THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Case No. 2013-001295

APPEAL FROM OCONEE COUNTY
Hon. R. Lawton McIntosh, Circuit Court Judge

Randolph M. James, P.C., ... Appellant
a North Carolina Professional Corporation

v.

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

FINAL BRIEF OF APPELLANT

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I. STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in ruling that plaintiff did not effect valid service upon the respondent Oconee County prior to the expiration of the statute of limitations for plaintiff's claims?

II. STATEMENT OF THE CASE

Plaintiff filed its complaint on April 3, 2012, alleging negligence on the part of Oconee County in the operation of its airport and asserting tort claims governed by the South Carolina Tort Claims Act [R. pp. 27-43, summons at R. p. 44]. Plaintiff's process server Tony Finley executed a return of service upon the Clerk of the Oconee County Council, Ms. Elizabeth Hulse, on May 11, 2012 [R., p. 49-50].

As indicated by Mr. Finley's Affidavit of Service and his subsequent Affidavit of August 28, 2012 [R. p. 53-54], Mr. Finley went to the office of Ms. Hulse and was advised that she was not present. Mr. Finley then left the complaint and summons with Mr. D. Glenn Breed, the Assistant Administrator for Oconee County [R., p. 54, ¶ 8], who was the only person in the county office [R., p. 206, lines 9-10]. It is disputed whether Mr. Finley advised Mr. Breed that the papers were a summons and complaint [R., p. 206, lines 11-18; Affidavit of Tony Finley, R., p. 54, ¶¶ 7 and 8]. It is undisputed, however, that Mr. Breed was above the age of 18 years [R., p. 208, lines 8-9] and did, in fact, deliver the summons and complaint to Ms. Hulse that same day upon her return to the office [R., p. 208, lines 3-7].

Oconee County moved on May 2, 2012 to dismiss plaintiff's complaint on the basis of insufficient service of process [R., pp. 45-48], contending

that the service of the complaint and summons upon Mr. Breed and his subsequent delivery of the complaint and summons to Ms. Hulse did not comply with Rule 4(d)(6) SCRCP.

A hearing was held on the motion for September 4, 2012 before the Hon. Alexander S. Macaulay, Circuit Court Judge [R. pp. 184-232]. In the course of that hearing, the defendant presented witnesses, including Mr. D. Glenn Breed and the Court received the arguments of counsel. Judge Macaulay indicated his intention to grant the defendant's motion at the conclusion of the September 4, 2012 hearing [R. p. 228, lines 17-23].

Plaintiff then filed and served an amended complaint [R. pp. 134-151. Defendant filed a second motion to dismiss with prejudice on September 17, 2012 [R., pp. 161-163] and, on November 1, 2012, filed a motion to consolidate its prior motion to dismiss with the second motion on November 1, 2012 [R. p. 175]. Judge Macaulay granted the motion to consolidate the two motions on November 2, 2012 [R. p. 3] and a hearing was set for December 11, 2012. The Hon. R. Lawton McIntosh, Circuit Court Judge, presided over the December 11, 2012 hearing [R. pp. 233-252] and on December 11, 2012, issued a summary order dismissing plaintiff's action with prejudice [R. pp. 21-22] and directing the defendant's counsel to prepare a proposed order for submission after review by plaintiff's counsel

[R. p. 21]. Judge McIntosh's order [R. pp. 4-20] was signed March 25, 2013 [R. p. 20] and filed April 5, 2013 [R. p. 2].

On April 22, 2013, plaintiff moved for reconsideration of Judge McIntosh's order [R. p. 174, supporting Memorandum R. p. 175-181]. Judge McIntosh denied plaintiff's motion without argument on May 7, 2013 [R. pp. 25-26] and plaintiff filed its Notice of Appeal on May 29, 2013 [R. pp. 182-183].

III. ARGUMENT

A. Service was timely effected upon Oconee County by delivery of the summons and complaint to Ms. Elizabeth Hulse by Mr. D. Glenn Breed.

South Carolina courts have long recognized that the principal purpose of service of process is to place the party served on notice of an action against that party:

> 'The chief object of service of process is to give notice to the party served of the proceeding against him.' *McSwain v. Grain & Provision Co.,* 93 S.C. 114, 76 S.E. 122, Ann. Cas. 1914D, 991.

Bass v. American Products Export & Import Corp., 124 S.C. 346, 117 S.E. 594, 596 (S.C. 1923). This principle has more recently been affirmed in *Burris Chemical, Inc. v. Daniel Construction Co.,* 251 S.C. 483, 163 S.E.2d 618 (1968) and in *Mull v. Ridgeland Realty, LLC,* 387 S.C. 479, 693 S.E.2d 27 (2010). In *Mull,* service of process on a foreign corporation was sent by certified mail, restricted delivery, to the corporation's registered agent at the South Carolina address shown in the records of South Carolina Secretary of State. The registered agent did not, in fact, reside at that address but instead resided in New York. A receptionist at the South Carolina address signed for the certified mail delivery. Similar service was sent to the registered agent's correct New York address and that receipt was signed by the registered agent. The registered agent acknowledged receipt of process but

no answer was filed for the defendant. Plaintiff obtained a default judgment which the defendant then moved to set aside. Holding that the service of process was sufficient, the Court observed:

> Thus, the principal object of service was achieved in this case because the service was sufficient to put Sgambetterra [the registered agent]—and, by extension, Ridgeland Realty [the corporate defendant]—on notice of Mull's claim.

Id. at 31. This holding is consistent with the statement of the Court in *Roche. v. Young Bros., Inc., of Florence,* 318 S.C. 207, 456 S.E.2d 897, 900 (1995):

> Rule 4, SCRCP serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action. 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.

While 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 (1987), personal service of process "should not become a game of wiles and tricks." *BB & T v. Taylor,* 369 S.C. 548, 633 S.E.2d 501, 504 (2006) citing 62B Am. Jur.2d *Process* § 190 (2005).

Plaintiff submits that delivery of the summons and complaint by Mr. Breed to Ms. Hulse effected valid service upon Oconee County. The

relevant facts demonstrate as follows:

- Mr. Glenn Breed is a natural person over the age of 18 years [R., p. 208, lines 8-9].
- Mr. Breed is not a party to or an attorney in the civil action at issue [R. pp. 27-43, R. p. 44].
- Mr. Breed accepted the summons and complaint from plaintiff's process server [R. p. 207, line 24 – p. 208, line 2].
- Mr. Breed delivered the summons and complaint to Ms. Hulse later that same day [R. p. 208, lines 3-7].
- Defense counsel thereafter appeared for Oconee County and vigorously defended this civil action [R. pp. 45-48].
- The summons delivered to Ms. Hulse was signed by plaintiff's attorney and otherwise was correct in form and content [R. p. 44].
- Both the summons and complaint were delivered together to Ms. Hulse by Mr. Breed [R. p. 208, lines 3-7].

Rule 4 of the South Carolina Rules of Civil Procedure governs service of process in civil actions. Rule 4(a) SCRCP governs issuance of a summons and the record demonstrates that plaintiff complied with this portion of the Rule. Rule 4(b) SCRCP governs the form of a summons and the record

demonstrates plaintiff's compliance with this portion of the Rule. The relevant portion of Rule 4(c) SCRCP specifies who may serve a summons:

> (c) **By Whom Served**. Service of summons may be made by the sheriff, his deputy, or by any other person not less than 18 years of age, not an attorney in or a party to the action. . .

Mr. Breed is unequivocally within the class of persons who can legally effect service of a summons and complaint.

Rule 4(d)(6) SCRCP specifies that service upon a governmental subdivision is made "by delivering a copy of the summons and complaint to the chief executive officer[1] or clerk thereof . . ." The only evidence of record shows without contest that a copy of the summons and complaint was, in fact, promptly delivered by Mr. Breed to Ms. Hulse, the Clerk of the County Council.

It is noteworthy to examine what is ***not*** required by Rule 4. The person effecting delivery of a summons and complaint to a county council's clerk is not required to be retained by, or even knowingly acting on behalf of, the plaintiff. There is no formula of language that must accompany delivery of

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[1] As argued before Judge Macaulay [R. p. 196, line 18 – p. 198, line 3] in the September 4, hearing, service upon the "chief executive officer" of Oconee County is problematic, in that there is no position or individual in the council administrator form of government who by virtue of statute or ordinance is designated the "chief executive officer." Unlike the Council Manager form of government authorized for municipalities in South Carolina under S.C. Code Ann. § 5-13-10 *et seq.*, which **does** specifically designate a "chief executive officer" for that form of government, S.C. Code Ann. § 4-9-620 *et seq.* only designates a "chief administrative officer" and makes no reference to a "chief executive officer." Defendant respondent and Judge Macaulay apparently assumed that the "chief administrative officer" was the equivalent of the "chief executive officer" but there is no precedent or statutory authority to support that assumption.

a summons and complaint. There is no requirement that the person delivering the summons and complaint even be aware that he or she is doing so. There is no requirement that the summons and complaint pass directly from a single person to the person being served. All that is required with respect to governmental subdivisions such as a county is "delivery" of the summons and complaint to the council's clerk. Mr. Breed may not have known or intended that he was serving process upon Mrs. Hulse, but that does not alter the literal fact that the summons and complaint was "delivered" to Ms. Hulse and thereby placed Oconee County on notice of the action against it.

Respondent offered no evidence below to dispute the evidence of literal compliance with Rule 4(d)(6) SCRCP as described above. Instead, respondent argued for imposition of additional conditions that are not contained in the Rule, *i.e.,* that once the process papers left the hands of the process server retained by plaintiff and went into the hands of Mr. Breed, whatever "service" was to take place had irrevocably occurred.

Plaintiff submits that the language of Rule 4, which has the force and effect of statute, should be interpreted in the same manner as other statutes enacted by the South Carolina legislature. "The primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature,"

Gilstrap v. South Carolina Budget and Control Bd., 310 S.C. 210, 213 (1992). "If the statute is ambiguous, . . . courts must construe the terms of the statute." *Town of Mt. Pleasant v. Roberts,* 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). "A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design and policy of lawmakers. In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose." *Id.* "Where the statute's language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and **the court has no right to impose another meaning.**" *Gay v. Ariail,* 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009) (Emphasis supplied). The cardinal rule of statutory construction is that words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation." [Citations omitted.] *Hitachi Data Systems Corp. v. Leatherman,* 309 S.C. 174, 420 S.E.2d 843, 846 (1992).

Rule 4 SCRCP is unambiguous as to who can be a process server and attaches no special conditions on the mode or manner of "delivery." Plaintiff appellant has literally complied with the requirements of Rule 4 SCRCP by effecting delivery of the summons and complaint to Ms. Hulse.

Respondent argued below that this interpretation of Rule 4 SCRCP would overrule long-standing precedent regarding service of process, but appellant respectfully disagrees with that contention. This is not a matter in which service was effected by shoving papers under the door of a closed office, as was the case in *Seubert v. Buchanan*, 250 S.C. 140, 156 S.E.2d 632 (1967). This is not a matter in which the defendant has been subjected to a default judgment after process was never delivered to the party to be served, as was the case in *Hamilton v. Davis,* 300 S.C. 411, 389 S.E.2d 297, 298 (1990). This is not a matter in which the defendant went into default by failing to respond to the complaint after receiving process, as was the case in *Myrtle Beach Lumber Co., Inc. v. Globe International Corp.,* 281 S.C. 290, 315 S.E.2d 142 (1984).

This is not a matter that involves speculation on the part of the process server about who received the service of process, as was the case in *BB & T v. Taylor,* 369 S.C. 548, 633 S.E.2d 501 (2006). This is not a matter in which the party to whom the process was required to be delivered has no recollection or knowledge of receiving the process, as was the case in *Moore v. Simpson,* 322 S.C. 518, 473 S.E.2d 64 (1996). The interpretation urged by plaintiff comes into play only when (1) the summons and complaint is promptly delivered to the intended recipient, (2) there is no dispute as to

receipt of the summons and complaint, (3) there is no absence of memory as to if or when the process was received and (4) there is no prejudice to the party served in terms of making a timely response to the summons and complaint. In short, the interpretation by plaintiff only comes into play when all of the principal objects of service of process, as enunciated by the South Carolina courts for almost one hundred years, have been fulfilled and this interpretation does not undermine any South Carolina precedent concerning service of process.

Respondent's argument is essentially that, because appellant's process server Tony Finley did not personally and directly place the summons and complaint into Ms. Hulse's hands, but instead acceded to Mr. Breed's offer to give them to her when she returned to the office, service was ineffective and no "delivery" to Ms. Hulse took place. In respondent's view, it does not matter how fully and promptly Ms. Hulse and Oconee County received notice of the action and it does not matter that the only conceivable prejudice that could be suffered by Oconee County would be having to defend the action on the merits instead of technicalities.

Appellant submits that Judge McIntosh erred when he concluded that the delivery of the summons and complaint to Ms. Hulse did not effect valid service and further concluded that, because no service was effected within

the statute of limitations for plaintiff's tort claims, the action should be dismissed with prejudice. The ruling below exalts form over substance and ignores the undisputed fact that the principal object of service was, in fact, fully accomplished by plaintiff and that Oconee County received full and prompt notice of the action against it. Therefore, the ruling of the court below should be reversed and this matter should be remanded to proceed on its merits.

B. Mr. D. Glenn Breed had apparent authority to accept service of the summons and complaint.

Plaintiff appellant also contends that, whether on behalf of Ms. Hulse or on behalf of Mr. Scott Moulder, the Chief Administrative Officer of Oconee County (assuming for purposes of argument that Mr. Moulder was the "chief executive officer" for Oconee County), Mr. D. Glenn Breed has apparent authority to accept service of the summons and complaint from the process server. Mr. Breed is the Assistant County Administrator for Oconee County [R. p. 205, lines 2-6]. Respondent argued below that, because Mr. Breed was not specifically authorized to receive service of process by Ms. Hulse or Mr. Moulder or by statute, no service upon him could be effective.

As noted above, Mr. Breed was the only person in the county offices when Mr. Finley arrived to serve process on Ms. Hulse [R. p. 206, lines 9-10]. This is a factor that has been given importance in at least one South

Carolina decision involving service of process upon corporations. *See, e.g., Richardson v. P.V., Inc.,* 383 S.C. 610, 682 S.E.2d 263, 265 (2009) (" . . . Cruel was the only employee present, which represented to third parties that she was in charge.").

Mr. Breed, as Assistant County Administrator, certainly has more authority and discretion than a secretary or receptionist (the recipient of service in *Moore v. Simpson,* 322 S.C. 518, 473 S.E.2d 64 (1996)) or a clerical employee (the recipient of service in *Roberson v. Southern Finance of South Carolina, Inc.,* 365 S.C. 6, 615 S.E.2d 112 (2005)). "An agent's high level of actual or apparent responsibility suffices to permit service to be effective as against the principal," *Graham Law Firm, P.A. v. Makawi,* 396 S.C. 290, 721 S.E.2d 430, 433 (2012). In *Burris Chemical, Inc. v. Daniel Construction Co.,* 251 S.C. 483, 163 S.E.2d 618 (1968), the Supreme Court of South Carolina held that an acting general superintendent on a construction site who was in charge of fifteen men was an agent upon whom service upon a corporation could be made, observing:

> It cannot be logically argued that the superintendent in charge of all the remaining employees at a project of this magnitude is not such a representative of the corporation as contemplated by the legislature to apprise the corporation that an action had been commenced. . . . The service could reasonably be expected to result in prompt notice to the corporation with adequate opportunity to defend.

Id. at 620. *See also Richardson v. P.V., Inc.*, 383 S.C. 610, 682 S.E.2d 263, 265 (2009):

> In the instant case, even if Cruel [the desk clerk] did not have actual authority, we find that she had apparent authority to accept service of process. When Asbill [the process server] initially entered the hotel's office, Cruel was the only employee present, which represented to third parties that she was in charge.

While the text of Rule 4(d)(3) SCRCP governing service upon corporations differs from that of Rule 4(d)(6) SCRCP, Rule 4(d)(3) makes no reference to agents with "apparent authority." South Carolina courts, as demonstrated by the cases cited in the paragraph above, have found that service was effective upon persons who appeared to have authority for the corporation, even though such persons with apparent authority were not in the list of specifically "authorized" persons under the Rule.

There would not appear to be any reason that the Assistant County Administrator, when the only person in the county office, would not apparently be representing to persons coming to the office that he was in charge. The likelihood of the Assistant County Administrator promptly forwarding service of process to the appropriate county officials and counsel would seem to be as high or higher than the likelihood of a construction foreman promptly forwarding service of process to the corporation that employed him.

Unless there is some statutory or policy reason that service effected in suits against counties should be held to a stricter standard that for service in suits against corporations (and appellant has found no such reason in its research), appellant submits that when Mr. Glenn Breed accepted the service documents from appellant's process server, he had apparent authority to accept that process and Oconee County was thus effectively served. Accordingly, appellant submits again that the ruling of the court below was in error and that this action should be remanded to proceed on the merits.

IV. Conclusion

Oconee County was fully and promptly placed on notice of the action against it when the county's Assistant County Administrator received the process documents from appellant's process server and delivered them to the County Council's Clerk Ms. Elizabeth Hulse. Oconee County has not been denied due process in any manner because of the means of service effected. It is uncontested that Ms. Hulse received the summons and complaint and it is abundantly obvious from the record that Oconee County was able to appear and defend itself through counsel.

Appellant complied with the literal terms of Rule 4(d)(6) SCRCP by effecting delivery of the summons and complaint to Ms. Hulse. It is only when additional requirements beyond delivery of the summons and

complaint by a competent individual are imposed by ". . .subtle or forced construction to limit or expand its operation" (as was disapproved for statutory construction in *Hitachi Data Systems Corp. v. Leatherman,* 309 S.C. 174, 420 S.E.2d 843, 846 (1992)) that any colorable argument arises that the service in this matter was insufficient.

In *Patel v. Southern Brokers,* 277 S.C. 490, 289 S.E.2d 642, 645 (1982), the South Carolina Supreme Court stated that "[t]his Court has consistently overruled technical objections to service of process where the defendant has not been denied due process." In *McCall v. IKON d/b/a IKON Educational Services,* 363 S.C. 646, 611 S.E.2d 315, 317 (2005), the South Carolina Court of Appeals noted with approval the Supreme Court's statement that "[w]e have never required exacting compliance with the rules to effect service of process." The *McCall* court went on to observe:

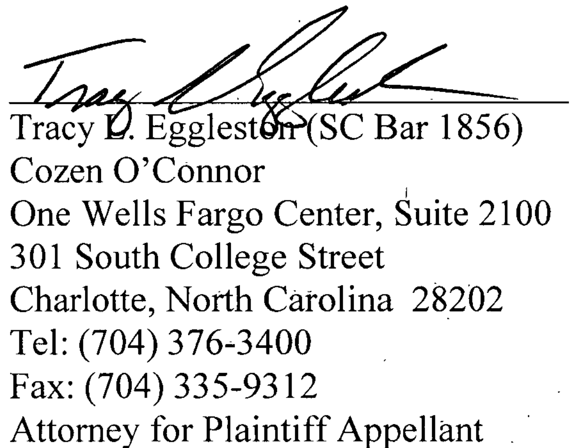
> A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court. If it names them in such terms that every intelligent person understands who is meant, as is the case here, it has fulfilled its purpose; and courts should not put themselves in the position of failing to recognize what is apparent to everyone else.

Id. at 318.

Appellant asks this Court to recognize that what is apparent from the record—that Oconee County received full and prompt notice of the suit

against it, that Oconee County was not denied due process in any manner and that Oconee County has not been prejudiced in its defense in any way. For these reasons, appellant submits that the ruling of the court below that service of process on Oconee County was insufficient should be reversed and that this matter should be remanded to the Circuit Court of Oconee County to proceed on its merits.

Respectfully submitted this 8th day of October, 2013.



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CERTIFICATE OF SERVICE

I herewith certify that a copy of the foregoing **FINAL BRIEF OF APPELLANT** has been served upon all counsel this 8th day of October, 2013 via electronic mail and by mailing a copy of same, first class postage pre-paid, in an envelope addressed as follows:

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CERTIFICATE OF CONTENT

This is to certify that Appellant's Final Brief is identical to the brief previously served under Appellate Court Rule 208 with the exception of adding references to the record and correction of typographical errors and/or misspellings.

DATED this 8th day of October, 2013.

Tracy L. Eggleston

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