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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

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

Appellate Case No. 2023-001360

Taylor Chasey Robertson,

Appellant,

v.

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

Respondents.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN DISMISSING THE CASE AGAINST RESPONDENTS SOUTH CAROLINA DEPARTMENT OF PUBLIC SAFETY ("SCDPS") AND SOUTH CAROLINA HIGHWAY PATROL ("SCHP") BY FINDING THAT SERVICE OF PROCESS MADE UPON THE SAME WAS NOT PROPER, AND THUS NOT TIMELY COMMENCED?

2. DID THE TRIAL COURT ERR IN FINDING THAT RESPONDENT GOSHORN HAD IMMUNITY UNDER THE SOUTH CAROLINA TORT CLAIMS ACT, AND UPON MAKING THAT FINDING, DID THE TRIAL COURT ERR BY DISMISSING THE CLAIMS AGAINST HIM?

STATEMENT OF THE CASE

This case arises out of a stop and arrest which occurred at approximately 2:00 AM on May 9, 2020, in Spartanburg, South Carolina. Trooper Patrick Goshorn, an employee of Respondents SCDPS and SCHP, arrested Appellant Robertson for driving under the influence. However, Ms. Robertson was not impaired, and breathalyzer analysis performed by the Datamaster machine demonstrated that Ms. Robertson had a 0.01 Blood Alcohol Content ("BAC"). Per SC Code 56-5-2930, an individual is conclusively presumed not under the influence of alcohol if they provide a sample of .05% or less. Ms. Robertson was then "un-arrested", released, and left to fend for herself without her car (which had been impounded), in the cold, shortly after 3:00 AM. (Sum. and Compl., R. p. 26).

On May 9, 2022, Taylor Chasey Robertson brought this action alleging Negligence, Gross Negligence, SC Tort Claims Act violations, False Imprisonment, Malicious Prosecution, Abuse of Process, and Outrage against the South Carolina Department of Public Safety ("SCDPS"), and the South Carolina Highway Patrol ("SCHP") (collectively "SCDPS"), and Trooper Patrick J. Goshorn. (Sum. and Compl., R. pp. 20-35).

Counsel for Respondents, Russell Harter, timely Answered the Summons and Complaint

on October 6, 2022. (Answer, R. pp. 36-43). Hours before filing the Answer, Attorney Harter also filed a 12(b) Motion to Dismiss with exhibits and a Motion to Dismiss pursuant to S.C. Code Ann. § 15-78-60 and § 15-78-70 as to Respondent Goshorn. (DEFs' Rule 12(b) Motion to Dismiss, R. pp. 44-50; DEFs' Motion to Dismiss pursuant to § 15-78-60, 70, R. pp. 51-52). The basis for the first 12(b) Motion was that Respondent SCDPS alleged that service upon the agency was not accomplished in a timely fashion. The basis for the other Motion to Dismiss was that Respondent Goshorn was immune under the South Carolina Tort Claims Act.

Respondents' Motions were heard by the Honorable J. Derham Cole on February 23, 2023. During the hearing, Appellant agreed to dismiss certain causes of action against Trooper Goshorn, *to wit*, Negligent Training/Supervision/Retention, Outrage, and Gross Negligence/Recklessness.

On March 21, 2023, a Form 4 Order was filed by the Court granting all of Respondents' Motions, with a directive to the Respondents' attorney to prepare and submit a proposed formal order for the Court's consideration. (Form 4 Order granting DEFs' Motions to Dismiss, R. pp. 1-4). On May 24, 2023, but still prior to Respondents submitting a proposed order per the trial court judge's directive, Appellant filed a Motion for Reconsideration (PLT's Motion for Recon. of Form 4 Order, R. pp. 55-185). A few days later, Respondents filed a Proposed Order which was signed by Judge Cole on June 27, 2023 and dismissed the entirety of Appellant's case. (Formal Order granting DEFs' Motions to Dismiss, R. pp. 5-13). On June 30, 2023, Appellant filed an Amended Motion to Reconsider of the June 27, 2023, Order. (PLT's Amended Motion for Recon., R. pp. 186-374). The Motion to Reconsider was heard on August 14, 2023.

On August 16, 2023, Judge Cole denied Appellant's Motion. (Form 4 Order denying PLT's Motion for Recon., R. pp. 14-17). On August 25, 2023, Appellant served the Notice of

Appeal on the Respondents.

ARGUMENTS

I. THE TRIAL COURT ERRED IN DISMISSING THE APPELLANT'S CASE AGAINST THE SCDPS AND SCHP, BECAUSE IT FAILED TO ANALYZE WHETHER OR NOT SERVICE OF PROCESS WAS PROPER UNDER THE CORRECT RULES.

A. Standard of Review & Applicable Law—Rule 4(d)(5) & Sufficient Compliance

"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 when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 607, 681 S.E.2d 885, 888 (2009).

Failure to apply the correct rules to an analysis constitutes an error of law. In the present case, the trial court applied the wrong rules when analyzing whether or not service of process on the SCDPS/SCHP was proper. Had the trial court applied the correct rules and supporting case law to its analysis, then it would have likely found that service of process was proper, or in the alternative, that the service of process sufficiently complied with the rules. Accordingly, the case against the SCDPS and the SCHP should not have been dismissed.

Rule 3(a), SCRCP allows for a summons and complaint to be served within 120 days of filing, if not served within the statute of limitations. There is no dispute that the service of process at the heart of this discussion occurred within 120 days of the filing of the summons and complaint. Accordingly, if the Court of Appeals determines that said service of process was in fact proper, then the case will have timely commenced.

The SCDPS and the SCHP are state agencies. Service on a state agency is governed by Rule 4(d)(5) and that rule is controlling in the present case. It says:

> [Service shall be made] upon an officer or agency of the State by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

In contrast, Rule 4(d)(3) SCRCP applies specifically to Corporations and Partnerships. *To wit*:

> Upon a corporation or upon a partnership or other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant.

However, in the present case, the trial court cited Rule 4(d)(3) and appears to have analyzed it as a sort of piggyback to Rule 4(d)(5):

> Rule 4(d) provides that when a state agency is a defendant that service is made by delivering the Summons and Complaint to the officer or agency in keeping with Rule (d)(3), which provides that the Summons and Complaint be served to an officer, a managing or general agent, or an agent authorized by appointment of law to receive service of process. [sic]. (Formal Order of June 27, 2023, R. p. 8).

The only way 4(d)(3) would have any bearing on a State Agency would be if said agency was a corporation—which the SCDPS is not. Accordingly, the alleged improper service should have been analyzed under 4(d)(5), in conjunction with the spirit of 4(d) generally, pursuant to South Carolina common law—in other words: sufficient compliance. Such an analysis would have led to a finding that service was proper.

B. Rule 4(d)(5) – Serving the SC Attorney General

Addressing the second part of the rule first, Rule 4(5)(d) requires service be made upon not just the state agency being sued, but also the SC Attorney General. Appellant indisputably

served the Attorney General's office. The Attorney General is the State's Chief Legal Officer and the individual in state government who is responsible for guiding and arranging for the defense of State agencies facing litigation. Despite the specific method indicated by the Rule as being by certified mail, service was accomplished by personal service as the time remaining to serve the Summons and Complaint was nearly expired. In the interest of ensuring service would definitively arrive at its intended destination on time, and rather than rely on the postal service to deliver something AND ensure the certified mail process is correctly handled, Appellant chose to serve the Attorney General's office in a manner most likely to be successful—and at a significantly greater burden and higher cost than certified mail. Additionally, it does not appear that Respondent has refuted that the Attorney General's office was properly and timely served.

Arguably, serving the Attorney General's office is more important than serving the state agency itself. The trial court's analysis and interpretation of the service of process rules turns the relationship between the Attorney General and state agencies upside down. The Attorney General is (obviously) the State's Chief Legal Officer. South Carolina law charges him or her with the duty to defend public officers and employees in civil actions (S.C. Code § 1-7-50) and coordinate with Solicitors to provide for the representation of State institutions, and agencies with respect to civil proceedings (S.C. Code § 1-7-350). The agencies themselves cannot even hire counsel to represent the agency or as an employee without the Attorney General's approval. S.C. Code § 1-7-160, 170. (emphasis added). Read in light of this reality, it is evident that the drafters of the Rule wanted to make sure that the State's Chief Legal Officer (the one with the power, authority, and responsibility to actually do something in response to the Summons and Complaint) received notice of any lawsuits against state agencies, thus the requirement that a plaintiff be able to verify service on the attorney general by certified mail.

But as to the agency itself, it can be argued that Rule 4(d)(5) says, in effect, to make sure the Attorney General is definitively served—and be sure to provide a courtesy copy to the state agency too. This is supported by the DC Circuit case, *Morrissey v. Mayorkas*, which discusses the federal rule that South Carolina's Rule 4(d)(5) was patterned after. The case states:

> Because federal agencies are generally represented by the Department of Justice in litigation, the specific requirements for service on the United States provide notice to the officials who will be litigating the claims. (Cf *Light v. Wolf*, 816 F.2d 746, 750 (D.C. Cir. 1987). Rule 4's requirement to serve the Attorney General, the head of the Department of Justice, as well as the relevant U.S. Attorney, the local component of the Department, ensures the Department has notice and is able to provide a defense consistent with the broader goals of the government.").

17 F.4th 1150, 1156 (D.C. Cir. 2021).

While plaintiffs certainly are not free to ignore the agency "delivery" requirement of Rule 4(d)(5), which Appellant here did not do, the most important component of Rule 4(d)(5) service is easily the requirement of service on the Attorney General. Accordingly, and as the Rule reads, the agency "delivery" requirement is nearly an afterthought. And understandably so, given the legal structure of the rights and responsibilities of the relationship.

C. Rule 4(d)(5) – Delivering a Copy to an Agency of the State

i. Delivery occurred

As to the first part of Rule 4(d)(5), Appellant unquestionably "delivered" a copy of the summons and complaint to the physical address listed publicly by the SCDPS. Appellant's process server delivered the Summons and Complaint to 10311 Wilson Blvd., Blythewood, SC 29016. (Affidavit of Personal Service on SCDPS/SCHP, R. pp. 438, 440-441). Respondent SCDPS has this address displayed on the frontpage of its website, located at https://scdps.sc.gov/. (Frontpage of SCDPS Website, R. pp. 430-433). Additionally, SCDPS specifically notes this as its "Street Address" on its Contact Us page, located at

https://scdps.sc.gov/about/contact. (Contact Us page of SCDPS website, R. p. 434). Once inside the building, there is what appears to be a common front desk—a common gatekeeper so to say—without designation as to which agency controls it. Appellant's process server provided an affidavit (that was submitted to the Court and opposing counsel prior to both the Order granting dismissal and the Order denying reconsideration) where he states that he went to the specific physical address listed by the SCDPS on its public, official website. (Affidavit of Jamahl Spratley, R. p. 462). It was not apparent to him that the same specific address was also shared by other state agencies. He entered the building, went to the front desk, informed the person at the front desk that he was there to serve the SCDPS, and was informed by the person at the front desk that she could accept the documents he was serving.

Additionally, the simple fact that the SCDPS timely filed an answer in this case is evidence that the agency was delivered a copy of the lawsuit.

ii. 4(d)(5) does not specify "who" may accept service on a state agency

The Order granting dismissal relies on the affidavit of Diana Brown (Affidavit of Diana Brown, R. pp. 442-443), who is the Human Resource Operations Manager of the South Carolina Department of Public Safety. The affidavit states, in part:

> The Department and the Patrol have designated employees who are authorized to accept service of process on their behalf. These employees change over time as employees and roles change. However, in order for any employee to accept service on behalf of the Department or the Patrol, the individual must be employed by the Department or the Patrol.

The affidavit also indicates that the person that signed for the summons and complaint, Candace Horton, was not an employee of either the South Carolina Department of Public Safety or the South Carolina Highway Patrol, and that Horton was never authorized to accept service on behalf of either the Department or the agency. While Appellant recognizes that one cannot serve

any random state employee and then claim that a specific agency has been served, the facts of this particular case would not warrant such a lazy counterargument.

A simple search of "service of process" within the SCDPS website has only one page[1] (SCDPS webpage re: Service of Process, R. pp. 435-436) with any information on service of process that is remotely substantive, and even that is limited. It simply says that one "may serve" the Office of the General Counsel, with no other guidance or the names of the so-called "designated employees" who are authorized to accept service of process. Perhaps most striking about the website's service directions is that the address specifically provided is a Post Office Box—which does not allow for personal service.

The SCDPS website's directions notwithstanding, Brown's affidavit stating that "designated employees who are authorized to accept service of process on (the department's) behalf" is unreasonably restrictive and inconsistent with the requirements set forth by 4(d)(5). Further, Rule 4(d) and its subparts, when viewed together, actually provide some level of clarity. Specifically, there are multiple subdivisions of Rule 4(d) (including 4(d)(3)) that do indicate who may accept service on behalf of the respective persons and/or entities:

- Rule 4(d)(1) allows service to be made upon an **individual** by leaving copies "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***." (emphasis added).

- Rule 4(d)(3) allows service to be made upon a **corporation or partnership** by delivering a copy of the summons and complaint "to an officer, a managing or general agent, or ***to any other agent authorized by appointment or by law to receive service of process*** . . ." (emphasis added).

- Rule 4(d)(4) allows service to be made upon **the State of South Carolina** by delivering a copy of the summons and complaint "to the Attorney General, or

[1] https://scdps.sc.gov/general-counsel/subpoenas

when another official is designated to be served by the statute permitting such action by delivering a copy of the summons and complaint to that official . . ." (emphasis added).

- Rule 4(d)(6) allows service to be made upon a **Governmental Subdivision (e.g., municipal corporation, county, etc.)** 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 . . ." (emphasis added).

To contrast the rules of personal service between the subdivisions above and Rule 4(d)(5), the full text of Rule 4(d)(5) is, once again, as follows:

> SCRCP 4(d)(5) State Officer or Agency: [Service shall be made] upon an officer or agency of the State by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

To minimize confusion, let's remove the parts of this rule pertaining to a State Officer (as this is not at issue), the section pertaining to service on the Attorney General (as this was previously addressed), and the last sentence—as the SCDPS is not a corporation:

> [Service shall be made] upon an . . . agency of the State by delivering a copy of the summons and complaint to such . . . agency [].

Contrary to the trial court's decision, there is nothing about Rule 4(d)(5) or its "plain language" that indicates how a state agency may be served (but the subdivisions listed above do indicate as much)—nor does it discuss merging it with another subpart. It also doesn't say what types of delivery are sufficient (or alternatively insufficient) to effectuate service. Further, interpreting Rule 4(d)(5) as a limitation that requires service on an agency to be made upon "designated employees who are authorized to accept service of process on (the department's) behalf" is inconsistent with the other subdivisions of Rule 4(d). In other words, the drafters in the

state legislature would have included with specificity the manner(s) in which service could be made. At least in regard to Rule 4(d)(5), if only one manner of service were acceptable (i.e., *upon designated employees who are authorized to accept service of process on (the agency's) behalf*), the legislature would have said so, just as they did in above subdivisions?[2]

iii. 4(d)(5)-related Case Law—Not Precedential & Not Decided Correctly

Perhaps the case most often used to support the same findings as the trial court is the federal court case *Maybin v. Northside Correctional Center,* 891 F.2d 72, 73-4 (4th Cir. 1989). However, *Maybin* is of dubious value. In *Maybin*, Plaintiff sued her employer, which was a state agency, for discrimination. She served the attorney general of SC by mail pursuant to Rule 4(d)(5). As to the requirement that plaintiff deliver a copy of the summons and complaint to the agency, the opinion reports that the plaintiff served a particular "caseworker" at the facility. The case does not say how the caseworker was served and the Fourth Circuit's sole treatment of this issue in its opinion declared that Plaintiff's attempted service upon the caseworker was not effective service upon the agency. "Service to an agency is not legally obtained unless such service is made upon a person of suitable position and discretion within the agency," the Fourth Circuit said. *Maybin* cited state court case *Jensen v. Doe*, 292 S.C. 592, 358 S.E.2d 148 (S.C.Ct.App.1987), in support of that statement.

It bears noting at the outset that *Jensen* doesn't even say what *Maybin* said it says. In fact, whereas the issue in *Maybin* was whether service on the individual employee was effective service on the agency, the issue in *Jensen* was the reverse – whether service on the agency employer was sufficient substitute service on the individual employees who worked there. In *Jensen*, the plaintiff sued certain Doe defendants under the fictitious name statute in

[2] To be clear, and for reasons set forth later in this Brief, Appellant is not arguing that the manner(s) by which to obtain proper service is limited only to those specific manners propounded by the germane Rule 4 sections. Rather, that those Rule 4 sections which do not specify the manners by which to effect service *may not be limited*.

their individual capacities. Those defendants were employees of a state agency (DSS). The Sheriff attempted to effect service on the individual defendants by leaving the papers with an employee at the agency. The trial court "found [that the agency] was a proper agent to receive service of process for these [individual] defendants, because it was the defendants' employer at the time of the decedent's death." The Fourth Circuit disagreed, however, because "[t]he record … contain[ed] no evidence showing that [the agency] was the employer of the defendants at the time of the attempted service."

The *Jensen* Court did state in the very next sentence that:

> "[w]ithout evidence that the defendants were served by delivery of the papers to a person of discretion employed at their present place of business, … there is nothing in the record to show these [individual] defendants were served with process."

However, that statement was based on the now repealed Section 15-9-520, which was a statute providing for substitute service *on individuals*, not state agencies. *See, e,.g., Collins Music Co., Inc. v. Lord*, 346 S.E.2d 724, 289 S.C. 458 (S.C. 1986) ("Under § 15-9-520 substitute service of process may be effected by personally serving a person of discretion at a defendant's residence or place of business."). When South Carolina adopted its Rules of Civil Procedure, the Notes to Rule 4 said (and still say) that "Rule 4(d)(1)," regarding service on individuals, "preserves the requirements of Code § 15-9-520." That statement further underscores that *Jensen* (which was premised on § 15-9-520) was a case about an attempted substitute service on individuals, not entities or state agencies. The Notes to Rule 4(d)(5), by contrast, do not declare any intention to preserve any aspect of any prior statutes, but rather expressly declare the intent of that subsection to "conform to the Federal Rules and clarify State practice concerning service on the State, its officers or agencies, and on political subdivisions."

In short, *Jensen* was a pre-Rules of Civil Procedure case that relied on now-repealed

statutes related to substitute service on individuals and certainly had nothing to say about the conditions under which a party might properly "deliver" a copy of a summons and complaint to an agency for Rule 4(d)(5) purposes. And for whatever reason, the *Maybin* Court decided that *Jensen* said just that.

iv. There is no firm precedence to guide compliance with 4(d)(5), so substantial compliance should be sufficient.

Unfortunately, there is no appellate case law in South Carolina outlining the contours of the agency service requirements under 4(d)(5). *See also* 24 S.C. Jur. Rules of Civil Procedure § 4.2. But there are other good authorities to help discern the meaning of Rule 4(d)(5)'s requirement that a plaintiff "deliver" the summons and complaint to the state agency being sued, and those authorities strongly indicate that the manner in which the SCDPS was served was sufficient and proper.

We start with the Rules of Civil Procedure themselves. South Carolina adopted its Rules in 1985 and repealed many state statutes addressed to civil procedure matters at the same time. Nonetheless, as indicated by the Notes to the Rules, some of the subsections of Rule 4 preserved the principles of certain repealed statutes. Rule 4(d)(1), for example, expressly reserved the principles of S.C. Code Ann. § 15-9-520 (1976), which dealt with substitute service on individuals. *See* Note to Rule 4(d)(1). Rule 4(d)(5), however, did not preserve the principles of any precursor statutes; rather that subsection of the Rule "conform[ed] to the Federal Rules and clarif[ied] State practice concerning service on the State, its officers or agencies, and on political subdivisions." *See* Note to Rule 4(d)(5). In the early 1980's, the Federal Rule of Civil Procedure that SC Rule 4(d)(5) was patterned after also provided that service upon a government agency should be accomplished by "delivering" a copy of the suit papers to the defendant agency. *See* Notes to Federal Rule.

"It is the plaintiff's burden to show that the court has personal jurisdiction over the defendant." *Fassett v. Evans*, 610 S.E.2d 841, 843 (S.C. Ct. App. 2005) (citation omitted). "The purpose of the summons is to acquire jurisdiction of the person of the defendant and to give him notice of the action and an opportunity to appear and defend." *White Oak Manor, Inc. v. Lexington Ins. Co*., 753 S.E.2d 537, 541 (S.C. 2014) (internal citations and quotation marks omitted); see also *Burris Chemical, Inc. v. Daniel Const. Co*., 163 S.E.2d 618, 620 (S.C. 1968) ("The principal object of service of process is to give notice to the defendant corporation of the proceedings against it."). It follows that Rule 4, which governs service of process, "confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action." *BB & T v. Taylor*, 633 S.E.2d 501, 503 (S.C. 2006) (quoting *Roche v. Young Bros., Inc. of Florence*, 456 S.E.2d 897, 899 (S.C. 1995)).

As previously stated, and something that cannot be said enough: **there is no appellate case law in South Carolina outlining the contours of the agency service requirements under 4(d)(5).** Further, South Carolina's Rule 1 mirrors the federal rule; it states that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." There's nothing just about taking an overly technical view of the service requirements of Rule 4, especially where the purported technical default caused no prejudice to the Defendant and the purposes of service were otherwise satisfied.

And in fact, the South Carolina appellate court opinions have actually taken precisely that approach to issues related to service of process (although they have not cited Rule 1 in their analyses), eschewing technical "gotcha" gamesmanship in favor of focusing on the policies and purposes underlying the service requirements. As the Fourth Circuit observed in 2010:

> The South Carolina Supreme Court has noted that it will not require "exacting compliance" with the rules related to service of process. *Roche v. Young Bros.,*

> *Inc. of Florence,* 318 S.C. 207, 209-10, 456 S.E.2d 897 (1995). Instead, the court inquires into "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 210, 456 S.E.2d 897.

Colleton Preparatory Acad. Inc. v. Hoover Universal, Inc., 616 F.3d 413 (4th Cir. 2010) (rejecting challenge to service where delivery was not restricted to the addressee because, under the circumstances, the defendant would have had actual and timely notice of the lawsuit and it was undisputed that the registered agent received the lawsuit papers, notwithstanding the failure to employ restricted delivery certified mail).

As the South Carolina Supreme Court said in the *Roche* case cited by the Fourth Circuit:

> Rule 4, SCRCP serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action. *We have never required exacting compliance with the rules to effect service of process.* See *Foster v. Crawford*, 57 S.C. 551, 36 S.E. 5 (1900) (when officer's return defective as to time and place of service, it can be amended to state facts); *Saunders v. Bobo*, 2 Bailey 492 (1831) (sheriff's incomplete return that was not sworn to may be amended); *Miller v. Hall*, 1 Speers 1 (1842). *Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings*.

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

Those are the principles that have continually echoed throughout the law of South Carolina, as the statement that "[e]xacting compliance with the rules is not required to effect service of process" has been quoted repeatedly in numerous appellate cases in South Carolina since *Roche*. See, e.g., *Richardson v. P.V., Inc.*, 682 S.E.2d 263, 383 S.C. 610 (S.C. 2009); *Bage, LLC v. Southeastern Roofing*, 646 S.E.2d 153, 373 S.C. 457 (S.C. App. 2007) (quoting the principles from *Roche* and stating that "the efficacy and rationale behind the requirement for service of process—that the defendant has notice of the proceedings—has luculently been met in

this case." See *Roche*, 318 S.C. at 210, 456 S.E.2d at 899 ("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."); *Moore*, 322 S.C. at 523, 473 S.E.2d at 66 ("Rather, inquiry must only 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."). Or as now-Justice Kittredge explained on behalf of the Court of Appeals in another case that involved a technical challenge to service:

> As this issue has been framed by Appellant, its resolution would seem to entail a technical analysis of when a corporation may be said to "exist" for purposes of our civil rules governing service of process. *Our rules governing service of process do not turn on parsing strict technicalities or debating murky legal abstractions*. On the contrary, our supreme court has specifically held that "[w]e have never required exacting compliance with the rules to effect service of process." *Roche v. Young Bros. Inc*., 318 S.C. 207, 209-10, 456 S.E.2d 897, 899 (1995) (citing *Foster v. Crawford*, 57 S.C. 551, 36 S.E. 5 (1900); *Saunders v. Bobo*, 2 Bailey 492 (1831); *Miller v. Hall*, 1 Speers 1 (1842)). "Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings." *Roche*, 318 S.C. at 210, 456 S.E.2d at 899. To establish that service has been properly effected, the plaintiff need only show compliance with the civil rules on service of process. *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct.App.1996). When these rules are followed, there is a presumption of proper service. *Roche*, 318 S.C. at 211, 456 S.E.2d at 900.

McCall v. Ikon, 611 S.E.2d 315, 363 S.C. 646 (S.C. App. 2005).

Going back to the *Jensen* case (and thus *Maybin* by extension), such is also diametrically at odds with the manner in which the South Carolina appellate courts have addressed service of process challenges under the Rules of Civil Procedure. As noted above, in the aftermath of *Roche's* exposition of the principles embodied in Rule 4 and the implications for any legal analysis regarding the sufficiency of service, the resounding chorus and theme of the appellate cases (since 1994 – eight years after *Jensen* and five years after *Maybin*) has been that "exacting

compliance" with the Rules is not required; rather, the South Carolina courts look to a more functional approach that centers on good faith, actual notice, and sufficient compliance for a court to acquire personal jurisdiction – in other words the purposes that animate Rule 4, rather than "strict technicalities" and "murky legal abstractions." By stark contrast, *Jensen* kicks off the conclusion of its analysis with the statement that "[c]ompliance with the service of process requirements must be strict, and approximations will not be effective." That statement certainly does not reflect the post-*Roche* case law in the State, nor does it reflect the other policies or analysis contained above in this memo. In short, neither *Jensen* nor *Maybin* should be understood to have any enduring value at this point.

D. Rule 4(d)(5) was substantially and sufficiently complied with

Given all of the above, it is plain that Appellant substantially complied with Rule 4(d)(5). The Attorney General was unquestionably served. Appellant unquestionably delivered a copy of the Summons of the Complaint to the agency at the physical address the agency itself provided to the whole world (or at least anyone with an internet connection). Respondents unquestionably appeared in this case and timely filed an Answer.

Rule 4(d)(5) does not require only certain people within the agency to be served. And the state agency—a component of the state government—should not be allowed to mislead or confuse the public by not specifying its physical address by way of suite or building designation, or if there is none, without informing the public that it has "roommates" living at the same physical address.

The purpose behind requiring service is a simple one. The requirements of service do "not arise from an arcane or highly technical application of the rules. Rather, [the service requirements] serve[] an essential function—ensuring that notice is properly received by all

entitled to it." *McCall v. IKON*, 363 S.C. 646, 655, 611 S.E.2d 315, 319 (Ct. App. 2005). "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." Id. at 652, 611 S.E.2d at 318 (quoting *Griffin v. Capital Cash*, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992)). (emphasis added).

Even if the Court were to find some technical glitches in the service of process, those glitches were the result of a good faith effort to comply with a rule that is not specific as to either the manner of "delivery" or the characteristics of the intended recipient. Even if the Court finds that compliance was not "exacting," there was sufficient compliance with the Rule. It is clear from Respondent's voluntary appearance at the onset of the case and timely response to the pleadings that the Respondents were on notice of this action. There was no prejudice.

All steps taken should have been sufficient to confer personal jurisdiction over a South Carolina agency in a South Carolina Court of Common Pleas. Accordingly, Appellant asks this Court to reverse the trial court's dismissal, and find that service was proper, and thus timely.

II. THE TRIAL COURT ERRED IN FINDING THAT TROOPER GOSHORN HAD IMMUNITY UNDER THE SCTCA, AND THEREFORE DISMISSING THE CLAIMS AGAINST HIM WAS IN ERROR.

A. Standard of Review & Applicable Law—SCTCA

A motion to dismiss must be based solely upon the allegations set forth in the complaint. Rule 12(b)(6), SCRCP; *Jarrell v. Petoseed Co., Inc.*, 331 S.C. 207, 209, 500 S.E.2d 793, 794 (Ct.App.1998). "Viewing the evidence in favor of the plaintiff, the motion must be granted if facts alleged in the complaint and inferences reasonably deducible therefrom do not entitle the plaintiff to relief on any theory of the case." *Id*. The question to be considered is whether in the

light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

The South Carolina Tort Claims Act (SCTCA) does not give governmental employees absolute immunity from suit for incidents that occur during their employment. South Carolina Code Section 15-78-70(b) of the SCTCA provides that "[n]othing in this chapter may be construed to give an employee of a governmental entity immunity from suit and liability if it is proved that the employee's conduct was not within the scope of his official duties or that it constituted actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-70(b) (emphasis added). Thus, this section of the SCTCA makes clear that "police officers whose conduct is outside the scope of their official duties or constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude are liable for their torts 'in the same manner and to the same extent as a private individual under like circumstances' without any immunity from the Act." *Shelley v. S.C. Highway Patrol*, 432 S.C. 335, 341, 852 S.E.2d 220, 223 (Ct. App. 2020); *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 187, 826 S.E.2d 585 (2019) ("A governmental employee is not afforded immunity under the Tort Claims Act for conduct outside the scope of his official duties, or for conduct that amounts to actual fraud, actual malice, or an intent to harm."). This section works in conjunction with Section 15-78-60(17) of the SCTCA, which provides that "[t]he governmental entity is not liable for a loss resulting from . . . employee conduct outside the scope of his official duties or which constitutes actual fraud, actual malice, intent to harm, or a crime involving moral turpitude." S.C. Code Ann. § 15-78-60(17) (emphasis added). As such, under this scheme, an individual governmental employee is not protected by the SCTCA and may be individually liable for actions that occur outside the scope of their official duties or are committed with fraud, actual

malice, intent to harm, or a crime involving moral turpitude, but the governmental entity is not liable under the SCTCA for such actions. Conversely, an individual governmental employee is immune from suit under the SCTCA for actions that are committed within the scope of their official duties and do not constitute fraud, actual malice, intent to harm, or a crime involving moral turpitude, but the governmental entity can be liable for such actions under the SCTCA.

Rule 8(e), S.C.R.C.P. allows a plaintiff to plead in the alternative and even assert inconsistent causes of action. Such alternative or inconsistent pleading with respect to individual government employees has been permitted by the South Carolina Supreme Court. In *Skydive Myrtle Beach, Inc.*, the Court held, "We find it is entirely appropriate for [the plaintiff] to allege that some of an individual's actions were within the scope of their official duties, and some were not, or even plead alternative theories of liability depending on whether an individual's actions were within the scope of their duties. . . . Pleading alternative theories of recovery based on the uncertainty of whether an employee acted within the scope of his employment or his official duties is common." *Skydive Myrtle Beach, Inc.*, 426 S.C. at 187-88, 826 S.E.2d at 591-92.

With respect to Appellant's claims against the SCDPS, SCHP, and Trooper Goshorn, Appellant has pled in her complaint alternative theories of liability against them both in accordance with the SCTCA. Here, Appellant contends at least three (3) causes of action remain viable against Trooper Goshorn:

- False Imprisonment;
- Malicious Prosecution; and
- Abuse of Process.

Accordingly, Appellant addresses each cause of action individually.

B. The Complaint Sufficiently States a Cause of Action for False Imprisonment Against Goshorn.

As set forth above, one of the exceptions to immunity under the SCTCA is if an individual officer's conduct constituted an "intent to harm." S.C. Code Ann. § 15-78-70(b). In her third cause of action, Appellant has alleged false imprisonment against all Respondents. "False imprisonment is an intentional tort." *Gist v. Berkeley County Sheriff's Dept.*, 336 S.C. 611, 619, 521 S.E.2d 163 (Ct. App. 1999). "To prevail on a claim for false imprisonment, the plaintiff must establish: (1) the defendant restrained the plaintiff, (2) the restraint was intentional, and (3) the restraint was unlawful." *Law v. S.C Dept. of Corrections*, 368 S.C. 424, 629 S.E.2d 642, 651 (2006) (emphasis added). Appellant alleged as part of her false imprisonment cause of action,

> Without evidence sufficient to constitute probable cause, and with evidence conclusively refuting the existence of probable cause, the Plaintiff was handcuffed and detained by the Defendants, and taken to the Greer City Detention Center for breathalyzer testing the Trooper knew or should have known was an exercise in futility. The acts . . . were intentional[.]

(See Compl., ¶ 71-72, R. p. 30).

Allegations that a defendant acted "for the purpose of injuring the plaintiff" satisfy this exception. *Skydive Myrtle Beach, Inc. v. Horry County*, 426 S.C. 175, 185, 826 S.E.2d 585 (2019). In fact, even if in proving "intent" under an intentional tort, a plaintiff need not prove "intent to harm," it could still be found by the jury that the officer acted with an intent to harm in committing the tort. See *Eldeco, Inc. v. Charleston County*, 372 S.C. 470, 642 S.E.2d 726, 732 (2007) ("Although it is true that harm may result from an intentional interference with existing or prospective contractual relations, it is not necessary that the interfering party intend such harm."). Further, "whether the officers' conduct constituted an intent to harm is a factual question for the jury." *White v. City of N. Charleston*, 2020-UP-231 (Ct. App. Aug. 5, 2020).

Thus, Appellant sufficiently plead the intentional tort of false imprisonment against Goshorn, and dismissal of this cause of action against him at this point was inappropriate, as it is a factual question for the jury to determine whether the false imprisonment was committed by Goshorn with an intent to harm.

C. The Complaint Sufficiently States a Cause of Action for Malicious Prosecution Against Goshorn.

Another exception in Section 15-78-70(b) is for causes of action that contain an element of "actual malice." The "actual malice" standard under the SCTCA in Section 15-78-70(b) is defined as acting with "ill will toward the plaintiff" or acting "with conscious indifference of the plaintiff's rights." *Castine v. Castine*, 403 S.C. 259, 268, 743 S.E.2d 93, 97 (Ct. App. 2013).

The Complaint sets forth a malicious prosecution claim against all Respondents. "'[T]o maintain an action for malicious prosecution, a plaintiff must establish: (1) the institution or continuation of original judicial proceedings; (2) by or at the instance of the defendant; (3) termination of such proceedings in plaintiff's favor; (4) malice in instituting such proceedings; (5) lack of probable cause; and (6) resulting injury or damage.'" *Law*, 368 S.C. 424, 629 S.E.2d at 648 (emphasis added). As part of Appellant's malicious prosecution claim against Respondents, Appellant alleged, "Defendants' accusation, arrest, detainment, initial prosecution, and continued prosecution against Plaintiff, in the absence of probable cause, was a malicious act." (Compl., ¶ 83, R. p. 31).

In *Brown v. Leonard*, No. 2008-UP-039 (Ct. App. Jan. 11, 2008), the South Carolina Court of Appeals examined the "actual malice" exception and held that "[a]lthough the [law enforcement agency] is entitled to statutory immunity from claims requiring a showing of malice, individual employees are not entitled to benefit from that same immunity. Otherwise, employees of organizations covered by SCTCA would have immunity from any intentional tort."

Id. The Court of Appeals held that the circuit court "erred in dismissing the malicious prosecution claim against [a deputy] based upon the same immunity granted to the [law enforcement agency]." *Id*.

While the Court of Appeals has subsequently held "one need not show actual malice in order to successfully maintain an action for malicious prosecution," it also held that a showing of malice under that cause of action "does not necessarily mean a defendant acted out of spite, revenge, or with a malignant disposition." *McBride v. Sch. Dist. of Greenville Cnty*., 389 S.C. 546, 698 S.E.2d 845, 855 (Ct. App. 2010) (emphasis added). Thus, a cause of action for malicious prosecution could possibly be maintained against the SCDPS and individual troopers simultaneously depending on if such actual malice is found or not. This determination is not made by the court at the Rule 12(b)(6) stage, as the South Carolina Supreme Court has long held that "the question of actual malice is a question of fact for a jury." *Anderson v. Augusta Chronicle*, 365 S.C. 589, 619 S.E.2d 428, 431 (2005); *Castine v. Castine*, 403 S.C. 259, 743 S.E.2d 93, 98 (Ct. App. 2013) ("[T]o the extent the existence of common law actual malice becomes an issue, its existence is a question of fact that must be proven at trial."). In other words, whether Goshorn in this case acted with actual malice or implied malice is a factual question for the jury, and thus, neither the SCDPS, nor the individual trooper, can be dismissed at the 12(b)(6) stage on immunity grounds under Section 15-78-60(17) or 15-78-70(b), respectively. See *White v. City of N. Charleston*, No. 2020-UP-231 (Ct. App. Aug. 5, 2020) ("Accordingly, the circuit court should not have granted immunity under [15-78-60(17)], as whether the officers' conduct constituted an intent to harm is a factual question for the jury.").

D. The Complaint Sufficiently States a Cause of Action for Abuse of Process Against Goshorn.

Appellant has alleged a cause of action for abuse of process against all Respondents and

alleged, “The Defendants had an ulterior purpose in employing legal process against the Plaintiff [and] acted willfully in the use of process, which was improper as improvidently authorized and/or aimed at an illegitimate collateral objective.” (Compl., ¶ 90-91, R. pp. 32). “The tort of abuse of process consists of two elements: an ulterior purpose, and a willful act in the use of the process that is not proper in the regular conduct of the proceeding.” *Swicegood v. Lott*, 379 S.C. 346, 665 S.E.2d 211, 213 (Ct. App. 2008). The South Carolina Court of Appeals has held that abuse of process “does not require a finding of actual malice or intent to harm.” *Id*. (emphasis added). However, under an abuse of process claim with respect to the “intent to harm” exception “harm may result from . . . ‘bad intent.’” 379 S.C. 346, 665 S.E.2d at 214. Again, under the SCTCA, the “actual malice” exception is “defined by situations where ‘defendant was actuated by ill will in what he did, with the design to causelessly and wantonly injure the plaintiff.’” *Id*. Under an abuse of process claim, the abuse may be accompanied, but “need not be accompanied by any ill will.” Again, the determination of whether the abuse of process was committed with actual malice or intent to harm is a factual question for the jury. *Anderson v. Augusta Chronicle*, 365 S.C. 589, 619 S.E.2d 428, 431 (2005); *Castine v. Castine*, 403 S.C. 259, 743 S.E.2d 93, 98 (Ct. App. 2013); *White v. City of N. Charleston*, 2020-UP-231 (Ct. App. Aug. 5, 2020). Therefore, at the 12(b)(6) stage, these claims for abuse of process against Goshorn cannot be dismissed.

E. Appellant Should Have Been Afforded the Opportunity to Amend Her Complaint Before the Final Order of Dismissal.

Appellant remains firm in her belief that the allegations against Trooper Goshorn were sufficiently pled in the Complaint. However, since the Court believed that Appellant’s Complaint was deficient in regard to any of the claims against Trooper Goshorn, she should have been given an opportunity to amend the Complaint before the final order of dismissal was entered.

The South Carolina Supreme Court holds, "[w]hen a trial court finds a complaint fails 'to state facts sufficient to constitute a cause of action' under Rule 12(b)(6), the court should have given the plaintiff an opportunity to amend the complaint pursuant to Rule 15(a) before filing the final order of dismissal." *Skydive Myrtle Beach, Inc. v. Horry Cnty.*, 426 S.C. 175, 179, 826 S.E.2d 585 (S.C. 2019). In *Skydive*, the Supreme Court found that the trial court erred in dismissing individually named employees under the SCTCA pursuant to Rule 12(b)(6) and "failing even to consider allowing [the plaintiff] to amend its complaint." *Id*. In so holding, the Court stated as follows regarding how claims against individual employees are to be judged at the pleading stage:

> A governmental employee is not afforded immunity under the Tort Claims Act for conduct outside the scope of his official duties, or for conduct that amounts to actual fraud, actual malice, or an intent to harm. § 15-78-70(b). Therefore, although [plaintiff] alleged in its complaint that Respondents were acting as agents of the governmental entities, the facts and claims recited above set forth several plausible grounds upon which [plaintiff] could successfully allege Respondents are not entitled to immunity. It is not our role to determine whether the allegations [plaintiff] might make in an amended pleading will state a valid claim. However, we cannot definitively say it is impossible for [plaintiff] to plead a valid claim against Respondents.

426 S.C. at 187, 826 S.E.2d 585.

Based on the arguments set forth above, there are certainly allegations that have been made against Trooper Goshorn that state valid claims against him. To the extent the trial court disagreed, Appellant should have been allowed the opportunity to amend her Complaint to more succinctly plead these allegations against Goshorn, instead of simply dismissing all claims against him.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court.

Respectfully submitted,

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