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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM MARLBORO COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge
Douglas Jennings, Jr., Special Referee

Appellate Case No. 2026-001144

Levi Owens, as Personal Representative of the Estate of Christopher McLean..... Respondent,

v.

Wayne Hunt..... Appellant.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF ISSUES ON APPEAL 5

STATEMENT OF THE CASE 6

STANDARD OF REVIEW 10

ARGUMENT 12

I. The special referee correctly held that service was effective and complete on February 9, 2017 and that the default judgment is not void. 12

A. Section 15-9-350 makes service on the Director the legal equivalent of personal service, and section 15-9-380 is a proof of notice provision that neither postpones nor conditions that service 12

B. The structure of Chapter 9 confirms that the General Assembly did not make the filing of the affidavit of mailing a condition of jurisdiction or of judgment. 16

C. *Holman* and *Cook* control this appeal 18

D. Courts construing statutes identical to section 15-9-370 hold that defects in the affidavit of compliance are curable even when it is proof of service. 23

E. Appellant's authorities concern service by publication and antiquated forms of constructive notice, not service on a statutory agent. 25

F. Appellant's due process argument is not preserved and, in any event, the mailing that *Wuchter* requires is precisely the mailing the statute commands and the Department made. 27

G. Rule 268(d)(2) bars Appellant's reliance on unpublished opinions, and *Free* would not help him if it could be cited. 29

H. Rule 4(d)(8), SCRCP, has no application to service through an agent appointed by law. 30

I. Appellant's construction would defeat the purpose of the statute and reward the very conduct the statute was enacted to overcome. 31

II. The special referee did not abuse his discretion in denying relief under Rule 60(b)(1), SCRCP. 33

A. Appellant bore the burden of proof, and the only evidence he offered confirms that the default was the product of his own neglect. 33

B. The affidavit on which Appellant relies was executed in another action eight months after his motion, and the accident report and investigative materials on which he relies are not in the record. 36

C. The special referee was not required to reach timeliness, meritorious defense, or prejudice. 38

III. Appellant's remaining arguments are not preserved for review. 39

CONCLUSION 41

TABLE OF AUTHORITIES

Cases

Ballenger Elec. Contractors, Inc. v. Reach-All Sales, Inc., 276 S.C. 394, 279 S.E.2d 127 (1981) 19

Bankers Tr. of S.C. v. Bruce, 283 S.C. 408, 323 S.E.2d 523 (Ct. App. 1984) 14

BB&T v. Taylor, 369 S.C. 548, 633 S.E.2d 501 (2006) 10, 12, 37

Beckham v. Durant, 300 S.C. 329, 387 S.E.2d 701 (Ct. App. 1989) 16, 40

Bodell Constr. Co. v. Robbins, 334 P.3d 1004, 1009 (Utah Ct. App. 2014) 35

Bowers v. Bowers, 304 S.C. 65, 403 S.E.2d 127 (Ct. App. 1991) 33, 37

Brown v. Carolina Emergency Physicians, P.A., 348 S.C. 569, 560 S.E.2d 624 (Ct. App. 2001) 10

Caldwell v. Wiquist, 402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013) 25, 28

Cook v. Fed. Ins. Co., 263 S.C. 575, 211 S.E.2d 881 (1975) ..... passim

Dandy v. American Laundry Machinery Inc., 301 S.C. 24, 389 S.E.2d 866 (1990) .. 19

Elam v. S.C. Dep't of Transp., 361 S.C. 9, 602 S.E.2d 772 (2004) 39

Ex parte S.C. Dep't of Revenue, 350 S.C. 404, 566 S.E.2d 196 (Ct. App. 2002) 12

Fisher v. DeCarvalho, 298 Kan. 482, 314 P.3d 214 (Kan. 2013) 25

Free v. Buff, No. 2015-UP-162, 2015 S.C. App. Unpub. LEXIS 187 (S.C. Ct. App. Mar. 25, 2015) 29, 30

Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp., 66 Wn. 2d 469, 403 P.2d 351 (1965) 25

Hammond v. Honda Motor Co., 128 F.R.D. 638 (D.S.C. 1989) 20

Herron v. Century BMW, 395 S.C. 461, 719 S.E.2d 640 (2012) 28

Hess v. Pawloski, 274 U.S. 352 (1927) 1, 23

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) 18

Holman v. Warwick Furnace Co., 318 S.C. 201, 456 S.E.2d 894 (1995) ..... passim

I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000) 28, 39

Martin v. Meier, 111 Wn. 2d 471, 760 P.2d 925 (1988) 24, 28

McGee v. McGee, 156 Fla. 346, 22 So. 2d 788 (Fla. 1945) 25

Melton v. Olenik, 379 S.C. 45, 664 S.E.2d 487 (Ct. App. 2008) 10

Middleton v. Stokes, 71 S.C. 17, 50 S.E. 539 (1905) 24

Miller v. Aiken, 364 S.C. 303, 613 S.E.2d 364 (2005) 15

Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306 (1950) 28

Patel v. S. Brokers, Ltd., 277 S.C. 490, 289 S.E.2d 642 (1982) 27

Peake v. Suzuki Motor Corp., No. 0:19-cv-00382-JMC, 2019 U.S. Dist. LEXIS 191295 (D.S.C. Nov. 4, 2019) 20

Rielly v. Crook, 112 Ga. App. 334, 145 S.E.2d 110 (Ga. Ct. App. 1965) 24

Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 456 S.E.2d 897 (1995) 11, 27, 35

Seubert v. Buchanan, 250 S.C. 140, 156 S.E.2d 632 (1967) 26

Smith v. Sanders, 360 Ga. App. 286, 861 S.E.2d 123 (Ga. Ct. App. 2021) 23, 24

Sorenson v. Stowers, 251 Wis. 398, 29 N.W.2d 512 (Wis. 1947) 22

State v. Sweat, 386 S.C. 339, 688 S.E.2d 569 (2010) 32

Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 681 S.E.2d 885 (2009) 33, 38

Tate v. Hughes, 255 Ga. App. 511, 565 S.E.2d 853 (Ga. Ct. App. 2002) 24

Town of Summerville v. City of N. Charleston, 378 S.C. 107, 662 S.E.2d 40 (2008) 10

Trico Engineering Consultants v. Kozlowski, No. 2010-UP-511, 2010 S.C. App. Unpub. LEXIS 584 (S.C. Ct. App. Nov. 23, 2010) 29

Wilder Corp. v. Wilke, 330 S.C. 71, 497 S.E.2d 731 (1998) 39

Williams v. Watkins, 384 S.C. 319, 681 S.E.2d 914 (Ct. App. 2009) 33

Wilson v. Wilson, 312 S.C. 172, 439 S.E.2d 323 (Ct. App. 1993) 38

Wright v. Peterson, No. 5:20-01859-MGL, 2021 U.S. Dist. LEXIS 57012 (D.S.C. Mar. 25, 2021) 31

Wuchter v. Pizzutti, 276 U.S. 13 (1928) 27, 28

Statutes

La. Stat. Ann. § 13:3475 18

Miss. Code Ann. § 13-3-63 18

N.C.G.S. § 20-7.1 34

N.Y. Bus. Corp. Law § 307 18

O.C.G.A. § 40-12-2 23

S.C. Code Ann. § 15-9-210 17

S.C. Code Ann. § 15-9-240 17

S.C. Code Ann. § 15-9-245 ..... 18, 20

S.C. Code Ann. § 15-9-280 17

S.C. Code Ann. § 15-9-285 17

S.C. Code Ann. § 15-9-290 17
S.C. Code Ann. § 15-9-350 ..... passim
S.C. Code Ann. § 15-9-370 ..... passim
S.C. Code Ann. § 15-9-380 ..... passim
S.C. Code Ann. § 15-9-750 17

Rules

Rule 208, SCRCP 40
Rule 209, SCACR 37
Rule 210, SCACR 37
Rule 268, SCACR 29
Rule 3, SCRCP 2, 7
Rule 4, SCRCP 16, 30
Rule 5, SCRCP 5, 9, 16, 40
Rule 55, SCRCP 33
Rule 59, SCRCP ..... passim
Rule 60, SCRCP ..... passim

Treatises

Proverbs 26:27 (King James) 4

INTRODUCTION

This appeal asks whether South Carolina's nonresident motorist statutes mean what they say or whether they may be turned into an instrument for the very evasion they were enacted to defeat. For at least a century state law has provided that a driver who accepts the privilege of using the highways of a state not his own thereby appoints a public officer of that state as his agent for service of process. *See Hess v. Pawloski*, 274 U.S. 352, 356-57, 47 S. Ct. 632, 633, 71 L. Ed. 1091 (1927). The reason for that appointment is obvious. A motorist who crosses the state line, injures a citizen, and returns home should not be able to put himself beyond the reach of the courts of the place where the injury occurred. South Carolina codified that reasoning in S.C. Code Ann. § 15-9-350, and the General Assembly did not equivocate about its effect. Process served upon the Director of the Department of Motor Vehicles "shall be of the same legal force and validity as if served on him personally." S.C. Code Ann. § 15-9-350 (2005).

Appellant would have this Court hold that those words mean nothing until a later day that is not of the plaintiff's choosing and not within the plaintiff's control. On Appellant's reading, service on the Director accomplishes nothing. The certified mail the Director sends accomplishes nothing. The open mail the Director sends when the certified mail comes back accomplishes nothing. The affidavit the Director prepares accomplishes nothing. Service occurs, and jurisdiction attaches, only when the plaintiff, having waited for the postal service to attempt delivery at whatever

address the nonresident left behind, waited for the envelope to find its way back to Columbia, waited for the Department to prepare its affidavit and mail its second letter, and waited for the Department to transmit those papers to him, finally places them in the clerk's file. Any action taken by the court in the interim is void, and nothing is tolled. The Director, whom the General Assembly named the nonresident's "true and lawful attorney," is reduced to a messenger whose acceptance of service counts for nothing until something else is filed by someone else.

Consider the plaintiff who, through no fault of his own, retains counsel in the final weeks of the limitations period, files within the period, and serves the Director with time to spare under Rule 3(a), SCRCP. If the certified mail is returned after the period for service has run, or the Department's affidavit reaches counsel a day late, the action is lost. The statute that promised him certainty has delivered him a trap. Consider the plaintiff whose adversary drove a leased or borrowed commercial truck. The collision report lists no owner and no employer subject to liability, as it listed none here. The only thread leading to the driver is the address on his license, and if that address is stale the plaintiff has nothing else to follow and no one else to sue.

The nonresident motorist statutes exist precisely for that plaintiff. Under Appellant's reasoning they abandon him. Consider, finally, the driver who understands the rule Appellant proposes. He learns that the surest way to defeat a South Carolina judgment is to keep a wrong address on his license, decline his certified mail, and move. The longer the Department's letters take to come back, the later the plaintiff's filing. Appellant's rule places the motorist who conceals himself

in a better position than the motorist who does not, and it rewards the concealment in exact proportion with its success by creating uncertainty as to whether service on the Director was service at all.

The law does not permit a man to profit from his own wrong. And it has never treated service upon a designated agent as a thing that hovers in the air, forever approaching completion and perhaps never arriving, like Achilles in Zeno's paradox, condemned by a philosopher's trick of division never to overtake the tortoise. Our Supreme Court has twice refused to read these statutes that way. In *Cook v. Federal Insurance Co.*, construing the predecessor of section 15-9-380 on facts that mirror these in every respect that matters, including an argument that the statute was not "strictly complied with," the Court upheld default judgments against a nonresident whose certified mail came back "unclaimed -- no such number -- addressee unknown" and held that "the only requirement was that Plaintiff comply with the statute in good faith." *Cook v. Fed. Ins. Co.*, 263 S.C. 575, 581-83, 211 S.E.2d 881, 883-84 (1975). In *Holman v. Warwick Furnace Co.*, the Court held that service through a statutory agent "is complete, regardless of whether the [defendant] actually receives notice of the suit." *Holman v. Warwick Furnace Co.*, 318 S.C. 201, 204, 456 S.E.2d 894, 896 (1995). The special referee followed those decisions. Appellant's brief does not mention the first and cannot answer the second.

Nor did the special referee abuse his discretion under Rule 60(b)(1), SCRCP. Appellant's own affidavit establishes that he moved four months before a fatal collision, never updated the address on his commercial driver's license as North

Carolina law required, let that stale address be written into the collision report, left no forwarding address, and then moved four more times in nine years without telling a soul connected with this case where he had gone. "Whoso diggeth a pit shall fall therein…" *Proverbs* 26:27 (King James). Appellant dug his own pit, and he cannot now ask this Court to hold that the General Assembly built its nonresident motorist statutes to lift him out of it, especially when his rescue comes at the expense of the families and estates those statutes were written to protect. The order should be affirmed.

STATEMENT OF ISSUES ON APPEAL

I. Whether the special referee correctly held that service of process upon the Director of the Department of Motor Vehicles as Appellant's statutory agent was effective and complete on February 9, 2017, such that the circuit court acquired personal jurisdiction over Appellant on that date and the default judgment is not void under Rule 60(b)(4), SCRCP.

II. Whether the special referee acted within his discretion in finding that Appellant, who bore the burden of proof, offered no satisfactory explanation for his default and therefore was not entitled to relief under Rule 60(b)(1), SCRCP.

III. Whether Appellant's due process argument, his request that the order of reference be set aside so that the case may proceed before the circuit court, and his Rule 5(d), SCRCP dismissal argument are preserved for appellate review.

STATEMENT OF THE CASE

On December 10, 2013, Christopher McLean was killed in Marlboro County when the vehicle in which he was riding was involved in a collision with a commercial truck driven by Appellant. (Compl. ¶ 3). Appellant was then a resident of North Carolina. His North Carolina commercial driver's license listed his address as 16671 NC Highway 210, Rocky Point, North Carolina, and that address was recorded on the collision report. (Jan. 5, 2026 Order at 3). Four months before the collision Appellant had moved to a different address within North Carolina, but he had not updated his commercial driver's license, and no one other than Appellant knew of the change. (Hunt Aff. ¶¶ 5, 8; Jan. 5, 2026 Order at 3).

On December 8, 2016, Respondent filed a summons and complaint alleging wrongful death and survival claims against Appellant in the Marlboro County Court of Common Pleas. (*See generally* Compl.). Pursuant to section 15-9-350 of the South Carolina Code, Respondent served Appellant through the Director of the South Carolina Department of Motor Vehicles as Appellant's statutory agent for service of process. On February 9, 2017, the Director received the process on behalf of Appellant. (Ealy Aff.; Jan. 5, 2026 Order at 4). On February 10, 2017, the Director mailed notice of service and a copy of the process by certified mail to Appellant at his last known address. (Ealy Aff.). On February 15, 2017, Respondent filed proof of

service with the clerk of court documenting the Director's acceptance of service on Appellant's behalf. (Feb. 15, 2017 Proof of Service; Jan. 5, 2026 Order at 5, 14).[1]

The certified mail was not accepted or receipted for by Appellant and was returned to the Department on March 8, 2017, bearing the postal endorsement "Return To Sender Unclaimed Unable To Forward." (Ealy Aff.). On March 10, 2017, in compliance with section 15-9-380, the Department sent the notice of service and a copy of the process to Appellant's last known address by open mail and prepared an affidavit of mailing documenting the return of the certified mail and the open mailing. (Ealy Aff.; Jan. 5, 2026 Order at 4). Under Rule 3(a), SCRCP, Respondent had until April 7, 2017 to serve Appellant. Every step required of Respondent and of the Director was substantially complied with and completed before that date. (Jan. 5, 2026 Order at 3 n.1, 14).

On November 16, 2017, Respondent filed an affidavit of default, and the circuit court entered default that same day. (Aff. of Default; Entry of Default). On October 22, 2018, the circuit court referred the matter to the special referee to determine damages. (October 22, 2018 Order of Reference). Notice of the damages hearing was mailed to Appellant at his last known address on November 4, 2021. (Nov. 4, 2021 Aff. of Service). On November 18, 2021, the special referee entered and filed a default judgment awarding Respondent $5,100,000.00 in survival and wrongful death damages. (*See generally* Nov. 18, 2021 Order). On July 11, 2022, Respondent filed the

[1]Appellant's brief asserts that no acceptance of service appears in the public index. (Appellant's Br. at 4). The special referee found otherwise, and that finding is supported by the record. (Feb. 10, 2017 Proof of Service; Jan. 5, 2026 Order at 5, 14).

Department's affidavit of mailing and the returned envelope. (*See generally* Ealy Aff.).

On October 26, 2022, Appellant filed a motion to be relieved from the default judgment or in the alternative to vacate it. (October 26, 2022 Mot. to Vacate). By Appellant's own account he did not learn of this action until November 2, 2022, a week after that motion was filed. (Hunt Aff. ¶ 4). The only affidavit Appellant ever offered in support of the motion was executed on June 10, 2023, nearly eight months after the motion was filed, and it is captioned in a different action, Civil Action No. 2016-CP-34-00264, in which Maisha Jacobs is the plaintiff. (Hunt Aff. ¶¶ 1, 3). In that affidavit Appellant admits that he moved in August 2013, that he had not updated his commercial driver's license at the time of the collision, and that he thereafter moved to Wilmington, North Carolina in May 2017, to Rocky Point, North Carolina in 2019, to Xenia, Ohio in 2021, and to Orangeburg, South Carolina in 2022. (Hunt Aff. ¶¶ 5, 8).

Appellant's motion was heard by the circuit court on May 28, 2024, and, after the parties briefed the question of the circuit court's authority to rule on a matter referred to a special referee, the circuit court entered a Form 4 order on July 24, 2024, declaring that it did not have jurisdiction over the matter. (Form 4 Order, July 24, 2024). Appellant did not appeal that order. The special referee heard Appellant's motion again on October 10, 2024, directed the parties to mediation, and, after mediation failed, denied the motion by order filed January 5, 2026. (Jan. 5, 2026 Order at 1, 18). The special referee held that service was effective and complete upon

delivery of the suit papers to the Director on February 9, 2017, that Respondent and the Department substantially complied with every requirement of the statutes, that the filing of the affidavit of mailing and envelope is a proof of notice requirement rather than a jurisdictional one, and that Appellant's own affidavit demonstrated that there was no satisfactory explanation for his default. (Jan. 5, 2026 Order at 2, 7, 14, 16). The order does not mention due process, the United States Constitution, Rule 5(d), SCRCP, or any request that the order of reference be set aside. Appellant did not file a motion to alter or amend under Rule 59(e), SCRCP, and three weeks later filed its notice of appeal. (Not. of Appeal).

STANDARD OF REVIEW

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge," and an appellate court's review "is limited to determining whether there was an abuse of discretion." *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502-03 (2006). An abuse of discretion arises only where the judge was controlled by an error of law or where the order rests upon factual conclusions that are without evidentiary support. *Id.* This standard governs motions under Rule 60(b)(4) as well as motions under Rule 60(b)(1). *See id.* (reviewing the denial of a Rule 60(b)(4) motion premised on insufficient service of process for abuse of discretion); *Melton v. Olenik*, 379 S.C. 45, 50, 664 S.E.2d 487, 489-90 (Ct. App. 2008) (holding that the power to set aside a default judgment under Rule 60(b)(1) rests in the sound discretion of the trial court and will not be disturbed absent a clear showing of abuse). The findings of the court on questions of fact arising on a challenge to service of process are binding on the appellate court unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law. *Brown v. Carolina Emergency Physicians, P.A.*, 348 S.C. 569, 583, 560 S.E.2d 624, 631 (Ct. App. 2001).

The interpretation of a statute is a question of law reviewed de novo. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008). Respondent does not dispute that the meaning of section 15-9-380 is reviewed without deference. Respondent does dispute that the special referee misread it.

"The movant in a Rule 60(b) motion has the burden of presenting evidence proving the facts essential to entitle her to relief." *BB&T*, 369 S.C. at 552, 633 S.E.2d

at 503. "A presumption of proper service exists when the rules governing service are followed." *Id.* (citing *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995)).

ARGUMENT

I. The special referee correctly held that service was effective and complete on February 9, 2017 and that the default judgment is not void.

Rule 60(b)(4), SCRCP, permits relief from a judgment that is void, and a judgment is void if the court acted without personal jurisdiction. *BB&T*, 369 S.C. at 551, 633 S.E.2d at 503. A court generally obtains personal jurisdiction by the service of a summons. *Ex parte S.C. Dep't of Revenue*, 350 S.C. 404, 407, 566 S.E.2d 196, 198 (Ct. App. 2002). The whole of Appellant's jurisdictional argument therefore reduces to a single proposition, which is that the summons in this case was not served until July 11, 2022. That proposition is wrong. The summons was served on February 9, 2017, when it was delivered to the agent whom the General Assembly, and Appellant by virtue of operating a motor vehicle on South Carolina roadways, appointed to receive it.

A. Section 15-9-350 makes service on the Director the legal equivalent of personal service, and section 15-9-380 is a proof of notice provision that neither postpones nor conditions that service.

By virtue of operating a motor vehicle on the public roads of this State, a nonresident driver by operation of law is deemed to have appointed the Director of the Department of Motor Vehicles as his "true and lawful attorney upon whom may be served all summons or other lawful process in any action or proceeding against him growing out of any accident or collision in which such nonresident may be involved by reason of the operation by him…of a motor vehicle on such public highways, streets or public roads or anywhere within this State." S.C. Code Ann. §

15-9-350. The same section then states the legal consequence of service upon that attorney. "Such acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally." *Id.* The General Assembly could not have stated it more plainly and clearly; process served on the Director has the force of personal service. Nothing in section 15-9-350 postpones that force to a later day, and nothing conditions it upon a filing by a plaintiff.

Section 15-9-370 then describes the mechanics of such service. Service "shall be made by leaving a copy thereof, with an appropriate fee, in the hands of the Director," and "such service shall be sufficient service upon the nonresident" if notice and a copy of the process are forthwith sent to the defendant by certified mail and the defendant's return receipt and the plaintiff's affidavit of compliance "are appended to the summons or other process and filed with the summons, complaint, and other papers in the cause." S.C. Code Ann. § 15-9-370(. Section 15-9-380 supplies the substitute proof for the case in which the defendant, whether intentionally or unintentionally, does not accept and receipt for the certified mail. In that event the returned envelope is retained, the notice and copy of the summons are sent by open mail, and "the envelope and affidavit of mailing with sufficient postage of such open letter shall be filed with the clerk of court in which such action is pending and upon the filing thereof shall have the same force and legal effect as if such process has been personally served upon such defendant." S.C. Code Ann. § 15-9-380.

Appellant reads the final clause of section 15-9-380 as a declaration that service does not occur until the affidavit is filed. The clause says no such thing. Its subject is "the envelope and affidavit of mailing." Its predicate is that those papers, once filed, "shall have the same force and legal effect as if such process has been personally served." The clause does not say that the service already made upon the Director is ineffective until then. It does not say that service is "sufficient," "complete," "effective," or "perfected" upon the filing, words the General Assembly used freely elsewhere in the same chapter whenever it meant to fix the moment of service.

The statute does not set a deadline for the filing, and it does not prescribe any consequence for a filing that is late or that never occurs. What the clause does is give the plaintiff a conclusive form of proof for circumstances in which no signed receipt will ever exist. The filed envelope and affidavit stand in the record as proof that the defendant was afforded reasonable notice as required by due process, and the defendant is thereafter personally charged with notice of their contents in addition to the constructive notice already imputed to him through his agent. A principal is "affected with constructive knowledge of all material facts of which his agent receives notice while acting within the scope of his authority." *Bankers Tr. of S.C. v. Bruce*, 283 S.C. 408, 423, 323 S.E.2d 523, 532 (Ct. App. 1984).

This reading gives effect to every word of the three sections. Appellant's reading does not. If service occurs only upon the filing of the affidavit of mailing, then the sentence of section 15-9-350 declaring that process served on the Director has

"the same legal force and validity as if served on him personally" is stripped of meaning, because in Appellant's view the process served on the Director has no force at all. A statute must be read as a whole, and its sections must be read together in a manner that harmonizes with the subject matter and accords with the general purpose of the enactment. *See Miller v. Aiken*, 364 S.C. 303, 307-08, 613 S.E.2d 364, 366 (2005) (stating that statutes are read in the context of other statutes *in pari materia* and construed to escape absurdity and carry the legislative intention into effect). The special referee read the statutes *in pari materia*, and he was right to do so.

Appellant's reading also inverts the relationship between agent and proof that runs throughout the chapter. Under section 15-9-370 the defendant's return receipt is one of the papers to be filed. That receipt cannot exist on the day the Director is served. It comes into being days or weeks later, when the postal carrier obtains the defendant's signature, and it is then delivered to the plaintiff on request. S.C. Code Ann. § 15-9-370. It is absurd to contend that a nonresident served through the Director on the first of the month is not served until the twentieth because that is the day he signed for his mail, and our Supreme Court has squarely rejected the notion that the date of receipt by the defendant, rather than the date of delivery to the agent, is the date of service. *Holman*, 318 S.C. at 204-05, 456 S.E.2d at 895-96. The receipt, the affidavit of compliance, the returned envelope, and the affidavit of mailing are all papers that document what the agent and the plaintiff did. They are the proof of

additional notice. Mail to the defendant is not the mode of service; the mode of service is delivery to a statutorily authorized agent.

Even if the affidavit of mailing was proof of service, the Rules of Civil Procedure confirm that the timing of its filing does not impact the initial act of service. "Failure to make proof of service does not affect the validity of the service." Rule 4(g), SCRCP. The court may at any time and in its discretion allow any process or proof of service to be amended. Rule 4(i), SCRCP. Proof of service is to be filed within ten days after service, but the failure to do so does not nullify the service and merely gives the court discretion to dismiss on motion. Rule 5(d), SCRCP; *Beckham v. Durant*, 300 S.C. 329, 332, 387 S.E.2d 701, 703 (Ct. App. 1989). Under Appellant's theory a circuit court would lack personal jurisdiction over every properly served defendant until the return receipt was filed, and there would be no certainty of service. That is not South Carolina law. It is not the law anywhere. Appellant offers no reason why the proof called for by section 15-9-380 should be treated differently from every other proof of service known to our procedure, and there is none.

B. The structure of Chapter 9 confirms that the General Assembly did not make the filing of the affidavit of mailing a condition of jurisdiction or of judgment.

When the General Assembly intends the filing of an affidavit of compliance to be a condition of judgment, it says so. Chapter 9 of Title 15 contains two provisions for service on unauthorized insurers through the Secretary of State and the Chief Insurance Commissioner respectively, and each is built on the same architecture as sections 15-9-370 and 15-9-380. The mode of service is delivery of process to a state official, notice is sent to the defendant by mail, and the receipt and the plaintiff's

affidavit of compliance are filed with the clerk. S.C. Code Ann. §§ 15-9-280(c), 15-9-285(c) (2005).

But in those sections the General Assembly added two things that are conspicuously absent from section 15-9-380. It fixed a deadline for the filing, requiring that the papers be filed "by the date the defendant…is required to appear or respond thereto, or within any further time as the court…may allow," and provides that service is not "sufficient" if this requirement is not met. S.C. Code Ann. § 15-9-280(c)(2); *see also* S.C. Code Ann. § 15-9-285(c)(2) (imposing the same deadline). And it expressly forbade judgment by default "until the expiration of thirty days from the date of filing of the affidavit of compliance." S.C. Code Ann. § 15-9-280(d); *see also* S.C. Code Ann. § 15-9-285(d) (containing the identical prohibition). Section 15-9-290 goes further still and grants the court leave to extend the time for the mailing of process and the filing of the affidavit. S.C. Code Ann. § 15-9-290 (2005).

The same chapter also shows that the General Assembly knows how to fix the moment at which service becomes effective. Service on a corporation by certified mail "is effective upon the date of delivery as shown on the return receipt." S.C. Code Ann. §§ 15-9-210(b) (, 15-9-240(b) (2005). (Service by mail under court order "is perfected five days after its deposit in the United States mail." S.C. Code Ann. §§ 15-9-210(c), 15-9-240(d). Personal service out of state "shall be complete and final on the day of the date of the personal service of the summons." S.C. Code Ann. § 15-9-750 (2005). (

Section 15-9-380 contains no such language. It does not say that service is sufficient, effective, perfected, or complete upon the filing of the affidavit. It says that

the filed additional notice has the force of personal service. The canon of construction *expressio unius est exclusio alterius* holds that to express or include one thing implies the exclusion of another. *Hodges v. Rainey*, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000). Appellant invokes *Hodges* for its plain meaning rule, and the plain meaning rule serves Respondent well. But *Hodges* is also the leading South Carolina authority on *expressio unius*, and that canon is fatal to Appellant. The General Assembly expressly wrote deadlines and prohibitions on default into specific substitute service statutes and wrote effective service dates into others. It wrote none of these into section 15-9-380. This Court should not supply by construction what the General Assembly chose to omit.

The legislatures of other states have drawn the same line in the same way. Louisiana requires that the defendant's return receipt be "filed in the proceedings before judgment can be entered against the defendant." La. Stat. Ann. § 13:3475. Mississippi requires that the return receipt or evidence of refusal "shall be filed in the court wherein such action is pending before judgment can be entered…" Miss. Code Ann. § 13-3-63. New York provides that service on a foreign corporation through the Secretary of State "shall be complete ten days after such papers are filed with the clerk of the court." N.Y. Bus. Corp. Law § 307(c)(1). Each of these legislatures directly said what Appellant asks this Court to infer from silence. The General Assembly of South Carolina did not say it, and this Court is not at liberty to say it for them.

C. *Holman* and *Cook* control this appeal.

In *Holman* the Supreme Court answered a certified question that asked whether service through the Secretary of State under section 15-9-245 is effective on

the date the papers are received by the Secretary or on the date they are received by the defendant. *Holman*, 318 S.C. at 202-03, 456 S.E.2d at 895. The Court answered that service is effective upon delivery to the Secretary. *Id.* at 204-05, 456 S.E.2d at 895-96. It did so not as a matter peculiar to section 15-9-245 but as an application of a rule it had already announced for statutes of this kind.

"In construing statutes similar to the one at hand, this Court has held that service is effected when the designated agent is served." *Id.* at 204, 456 S.E.2d at 896 (citing *Ballenger Elec. Contractors, Inc. v. Reach-All Sales, Inc.*, 276 S.C. 394, 279 S.E.2d 127 (1981)). "This accords with the general rule that service upon an agent designated by law is permissible without any need to personally serve the defendant." *Id.* at 204, 456 S.E.2d at 896. "Once a summons and complaint are delivered to the secretary of state, service is complete, regardless of whether the corporation actually receives notice of the suit." *Id.* The Court distinguished its earlier decision in *Dandy v. American Laundry Machinery Inc.*, 301 S.C. 24, 389 S.E.2d 866 (1990), on the ground that the "mode of service" there was service by mail requiring a return receipt, whereas the "mode of service" under a statutory agent provision "is delivery to the Secretary of State." *Id.* at 205, 456 S.E.2d at 896.

Appellant's answer to *Holman* is that section 15-9-245 contains "starkly different wording." (Appellant's Br. at 16). It does not. Both statutory schemes appoint a state official as the nonresident's agent. Both direct that a copy be forwarded to the defendant by certified mail. Both provide for the case in which the certified mail is refused or unclaimed, directing that the returned envelope be

preserved, that a further mailing be made, and that an affidavit and the envelope be filed with the clerk. S.C. Code Ann. §§ 15-9-245(c), 15-9-380. And both declare that, when those steps are taken, the defendant is charged with notice as if the papers had reached his hands. Section 15-9-245(c) says that the corporation "must be charged with knowledge of the contents thereof." Section 15-9-380 says that the filed papers "shall have the same force and legal effect as if such process has been personally served."

The two provisions perform the same function in the same way. *Holman* held that the forwarding and filing provisions of section 15-9-245 did not alter the rule that service is complete upon delivery to the agent, and there is no principled basis on which the materially identical provisions of section 15-9-380 can be held to do what the provisions of section 15-9-245 do not. The United States District Court for the District of South Carolina, applying *Holman*, has said the same thing. The statutory direction that the agent forward the papers to the defendant "is not a requirement to effectuate service, but rather to provide additional notice." *Peake v. Suzuki Motor Corp.*, No. 0:19-cv-00382-JMC, 2019 U.S. Dist. LEXIS 191295, at *19 (D.S.C. Nov. 4, 2019); *accord Hammond v. Honda Motor Co.*, 128 F.R.D. 638, 642 (D.S.C. 1989) (holding that service under section 15-9-245 is effected upon delivery of the suit papers to the Secretary of State and that mail is only used to notify the defendant of the service).

Cook is more damaging to Appellant, and Appellant's brief does not mention it. In *Cook* the plaintiffs served a nonresident motorist under sections 46-104 and 10-

431 *et seq.* of the 1962 Code, the direct predecessors of sections 15-9-350 through 15-9-380. *Cook*, 263 S.C. at 580-81, 211 S.E.2d at 883. The summons and complaint were mailed to the North Carolina address the defendant had supplied to the investigating highway patrolman. *Id.* at 581, 211 S.E.2d at 883. The certified letter was returned marked "unclaimed -- no such number -- addressee unknown," a copy was then sent by open mail as the statute required, the defendant defaulted, and default judgments were entered. *Id.*

The insurer resisting payment argued that the court "lacked jurisdiction over the person" because service was "improper and ineffectual" and because section 10-431.1, the predecessor of section 15-9-380, "was not strictly complied with." *Id.* at 581-82, 211 S.E.2d at 883. The Supreme Court quoted section 10-431.1 in full, which is to say it quoted the very language on which Appellant now relies and rejected the argument. *Id.* at 582-84, 211 S.E.2d at 883-84. It held that the defendant "did 'fail or refuse to accept and receipt' for the certified letter," that "[o]ur statute does not require that one refuse to accept service," and that the defendant had been "served under the nonresident motorists' statute." *Id.* at 584, 211 S.E.2d at 884-85. Quoting with approval from American Jurisprudence and from the Supreme Court of Wisconsin, the Court declared the governing principle in words that could have been written for this case.

> [I]t is no absolute requirement to good and valid service that the Defendant actually receive the notice in order to vest jurisdiction in the courts, provided the Plaintiff has acted in good faith and stated correctly the last known address of the nonresident Defendant . . . . [I]n some cases it has been said that the burden is on the Plaintiff to investigate and learn the last known address of the Defendant. However, the

> general trend of authorities is to sustain the validity of service of process if the statutory provisions in themselves indicate there is a reasonable probability that, if the statute is complied with, the Defendant will receive actual service.

Id. at 583, 211 S.E.2d at 884. The Court then observed that "to uphold a Defendant in furnishing an incomplete or incorrect address to the office could defeat the purpose of the nonresident motorists' statute" and that "the only requirement was that Plaintiff comply with the statute in good faith." *Id.* (discussing *Sorenson v. Stowers*, 251 Wis. 398, 29 N.W.2d 512 (Wis. 1947)). In other words, strict compliance with the notice provisions of the statute is not required, so long as the statute has been substantially complied with, service has been effected, and the defendant has been afforded reasonable notice.

Cook is a decision of our Supreme Court construing the statute at issue on facts that mirror these in every material respect. A nonresident motorist supplied an address at the scene. The Director mailed the process to that address by certified mail. The letter came back unclaimed. Open mail followed. The defendant defaulted. Judgment was entered. The judgment was upheld against a challenge that the statute "was not strictly complied with" and that the court therefore lacked jurisdiction over the defendant's person. Appellant cannot avoid *Cook* by ignoring it, and he cannot reconcile his position with it. If service under section 15-9-380 did not occur until the plaintiff filed the affidavit of mailing, the Supreme Court in *Cook* would have had to ask when that filing occurred. It asked no such question. It asked whether the plaintiff had complied with the statute in good faith, found that he had, and held that the defendant had been served.

D. Courts construing statutes identical to section 15-9-370 hold that defects in the affidavit of compliance are curable even when it is proof of service.

South Carolina's nonresident motorist statutes descend from the model that nearly every state adopted after the Supreme Court of the United States sustained the Massachusetts statute in *Hess*. Georgia's nonresident motorist act is, in the words that matter here, indistinguishable from section 15-9-370. It provides that service "shall be made by serving a copy of the complaint . . . on the Secretary of State," that "[s]uch service shall be sufficient service upon any such nonresident, provided that" notice and a copy of the process are forthwith sent to the defendant by certified mail, and that "the defendant's return receipt and the plaintiff's affidavit of compliance with this Code section are appended to the summons or other process and filed with the summons, complaint, and other papers in the case…" O.C.G.A. § 40-12-2. Georgia treats its statute as in derogation of the common law and demands strict compliance with it. Yet even so, the Court of Appeals of Georgia has held, construing that very language, that the affidavit and receipt are proof and not service.

In *Smith v. Sanders* the plaintiff served the Secretary of State and mailed the process to the nonresident defendant, whose certified mail was returned "unclaimed." *Smith*, 360 Ga. App. 286, 287, 289, 861 S.E.2d 123, 124-26 (Ga. Ct. App. 2021). The affidavit of compliance filed with the clerk was not notarized, and the trial court denied default on the ground that service was therefore invalid. *Id.* at 287, 861 S.E.2d at 125. The Court of Appeals vacated that ruling. "[U]nder OCGA § 40-12-2, service is effected by serving the Secretary of State with a copy of the complaint and summons," and the plaintiff's "failure to file a properly notarized affidavit only

affected the validity of his *proof* of service, not the service itself." *Id.* at 289, 861 S.E.2d at 125-26. The defect in proof was cured by a later filing. *Id.* (citing *Rielly v. Crook*, 112 Ga. App. 334, 336, 145 S.E.2d 110 (Ga. Ct. App. 1965)).

The court further held, relying on the state's general provision that failure to make proof of service does not affect the validity of service, that the time to answer was not postponed to the date of the corrected filing. *Id.* at 289 & n.9; 861 S.E.2d at 126 & n.9. Georgia has long held that a plaintiff who follows the statute perfects service "irrespective of whether the defendant actually received such notice." *Tate v. Hughes*, 255 Ga. App. 511, 512, 565 S.E.2d 853, 854 (Ga. Ct. App. 2002). And South Carolina, unlike Georgia, only requires substantial compliance with the relevant service statutes, and not strict compliance.

> While it is a substantial compliance with the requirements of the statutes, as to the manner of the service of the summons, that gives to the Court jurisdiction in a cause and a right to control all subsequent proceedings, the mode of proof of such service is a mere question of practice, and is incidental, and subordinate to the jurisdictional fact that such service was duly made. It is the actual service . . . that determines the jurisdiction of the person – not the proof by which these conditions of jurisdiction are made to appear.

Middleton v. Stokes, 71 S.C. 17, 20, 50 S.E. 539, 540 (1905).

The Supreme Court of Washington, which also construes its nonresident motorist statute strictly, has likewise held that service on the Secretary of State under such a statute "constitutes valid personal service over defendant," and that a late filed affidavit of compliance under a companion long arm statute is substantial compliance where the defendant is not prejudiced by the delay. *Martin v. Meier*, 111 Wn. 2d 471, 476-78, 760 P.2d 925, 927-29 (1988) (citing *Golden Gate Hop Ranch, Inc.*

v. Velsicol Chem. Corp., 66 Wn. 2d 469, 403 P.2d 351 (1965)). The Supreme Court of Kansas has defined substantial compliance with rules of service as "compliance in respect to the essential matters necessary to assure every reasonable objective of the statute." *Fisher v. DeCarvalho*, 298 Kan. 482, 490, 314 P.3d 214, 219 (Kan. 2013).

Every objective of sections 15-9-350 through 15-9-380 that concerns notice to the defendant was met here within the statutory period for service. The Director was served. The certified mail was sent forthwith. When it came back, the open mail was sent at once and the affidavit was prepared the same day. The only thing that occurred later was the placement of that affidavit in the clerk's file, and that act was not calculated to give Appellant notice of anything. It was calculated to prove to the court what had already been done.

E. Appellant's authorities concern service by publication and antiquated forms of constructive notice, not service on a statutory agent.

Appellant insists that the special referee erred by declining to construe section 15-9-380 strictly. (Appellant's Br. at 14-15). The cases he cites do not support the proposition for which he cites them. *Caldwell v. Wiquist* is a service by publication case, and the rule it announces is that "South Carolina courts have repeatedly required strict compliance with publication statutes." *Caldwell v. Wiquist*, 402 S.C. 565, 572, 741 S.E.2d 583, 587 (Ct. App. 2013). The out of state decisions *Caldwell* canvassed were publication cases as well, and the quotation Appellant lifts from *Caldwell* concerning statutes "authorizing constructive service of process" is the *Caldwell* court's description of a Florida publication decision. *Id.* at 574, 741 S.E.2d at 588 (discussing *McGee v. McGee*, 156 Fla. 346, 22 So. 2d 788 (Fla. 1945)).

Constructive service is technically distinct from substituted service and consists of service by publication or posting.

Publication is the last resort of a plaintiff who cannot find the defendant, and it is properly hedged with strict requirements because there is no agent and no address and no reasonable probability that the notice will ever reach its object. Service on an agent appointed by law is a different thing altogether. Our Supreme Court drew this distinction when it held in *Holman* that the "mode of service" under a statutory agent provision is "delivery to the Secretary of State." *Holman*, 318 S.C. at 205, 456 S.E.2d at 896. The summons is then sent specifically to the address of the defendant as opposed to being publicly posted or published.

Settlemier and *Earle* are decisions of the Supreme Court of the United States from the 1870s addressing constructive notice by posting and substitute service on adult family members in an era before any state had thought to appoint a public officer as the agent of a motorist. Neither case concerned an agent statute, and both antedate *Hess* by half a century. *Seubert v. Buchanan*, 250 S.C. 140, 156 S.E.2d 632 (1967), stands only for the unremarkable proposition that substituted service must conform to the statute that authorizes it. No one disputes that principle. The Department conformed to the statute in every particular, and Appellant does not contend otherwise. His only complaint is that the papers proving that conformity reached the clerk's file later than he would like, and section 15-9-380 does not say when they must arrive.

Appellant's position also cannot be reconciled with the settled rule that South Carolina does not require exacting compliance to effect service. "We have never required exacting compliance with the rules to effect service of process." *Roche*, 318 S.C. at 210, 456 S.E.2d at 899. The question is "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 at 899. Our Supreme Court has overruled "technical objections to service of process" where the defendant was not denied due process and has held that a defendant may not defeat service by declining to accept mail that he knows contains a summons and complaint. *Patel v. S. Brokers, Ltd.*, 277 S.C. 490, 494, 289 S.E.2d 642, 645 (1982). Appellant's objection is technical in the purest sense. He identifies no step that the Director or Respondent omitted, no mailing that was not made, and no address that was not tried. All he does is identify a date on a filing stamp.

F. Appellant's due process argument is not preserved and, in any event, the mailing that *Wuchter* requires is precisely the mailing the statute commands and the Department made.

Appellant argues that the special referee's construction of section 15-9-380 is "inconsistent with the constitutional limitations set forth in *Wuchter*." (Appellant's Br. at 17). The Jan. 5, 2026 order does not mention *Wuchter v. Pizzutti*, 276 U.S. 13, 4 S.Ct. 259, 72 L.Ed. 446 (1928), due process, or the Constitution of the United States, and Appellant did not file a motion under Rule 59(e), SCRCP. "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d

716, 724 (2000). "Constitutional arguments are no exception to the preservation rules…" *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2012). This Court applied those rules to a due process challenge to substituted service in *Caldwell* itself and declined to reach the question because the orders below "do not use the words 'due process' or mention the constitution at all" and the appellant "failed to file Rule 59(e) motions." *Caldwell*, 402 S.C. at 576, 741 S.E.2d at 589. The same disposition is required here.

The argument fails on its merits in any event. *Wuchter* struck down a New Jersey statute because it permitted service on the Secretary of State without requiring anyone to send notice to the defendant. *Wuchter*, 276 U.S. at 19, 48 S. Ct. at 260. The constitutional defect was cured, the Court explained, by a statute under which "such officer or the plaintiff is required to mail the notice to the defendant." *Id.* Sections 15-9-370 and 15-9-380 require exactly that mailing, first by certified mail and then by open mail, and the Department made both mailings within the period for service. *Wuchter* has nothing to say about *when* an affidavit proving the mailing must be filed, and Appellant cites no case holding that due process is offended when a mailing the statute requires, and that actually occurred, is proved to the court at a later date.

Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action…" *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657, 94 L. Ed. 865 (1950). It does not require actual notice. *See Martin*, 111 Wn. 2d at 477, 760 P.2d at

928 (explaining that *Wuchter* itself makes clear that actual notice is not required by due process and that mailed notice to the last known address satisfies *Mullane*). Two mailings to the only address Appellant had ever given anyone were reasonably calculated to reach him, and the reason they did not is that Appellant had moved without telling the state that licensed him, the officer who investigated the collision, or the postal service.

G. Rule 268(d)(2) bars Appellant's reliance on unpublished opinions, and *Free* would not help him if it could be cited.

Appellant builds an entire subsection of his brief on *Free v. Buff*, No. 2015-UP-162, 2015 S.C. App. Unpub. LEXIS 187 (S.C. Ct. App. Mar. 25, 2015), an unpublished opinion of this Court, and on the circuit court order it affirmed. (Appellant's Br. at 18-19). He also relies on *Trico Engineering Consultants v. Kozlowski*, No. 2010-UP-511, 2010 S.C. App. Unpub. LEXIS 584 (S.C. Ct. App. Nov. 23, 2010), another unpublished opinion. (Appellant's Br. at 21). "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Rule 268(d)(2), SCACR. The special referee correctly gave *Free* no weight for that reason. (Jan. 5, 2026 Order at 13-14).

Even if *Free* could be considered, it would not assist Appellant. By his own description of the case, the plaintiff in *Free* never filed the affidavit of mailing at all, and the circuit court dismissed because "no affidavit of mailing with the original unclaimed envelope has been filed with the Clerk of Court…" (Appellant's Br. at 18). In other words, there was no proof that the defendant in *Free* had been afforded due process. Here the affidavit and envelope were filed, more than four months before

Appellant appeared and moved for relief. (Ealy Aff.). *Free* addressed a record in which proof of notice and due process was wholly absent, and it did not purport to decide whether the date of that proof fixes the date of service. Appellant's effort to convert a due process holding into a rule that service is void *ab initio* unless the proof precedes every subsequent order finds no support in *Free* and none in any published decision of this State.

H. Rule 4(d)(8), SCRCP, has no application to service through an agent appointed by law.

Appellant also invokes Rule 4(d)(8), SCRCP, for the proposition that certified mail cannot support a default unless the record contains a signed receipt. (Appellant's Br. at 4). Rule 4(d)(8) governs service made "by the plaintiff or by any person authorized to serve process" through registered or certified mail as the mode of service. Respondent did not serve Appellant by mail. Respondent served Appellant by delivering the summons and complaint to "an agent authorized by appointment or by law to receive service of process." Rule 4(d)(1), SCRCP. The Director is such an agent by force of section 15-9-350. The subsequent mailing was the agent's act of forwarding the papers to his principal, and our Supreme Court has already distinguished service by mail requiring a return receipt from service on a statutory agent on precisely this ground. *Holman*, 318 S.C. at 205, 456 S.E.2d at 896. Rule 4(d)(8) is beside the point.

I. Appellant's construction would defeat the purpose of the statute and reward the very conduct the statute was enacted to overcome.

Our nonresident motorist statutes were enacted for the benefit of South Carolinians injured on South Carolina roads by drivers who, by the time suit can be brought, are beyond the reach of ordinary process. They are to be construed to accomplish that purpose. *See Wright v. Peterson*, No. 5:20-01859-MGL, 2021 U.S. Dist. LEXIS 57012, at *11 (D.S.C. Mar. 25, 2021) (noting that nonresident motorist statutes such as section 15-9-350 are enacted for the plaintiff's benefit and are to be liberally construed). The Roman maxim that the welfare of the people is the supreme law, *salus populi suprema lex esto*, is the animating principle of such statutes, which rest on the police power of the State to regulate the use of its highways for the protection of its citizens.

The consequences of Appellant's reading of the statutes demonstrate its error. Under that reading a plaintiff who serves the Director has accomplished nothing. He must then wait for the postal service to attempt delivery at whatever address the nonresident chose to leave behind, wait for the envelope to be returned to the Department, wait for the Department to prepare its affidavit and send the open mail, wait for the Department to transmit those papers to him, and only then file them, and only then is the defendant served. Every one of those intervals is beyond the plaintiff's control. If the last of them ends a day after the period for service expires, the action fails and the statute of limitations, which the service on the Director was supposed to toll, has run. That is not a method of service that provides certainty. It is a trap, and the General Assembly did not build a trap for the citizens it set out to

protect. Courts reject a construction that would lead to a result so plainly absurd that it could not have been intended by the legislature or that would defeat the plain legislative intention. *State v. Sweat*, 386 S.C. 339, 350-51, 688 S.E.2d 569, 575 (2010).

Appellant's reading would also place the nonresident who conceals his whereabouts in a better position than the nonresident who does not. The motorist who keeps his license current and signs for his certified mail is served, on Appellant's view, when the receipt is filed under section 15-9-370. The motorist who moves without telling anyone and whose mail comes back unclaimed is not served until the plaintiff and Director jump through a longer and more uncertain series of hoops under section 15-9-380, and he may then argue, as Appellant does, that any action taken by the court in the interval is void. The law does not permit a party to take advantage of his own wrong, and it does not reward the man who moves his tent in the night and tells no one where he has pitched it. *Cook* said as much when it warned that "to uphold a Defendant in furnishing an incomplete or incorrect address to the office could defeat the purpose of the nonresident motorists' statute." *Cook*, 263 S.C. at 583, 211 S.E.2d at 883.

The special referee correctly held that service was effective and complete on February 9, 2017, that the circuit court acquired personal jurisdiction over Appellant on that date, and that the entry of default, the order of reference, and the default judgment are not void. That holding should be affirmed.

II. The special referee did not abuse his discretion in denying relief under Rule 60(b)(1), SCRCP.

A. Appellant bore the burden of proof, and the only evidence he offered confirms that the default was the product of his own neglect.

"Once a default judgment has been entered, a party seeking to be relieved must do so under Rule 60(b), SCRCP." *Sundown Operating Co. v. Intedge Indus., Inc.*, 383 S.C. 601, 608, 681 S.E.2d 885, 888 (2009). Relief under Rule 60(b) "requires a more particularized showing of mistake, inadvertence, excusable neglect, surprise, newly discovered evidence, fraud, misrepresentation, or 'other misconduct of an adverse party,'" and the standard is more rigorous than the good cause standard that governs an entry of default under Rule 55(c). *Id.* at 608, 681 S.E.2d at 888. "The different standards under the two rules underscore the clear intent to make it more difficult for a party to avoid a default once the court has entered a judgment, which carries greater finality, and often occurs later than, a clerk's entry of default." *Id.*

The burden is on the movant to prove a good faith mistake of fact, surprise, or excusable neglect. *Williams v. Watkins*, 384 S.C. 319, 324, 681 S.E.2d 914, 917 (Ct. App. 2009); *Bowers v. Bowers*, 304 S.C. 65, 67, 403 S.E.2d 127, 128-29 (Ct. App. 1991). The movant must first provide a satisfactory explanation for the default, and only after he has done so does the court proceed to consider the timing of the motion, the existence of a meritorious defense, and the degree of prejudice to the opposing party. *Sundown*, 383 S.C. at 607-08, 681 S.E.2d at 888.

Appellant's explanation for his default is that he did not receive the process the Director mailed to him. The special referee found that this was not a satisfactory

explanation because the evidence "only demonstrates that his failure to appear and defend is entirely the product of his own conduct." (Jan. 5, 2026 Order at 16). That finding is supported by the only evidence Appellant offered, which is his own affidavit. Appellant swore that he moved in August 2013, four months before the collision, and that he had not updated his commercial driver's license at the time of the collision. (Hunt Aff. ¶ 5). North Carolina law required him to notify the Division of Motor Vehicles of the change within sixty days and to obtain a duplicate license stating his new address. N.C.G.S. § 20-7.1. He did not do this.

As a result, the only address anyone had for the driver of a commercial truck involved in a fatal collision was an address at which he had not lived since August 2013. (Hunt Aff. ¶ 8). Appellant's affidavit does not say that he gave the investigating officer his actual address, that he told the other driver where he could be reached, that he ever updated his license during the pendency of this action, or that he left a forwarding address with the postal service. (*See generally* Hunt Aff.). To the contrary, his affidavit recites that he moved to Wilmington in May 2017, to Rocky Point in 2019, to Xenia, Ohio in 2021, and to Orangeburg in 2022, five residences in nine years, and that he received no papers at any of them. (*Id.* at ¶¶ 5, 6). The certified mail came back "Unclaimed Unable To Forward." (Ealy Aff.). The special referee's inference that Appellant left no forwarding address rests on that fact and on Appellant's silence, and it is a reasonable inference drawn from evidence in the record. (Jan. 5, 2026 Order at 3, 16-17).

This is not mistake, inadvertence, surprise, or excusable neglect. It is neglect of a legal duty that predated the collision and that continued for nine years afterward. A defendant who has not kept his own address current cannot claim surprise that the process his agent mailed to the address he supplied never reached him. *See Bodell Constr. Co. v. Robbins*, 334 P.3d 1004, 1009 (Utah Ct. App. 2014) (holding that the failure to update one's address and stay apprised of proceedings is not excusable neglect justifying relief from a default judgment under Rule 60(b)(1)). Our Supreme Court has held that a corporation which signed for a summons and then lost it internally was not entitled to relief, because "[l]osing a summons and complaint within the corporation is not a ground to set aside a default judgment." *Roche*, 318 S.C. at 212, 456 S.E.2d at 900. A man who loses himself is in no better position than a corporation that loses its mail. Appellant chose, as the special referee found, not to update his address with the North Carolina Department of Motor Vehicles, not to give an accurate address to the officer at the scene, and not to provide a forwarding address to the postal service, and he "cannot now complain that a default judgment was entered in his absence when he admittedly never undertook any of these obligations." (Jan. 5, 2026 Order at 17-18).

Appellant's response is that his failure to update his license occurred before the collision and therefore could not have been an attempt to avoid service. (Appellant's Br. at 24). Rule 60(b)(1) does not ask whether the defendant intended to evade service. It asks whether his neglect was excusable. Ignorance of the law that required him to update his license does not excuse him, and the collision itself was

the event that should have prompted any reasonable person to make sure that those who might seek him could find him.

Appellant knew he had been involved in a fatal collision in South Carolina. He knew the address on his license was wrong. He knew he had told no one his actual address. He then moved four more times. Nothing about the absence of notice that followed can fairly be called a surprise. Appellant also argues that a forwarding address would have done no good because the postal service forwards mail for only twelve months. (Appellant's Br. at 24 n.6). That argument concedes the point. Appellant did not leave a forwarding address at all, and had he updated his license within the sixty days the law allowed, the certified mail would have gone to the right address in the first instance and no forwarding would have been needed.

B. The affidavit on which Appellant relies was executed in another action eight months after his motion, and the accident report and investigative materials on which he relies are not in the record.

The infirmities of Appellant's arguments run deeper than their substantive content. Appellant's motion was filed on October 26, 2022. (Oct. 26, 2022 Mot. to Vacate). It was supported by no affidavit and no evidence. The only affidavit Appellant ever produced was executed in 2023, and it bears the caption of a different lawsuit, *Maisha Jacobs v. Wayne Hunt*, Civil Action No. 2016-CP-34-00264. (*See generally* Hunt Aff.). In it Appellant swears that he is "the defendant in the above captioned matter," which is to say the *Jacobs* action. (Hunt Aff. ¶ 1). Appellant's own designation of matter does not represent that the affidavit was ever filed in this action, and the public index does not reflect that it was.

Respondent acknowledges that the affidavit was served on Respondent's counsel and that the special referee considered it without objection from Respondent, and Respondent does not ask this Court to disregard the findings the special referee drew from it, every one of which is adverse to Appellant. But the manner in which Appellant went about his proof bears on the weight it deserves. A movant who bears the burden of proving the facts essential to relief, and who waits months after moving to swear to any facts at all, and who then swears to them in another case, has not made the particularized showing Rule 60(b) demands. *See BB&T*, 369 S.C. at 552, 633 S.E.2d at 503 (stating that the movant bears the burden of presenting evidence proving the facts essential to relief).[2]

Appellant's claim to a meritorious defense fares no better. His brief states that "the accident report confirms" that the other driver failed to yield and that "investigative materials" list Appellant as without fault. (Appellant's Br. at 2, 7, 25). No accident report and no investigative materials appear in the record on appeal, and no such documents were designated under Rule 209, SCACR. The only reference to either is Appellant's own characterization of them in his affidavit. (Hunt Aff. ¶ 3). "[T]he appellate court will not consider any fact which does not appear in the Record on Appeal." Rule 210(h), SCACR. The burden is on the appellant to furnish a

[2]Should this Court conclude that an affidavit never filed in this action and captioned in another is not properly part of the record on appeal, the result is the same. Rule 210(c), SCACR, provides that the record "shall not…include matter which was not presented to the lower court or tribunal." Without the affidavit Appellant's motion is wholly unsupported, and a motion under Rule 60(b) that is unsupported by any evidence must be denied because the movant has not carried his burden. *See Bowers*, 304 S.C. at 67, 403 S.E.2d at 129 (stating that the movant bears the burden of presenting evidence proving the facts essential to relief).

sufficient record from which this Court may make an intelligent review. *Wilson v. Wilson*, 312 S.C. 172, 177, 439 S.E.2d 323, 326 (Ct. App. 1993). Appellant has not done so, and this Court should decline his invitation to assess the merits of a wrongful death claim on the strength of hearsay and documents no court has seen.

C. The special referee was not required to reach timeliness, meritorious defense, or prejudice.

Appellant faults the special referee for not addressing the remaining Rule 60(b) factors. (Appellant's Br. at 23 n.5). The special referee explained why he did not. He found that Appellant "has not articulated a satisfactory explanation for his failure to appear even under the more lenient Rule 55(c), SCRCP 'good cause' standard." (Jan. 5, 2026 Order at 16). Under *Sundown* the remaining factors come into play only "[o]nce a party has put forth a satisfactory explanation for the default." *Sundown*, 383 S.C. at 607, 681 S.E.2d at 888. A satisfactory explanation is the threshold, Appellant did not cross it, and the special referee was not obliged to weigh factors that the law makes relevant only after the threshold is crossed.

The factors would not help Appellant in any event. As to timing, counsel filed the motion on Appellant's behalf on October 26, 2022, a week before Appellant says he first learned of this action. (Hunt Aff. ¶ 4). This was nearly a year after the default judgment was filed. The record does not disclose who retained counsel or what that person knew, but it does disclose that an attorney acting on Appellant's behalf was in a position to move for relief before Appellant himself claims to have known anything, and the law is clear that the negligence of those who act for a defaulting litigant is imputed to him. *Sundown*, 383 S.C. at 609, 681 S.E.2d at 889. As to

prejudice, Respondent has litigated this wrongful death action since December 2016 and obtained a judgment that Appellant has resisted for almost four years. The witnesses to a 2013 collision grow older with every year, and the decedent's estate waited a decade for the day in court that Appellant now proposes to take from it. And as to the merits, the only evidence of a meritorious defense is Appellant's description of documents that are not before this Court and his self-serving denial of liability.

The special referee applied the correct standard, made findings that are supported by Appellant's own sworn statements, and reached a conclusion that lies well within the discretion the law commits to him. There was no abuse of that discretion.

III. Appellant's remaining arguments are not preserved for review.

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). "Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the lower court." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004). Where the lower court does not rule, the party must move under Rule 59(e). *I'On*, 338 S.C. at 422, 526 S.E.2d at 724. Appellant filed no such motion, and this failure is fatal to three of his arguments.

The first is the due process argument addressed above. The second is Appellant's request, made in a footnote and in his conclusion, that the order of reference be set aside and that the case proceed before the circuit court rather than the special referee. (Appellant's Br. at 21 n.4, 27). That request is not among

Appellant's stated issues on appeal, and "[o]rdinarily, no point will be considered which is not set forth in the statement of the issues on appeal." Rule 208(b)(1)(B), SCACR. The June 5, 2026, order does not address such a request. The circuit court's July 24, 2024, Form 4 order holding that the circuit court did not have jurisdiction over this matter has not been appealed. Appellant thereafter presented his motion to the special referee, argued it, participated in the mediation the special referee ordered, and awaited the special referee's decision. He cannot now say that the special referee was the wrong tribunal.

The third is the argument, again confined to a footnote, that Respondent's complaint should be dismissed under Rule 5(d), SCRCP, for failure to file proof of service within ten days. (Appellant's Br. at 20 n.3). The June 5, 2026, order does not mention Rule 5(d) as a ground for dismissal, no Rule 59(e) motion was filed, and the argument is not within the statement of issues. It is also wrong. Rule 5(d) commits the question of dismissal to the discretion of the court, and the failure to file proof of service within ten days does not nullify the service. *Beckham*, 300 S.C. at 332, 387 S.E.2d at 703. Respondent filed proof of service on February 15, 2017, six days after the Director was served. (Feb. 15, 2017 Proof of Service).

CONCLUSION

Appellant was served through the agent the law appointed for him on February 9, 2017, within the period for service and within the statute of limitations. The Director did everything section 15-9-380 required and did it within days. Respondent proved that compliance to the court by filing every document the statute prescribes. The only criticism Appellant can level against the judgment is that the proof of compliance was filed later than the judgment was entered, and neither the words of the statute, nor the structure of the chapter in which it sits, nor the decisions of our Supreme Court in *Holman* and *Cook*, nor the decisions of courts construing identical statutes elsewhere, will bear the weight Appellant places on that circumstance. The judgment is not void. And the special referee, presented with a defendant who stated under oath he moved five times in nine years and told no one, did not abuse his discretion in concluding that such a defendant had offered no satisfactory explanation for his default. For the foregoing reasons, Respondent respectfully requests that this Court affirm the January 5, 2026, order of the special referee in its entirety.

Dated: 08/28/2026

/s/ John E. Parker, Jr.

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