Civ. P. 4 Process (South Carolina Rules of Civil Procedure (2022 Edition))*(emphasis added)*

The statutory requirements for service by publication mandate publication of the Summons.

§ 15-9-710. When service by publication may be had

When the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State and (a) that fact appears by affidavit to the satisfaction of the court or judge thereof, the clerk of the court of common pleas, the master, or the probate judge of the county in which the cause is pending and (b) it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made or that he is a proper party to an action relating to real property in this State, the court, judge, clerk, master, or judge of probate may grant an order *that the service be made by the publication of the summons* in any one or more of the following cases:

…

(3) when the defendant is a resident of this State and after a diligent search cannot be found;...

SC Code 15-9-710 When service by publication may be had (South Carolina Code of Laws (2024 Edition)) *(emphasis added)*

Rule 4 allows for service by statute if performed in the manner specified within the statute. § 15-9-710 allows for service made by "publication of the summons."

In the Appellant's first attempt at publication, Appellant did not achieve service utilizing the manner provided for in the statute because he caused to be published the *Order for Publication.*

Exacting compliance with the rules is not required to effect service of process. Roche v. Young Bros., Inc., of Florence, 318 S.C. 207, 456 S.E.2d 897 (1995) at 899. "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." Id. at at 899. A presumption of proper service exists when the rules governing service are followed. Id. at 900 .

BB&T v. Taylor, 633 S.E.2d 501, 369 S.C. 548 (S.C. 2006)

It is not the case that the Courts failure to require exacting compliance means that failure to comply with the Rules isn't necessary. Compliance with the rules creates a presumption of proper service. If a Plaintiff fails to comply, however, service may not be effective. (see BB&T v Taylor, 633 S.E.2d 501, 369 S.C. 548 (S.C. 2006) service was ineffective where occupant of home was present, but would not communicate and process server posted Summon and Complaint on door and called out his intention to deliver the papers. "[M]ore 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[s]..."; "acceptance of service by someone other than addressee is defective where the mail is sent restricted delivery..." Langley v. Graham, 472 S.E.2d 259, 322 S.C. 428 (S.C. App. 1996); Appellants have failed to show sufficient compliance with Rule 4(d)(1) and (3) where they failed to show receptionist was authorized to accept service on behalf of individual or corporate defendant. Moore v. Simpson, 322 S.C. 518, 473 S.E.2d 64 (S.C. App. 1996).

Here, the Appellant failed utterly in its compliance with the Rules by not conducting publication in the manner required by statute. The Appellant published the incorrect document when publication of the Summons was the only method by which service could be achieved.(R. p. 84; R. p 46 ll. 19-24). It further failed to comply with Rule 3 by attempting publication after the time limit provided for service after the Statute of Limitations has run.

The delay in this case falls solely at the feet of the Appellant. The Respondent cannot be blamed for (1) delay in the filing of the Summons and Complaint until 2 days before the Statute of Limitation was to run. (R. pp. 24 to 31), (2) for a 91 day delay in even attempting service AT ALL after filing the Summon and Complaint (R. pp. 85-86), (3) for the failure of the Appellant to attempt personal service more than once at a verified residence (R. pp. 85-86), (4) for the 21 days lost in procuring and Order for Publication due to failure to include the required affidavit with its Motion (September 9 to September 30, 2022) (r. pp 35-38), (5) for an additional 21 days in finally getting a document published by the Greenville News after obtaining the Order of Publication (October 6 to October 27, 2022) (R. p. 84), or (6) for the additional 45 days to correct the publication and publish the Summons (October 27 to January 10) ((R. p. 91, Paragraphs 2, 3). The Respondent further notes that the Appellant still has failed to file proof of service by publication for the time period when it finally published the Summons. The failures of the Appellant in unduly delaying even attempts at service and thereafter failing to comply with the Rules is not excusable in this case.

For the above reasons, this Court should find that there is evidence in the record to support the decision of the lower Court to deny that Service by Publication was ineffective, that therefore the lower Court did not abuse its discretion and the dismissal of the Appellants complaint should be affirmed.

Rule 60 SCRCP, or the doctrine of Equitable Tolling do not apply to extend the time for service and, if the Court finds they do, the Appellant should not be afforded relief where Appellant fails to timely comply with the requirements of S.C. Code Ann. §15-3-20 and SCRCivP 3(a) regarding time for service of process after the running of the applicable Statute of Limitations due to errors solely attributable to the Appellant.

Rule 60 S.C.R.Civ.P

Appellant appears to contend that because the Appellant "exercised good faith efforts" and "diligence" to achieve service and invokes Rule 60 SCRCivP and the doctrine of Equitable Tolling.

The Appellants reliance on Rule 60 is misplaced, as Rule 60 is utilized for relief from a final judgment. Appellant seeks to invoke Rule 60 as an excuse from an acknowledged failures.

> RULE 60. Relief from Judgment or Order
> …
> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect;
> …

However, if the Court determines that Rule 60(b) is an appropriate avenue of potential relief for the Appellant, the Appellant still has not satisfied the requirements of the Rule in order to justify relief.

Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Coleman v. Dunlap, 306 S.C. 491, 494, 413 S.E.2d 15, 17 (1992). The standard of review, therefore, is limited to determining whether there was an abuse of discretion. An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions

that are without evidentiary support. Tri-County Ice & Fuel Co. v. Palmetto Ice Co., 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief. Bowers v. Bowers, 304 S.C. 65, 67, 403 S.E.2d 127, 129 (Ct.App.1991).

The Appellant argues that due to a medical condition of Appellant's counsel, Appellant's counsel placed his trust in his staff to complete service in this matter. He argues that "good faith efforts" and "diligent efforts" were made by the staff but concedes mistakes were made in the process of service.

Appellant has the burden of presenting facts essential to entitle him to relief. The lower Court found that the Appellant made many errors in the course of attempting service of process. They are enumerated in detail in prior argument within the Respondent's brief. *Supra p 22*. Because there is evidentiary support in the record from which the Court could conclude that the Appellant failed to meet that burden, the Court did not abuse its discretion and the refusal of the Court to grant relief to the Appellant pursuant to Rule 60 should be affirmed.

Equitable Tolling

In a similar fashion, the Appellant contends that the Doctrine of Equitable Tolling should have been invoked by the Court to either extend the time for service or to extend the Statute of Limitations.

The Respondent contends that equitable tolling is inapplicable here because, in fact, the Appellant filed the Summons and Complaint in the case within the applicable statute of limitations. To the extent the Court would apply the doctrine to the time allowed for service under Rule 3, the Respondent contends that, under the circumstances of this case, it would be inappropriate.

Equitable tolling is a doctrine rarely applied in South Carolina to stop the running of statutes of limitations. Hooper v. Ebenezer Senior Svcs. and Rehabilitation Ctr., 377 S.C. 217, 230, 659 S.E.2d 213, 219 (Ct.App.2008). "Equitable tolling is reserved for extraordinary circumstances." Id.; see, e.g., Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (stating that while equitable tolling was allowed where claimant actively pursued remedies but filed defective pleading, or was induced by adversary into allowing deadline to pass, "[w]e have generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights."); Pelzer citing Hopkins v. Floyd's Wholesale, 299 S.C. 127, 382 S.E.2d 907 (1989)

The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a *diligent* plaintiff.

Equitable tolling has been deemed available where—

(1) extraordinary circumstances prevented the plaintiff from filing despite his or her diligence; or

(2) the plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory

(3) period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.

(4) the plaintiff, *despite all due diligence*, is unable to obtain vital information bearing on the existence of his or her claim.

51 Am.Jur.2d Limitation of Actions § 174 (2007); see also Hooper, 377 S.C. at 232, 659 S.E.2d at 221. (*emphasis added*).

> [A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation. We believe, therefore, that any resort to equity must be reserved for those rare instances where-*due to circumstances external to the party's own conduct*-it would be unconscionable to enforce the limitation period against the party and gross injustice would result. Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir.2000) (holding habeas petitioner's missing filing deadline due to erroneous advice from counsel not extraordinary circumstance requiring equitable tolling) (*emphasis added*). Pelzer v. State, 662 S.E.2d 618, 378 S.C. 516 (S.C. App. 2008)

The Respondent has previously recited the combined failures of the Appellant to effect service within the rules, failure to comply with Statutory requirements by error or oversight, and failure to proceed with diligence in serving the Respondent after filing suit immediately prior to the expiration of the Statutes of Limitation has compromised the rights of the Appellant to pursue a remedy. *Supra* p. 22 For the same reasons, the Court appropriately denied relief to the Appellant under the Doctrine of Equitable Tolling.

In Hooper v Ebenezer, 659 S.E.2d 213, 377 S.C. 217 (S.C. App. 2008), Hooper brought suit against Ebenezer Senior Services near the time of the running of the Statute of Limitations. Before service was accomplished the Statute of Limitations ran, thus Hooper had 120 days to serve Ebenezer pursuant to Rule 3(a) S.C.R.Civ.P. Hooper discovered that Ebenezer had been purchased by Agape and occupied their facilities. Hooper further discovered that Ebenezer's registered agent

for service had moved from the registered address and then had moved from a subsequent address and his whereabouts were unknown. Having exhausted options for service of the Registered Agent, Hooper, on the 129th day after the filing of the Summons and Complaint, served the administrator of Agape, who advised that she was authorized to accept service on behalf of Ebenezer.

This Court reasoned that Hooper failed to diligently investigate the relationship between Ebenezer and Agape to determine if service could be accomplished at the facility and that this delay caused service to be accomplished nine days after the deadline established by Rule 3(a). The Court found that "[t]he present litigation does not rise to the level necessary for the application of the salutary and salubrious doctrine of equitable tolling. Concomitantly, we refuse to actualize the doctrine of equitable tolling to the relevant statute of limitations in this case." Hooper v. Ebenezer Senior Services, 659 S.E.2d 213, 377 S.C. 217 (S.C. App. 2008).

The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a *diligent* plaintiff. Id.(*emphasis added).*

In this case, the Appellant's delays and errors are of their own making. The record is repleat with evidence of the same.

Because there is evidentiary support in the record from which the Court could conclude that the Appellant failed to proceed diligently, the Court did not abuse its discretion and the refusal of the Court to grant relief to the Appellant and dismissal of the Appellant's action should be affirmed.

CONCLUSION

The Court should conclude that the dismissal of the action by the lower Court

due to failure to properly commence the actions should be affirmed.

The findings that attempts at service upon an attorney not representing the Respondent in this civil matter were insufficient should be affirmed where the attorney did not have actual or implied authority to accept service on behalf of the Respondent, the service attempted was attempted by email and the service only sought to serve the Summons and did not include the Complaint. All these findings were supported evidence in the records from which the lower Court could reasonably conclude the same.

The Court's findings that the attempts at service by publication were insufficient should likewise be affirmed, where the evidence of records supports that the Appellant did not achieve service by publication of the Summons within 120 days of the filing of the Summons and Complaint when service was attempted after the running of the Statute of Limitations. That further the publication of the lower Court's *Order for Publication* does not comply with the rules and does not constitute proper service where the law requires publication of the Summons and mailing of the Summons to the Respondent.

That Rule 60 SCRCP and the doctrine of Equitable Tolling do not apply to extend the time for service under the circumstances of this case and the Appellant should not be afforded relief where Appellant fails to timely comply with the requirements of S.C. Code Ann. §15-3-20 and SCRCivP 3(a) regarding time for service of process after the running of the applicable Statute of Limitations due to errors solely attributable to the Appellant.

The Order of the lower Court dismissing the action for failure to properly commence the same should be affirmed.

Respectfully Submitted

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SC Court of Appeals

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, III ..... Appellant

v.

Michael John Dimaggio ..... Respondent.

CERTIFICATE OF SERVICE

The undersigned on behalf of Moorhead LeFevre, PA, counsel for the Respondent, does hereby certify that the Respondent's Final Brief with corrected caption in the above-captioned matter was sent by electronic mail utilizing the following listed addresses on this the 24th day of March, 2025.

Daniel J. Farnsworth, Jr., Esq.
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and

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March 23, 2025

Via U.S. Mail and AIS Email: ctappfilings@sccourts.org

The South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Ronald C. Cox v. Michael J. Dimaggio
Appellate Case Number: 2023-001497

Dear Clerk of Court:

Enclosed for filing in the above-captioned matter, please find Respondent's Final Brief and a Certificate of Service for same. In this copy of the Final Brief, the caption has been corrected to reflect "Final" brief in stead of "Initial" Brief.

Should you have any questions or if there is anything further that the Court needs, please reach out to our office at your convenience.

Respectfully submitted,

Moorhead LeFevre, PA

J. Kirkman Moorhead, Esq.

cc: Daniel J. Farnsworth, Jr., Esq.
Encls. as Noted

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