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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Case No. 2009-CP-46-01941

Jackie Hartley, ... Respondent,

RECEIVED
AUG 03 2012
SC Court of Appeals

v.

A.P. Karras, LLC d/b/a Eat Well Family Restaurant,
Andrew P. Karagounis,
Lucas Giannatos and Stacey Giannatos,

of whom
Lucas Giannatos and Stacey Giannatos are ..... Appellants.

REPLY TO MOTION TO DISMISS
and FOR EXTENSION OF TIME

Pursuant to Rules 240 and 263(b), S.C.A.C.R., the Appellants, by their counsel herein, reply to the Respondent's Motion to Dismiss and move this Court for an order granting them an extension of time in which to reply to the same, on the grounds stated below:

1. On May 21, 2012, the Appellants' Initial Brief and Designation of Matter to Be Included in the Record on Appeal were hand-delivered to counsel for Respondent. By mailed sent July 19, 2012 and received July 10, counsel for Appellants received the Respondent's Motion to Dismiss, filed with attachments but without the items listed in Appellants' Designation of Matter.
2. Under the normal time limits of Rule 204(e), S.C.A.C.R., Respondent's Motion was to be answered within ten days, rather than the normal period allowed for a Brief. Due to the

press of business in his office, counsel for Appellants has been unable to respond within the normal period and moves for the allowance of an extension of time.

3. The facts, as recited in the Respondent's Motion are contested. The following are those facts as understood by the Appellants:

   i. A hearing for Summary Judgment was heard by the Master in Equity, sitting as a Special Circuit Court Judge, on January 27, 2011. The Court stated its ruling and requested a written order. The written Order was executed on February 4, 2012 and mailed on February 14, 2011. (*Copy attached.*)

   ii. By letter filed with the Court and mailed to opposing counsel on February 7, 2011, the Appellant filed a *pro se* request for relief. (*Copy attached.*)

   iii. A later written Motion for relief *pro se,* invoking Rule 60, S.C.R.C.P., was prepared by other former counsel for Appellants and filed March 1, 2011. (*Copy attached.*)

   iv. During argument of the Appellants' Motion or Motions on June 16, 2011, counsel referenced their *pro se* letter of February 4th and argued its status as requesting Rule 59 relief. [TRANSCRIPT OF HEARING, p.4, l.24 – p.5, l.1; p.5,l.13 – p.6,l.11; p.11,l.11 – p.12,l.11; *copy attached.*] This argument was opposed by counsel for Respondent. [TRANSCRIPT OF HEARING, p.13,l.8-14.]

   v. As the Respondent acknowledges, the Court's written Order denying relief to the Appellants' Motion or Motions heard June 16, 2011 was mailed on July 11, 2011 and, as recited in the Notice of Appeal, received by counsel for Appellants on July 14, 2011.

4. Rule 203(b)(1), S.C.A.C.R., provides, in relevant part:

   (b) Time for Service.

   (1) Appeals From the Court of Common Pleas. A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.

5. As this Court may take judicial notice, thirty days after July 14, 2011 would fall on August 13, 2011. August 13, 2011 was a Saturday. Copies of calendars for those months are attached and incorporated.

6. Under those circumstances, the thirtieth day for this appeal would fall on Monday, August 15, 2011. Rule 263(a), S.C.A.C.R., provides, in relevant part:

(a) Computation. In computing any period of time prescribed or allowed by these Rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a state or federal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor such holiday.

7. The appeal herein was served on August 15, 2011. That appeal was timely.
8. While the Motion to Dismiss seems to address, by implication, other issues, its request for relief is based solely upon the issue of timeliness. That issue is fully addressed above.

The basis of this Reply and Motion is the within-cited Rules, the records of this appeal, and any attached documentation of the undersigned, which items are hereby incorporated in this Reply and Motion.

WHEREFORE, the Appellants herein move this Court to deny the Motion to Dismiss the Appeal and for an extension of time in which to file this Reply, as set out above, pursuant to Rule 240 and 263(b), S.C.A.C.R.

August 1, 2012

John Martin Foster
Post Office Box 106
Rock Hill, S.C. 29731-6106
(803) 324-8100
Attorney for Appellants

STATE OF SOUTH CAROLINA

COUNTY OF YORK

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2009CP4601941

Jackie Hartley *vs.* A P Karras LLC

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other:

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Order

Dated at York, South Carolina, this 6th day of July, 2011.

Court Reporter:

s/S. Jackson Kimball

PRESIDING JUDGE - S. JACKSON KIMBALL

This judgment was entered on the 11th day of July, 2011, and a copy mailed first class this 11th day of July, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

W Chaplin Spencer Jr Spencer & Spencer, PA
P.O. Box 790 Rock Hill, SC 29731

ATTORNEY(S) FOR THE PLAINTIFF(S)

Lucas Giannatos 1416 Sagestone Ct Charlotte, NC 28262
Stacy Giannatos 1416 Sagestone Ct Charlotte, NC 28262

ATTORNEY(S) FOR THE DEFENDANT(S)

David Hamilton

David Hamilton - Clerk of Court

SCRCP APP-24/FORM 4

CPFORM4M

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF YORK)

Jackie Hartley,)
)
Plaintiff,)
)
vs.)
)
A.P. Karras, LLC d/b/a Eat Well Family)
Restaurant, Andrew P. Karagounis, Lucas)
Giannatos and Stacy Giannatos,)
)
Defendants.)

ORDER

Case No.: 2009-CP-46-194

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2011 JUL 11 PM 3:52
DAVID HAMILTON
C.C.C.P. & GS
YORK COUNTY, SC

This matter came before the court on June 16, 2011, upon the Motion for Relief from Judgment (the "Motion") filed by defendants Lucas and Stacy Giannatos (collectively, "Giannatos") pursuant to Rule 60(b), South Carolina Rules of Civil Procedure ("SCRCP"). Jeremy D. Melville appeared on behalf of Plaintiff, and John Martin Foster appeared on behalf of Stacy Giannatos and Lucas Giannatos (collectively,"Defendants"), who were also present.

Based on the record and the arguments presented, I find and conclude as follows.

STATEMENT OF CASE

On January 27, 2011, a hearing was held before the undersigned on a Motion for Summary Judgment filed by Plaintiff ("Summary Judgment Motion"). Defendants appeared *pro se* at the hearing to defend against the Summary Judgment Motion. On February 14, 2011, I entered an Order Granting Summary Judgment ("Order") in favor of Plaintiff. On March 1, 2011, Defendants filed this Motion seeking relief from judgment pursuant to Rule 60(b), SCRCP, on the grounds of excusable neglect, relating to their failure to respond to certain Requests for Admissions served upon them in this action. The factual matter contained in the Requests for Admissions were deemed admitted, and established conclusively for all purposes of this action pursuant to Rule 36, SCRCP. Defendants assert that they did not receive copies of the Requests for Admissions, and that their failure to respond constitutes excusable neglect.

MK
#1

DISCUSSION

"[A] party making a motion under Rule 60(b) has the burden of presenting evidence providing the facts essential to entitle him to relief." *McClurg v. Deaton*, 380 S.C. 563, 579, 671 S.E.2d 87, 96 (Ct. App. 2008).

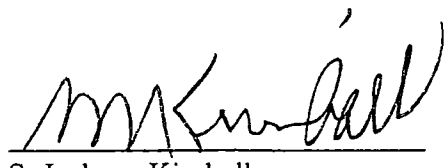
The Court finds that Defendants have not presented sufficient evidence of excusable neglect entitling them to relief from final judgment under Rule 60(b), SCRCP. As set forth in the Order, this Court previously determined that the Requests for Admissions at issue in this action were properly served by Plaintiff upon Defendants by mailing the requests pursuant to Rules 36 and 5(b)(1) of the South Carolina Rules of Civil Procedure. (Order, pp. 1-2, ¶ 4.) *See Roche v. Young Brothers*, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995)("When the civil rules on service are followed, there is a presumption of proper service."). Defendants have not presented evidence either at the hearing on the Summary Judgment Motion, or in this Motion, to rebut the presumption that the Requests for Admissions were properly served upon Defendants. Every other document served in this case was received by Defendants at the same address to which the Requests for Admission were sent.

Furthermore, Defendants have not presented any other evidence to the Court which would qualify as excusable neglect or otherwise entitle them to relief from final judgment under Rule 60(b), SCRCP.

Therefore, it is ordered that Defendants' Motion for Relief from Judgment be denied.

AND IT IS SO ORDERED.

July ~~June~~ 16, 2011



S. Jackson Kimball
Special Circuit Court Judge
York County

#2

RECEIVED
2-15-11

February 7, 2011

Dear Judge Kimball;

I never received a copy of the Plaintiff's Motion for Summary Judgment until after the hearing on January 27, 2011. I did not receive a copy of the Plaintiff's Requests for Admissions until I received a copy of the Plaintiff's Motion. I cannot explain why I did not receive these documents, but I did receive the Notice of Hearing, which was sent by certified mail. Thank you.

Lucas Giannatos

copy: Jeremy D. Melville
226 East Main Street
P O. Box 790
Rock Hill, SC 29731

8
14
v23

UNITED STATES POSTAL SERVICE

1000

29745

U.S. POSTAGE
PAID
ROCK HILL SC
29730
FEB 07. '11
AMOUNT

$3.24
00043292-06

Judge S. Jackson Kimball
Master-in-Equity
Special Circuit Court Judge
PO Box 627
York, SC 29745

Anastasia & Lukas Giannatos
1416 Sagestone Ct
Charlotte NC 28262

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT
OF THE RETURN ADDRESS. FOLD AT DOTTED LINE

CERTIFIED MAIL

7010 1870 0002 3421 3836

2374510627

STATE OF SOUTH CAROLINA

COUNTY OF York

☑ Plaintiff Sackie Hartley

P. Karras, LLC d/b/a Eat Well Family Rest, Andrew Garrigoun's (Lucas Giannatos

☐ Defendant Stacey Giannatos

IN THE COURT OF COMMON P

CASE NO

CA NO: 09-CP-46-1941

MOTION AND ORDER INFORMATION
FORM AND COVER SHEET

Plaintiff's Attorney: Bar No Address: phone: fax: e-mail: other:	Defendant's Attorney: Lukas / Stacey Giannatos Bar No Address: 1416 Sagestone Ct Charlotte NC 28262 phone: 803-327-9222 fax: e-mail: other:

☑ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)
☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)
☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

SECTION I: Hearing Information

Nature of Motion:
Estimated Time Needed. Court Reporter Needed: ☐ YES / ☐ NO

SECTION II: Motion/Order Type

☑ Written motion attached
☐ Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order

Signature of Attorney for ☐ Plaintiff / ☑ Defendant — Date submitted 3/1/2011

SECTION III: Motion Fee

☐ PAID – AMOUNT:
☐ EXEMPT (check reason)
☐ Rule to Show Cause in Child or Spousal Support
☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69 SCRCP)
☐ Proposed order submitted at request of the court; or reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter.
☐ Other:

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DAVID HAMILTON
C.C.C.P.&G.S.
YORK COUNTY, SC

JUDGE'S SECTION

☐ Motion Fee to be paid upon filing of the attached order.
☐ Other.

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Collected by: S Giles

Date Filed: 3-1-11

☑ MOTION FEE COLLECTED: $25
☐ CONTESTED – AMOUNT DUE:

SCCA/233 (11-03)

SIAIE OF SOUIH CAROLINA	)	IN THE CIRCUIT COURT FOR
	)	SIXIEENIH JUDICIAL CIRCUII
COUNIY OF YORK	)	
Jackie Hartley,	)	Case No 09-CP-46-1941
	)	
Plaintiff,	)	
	)	
v	)	MOIION FOR RELIEF FROM JUDGMENT
	)	
A.P. Karra, IIC d/b/a/ Eat Well Family Restaurant, Andrew P. Karagounis, Lucas Giannatos and Stacy Giannatos	)	
Defendant.	)	
	)	

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DAVID HAMILTON

Lucas Giannatos and Stacy Giannatos move pursuant to Rules 60 S.C.R. Civ. P for relief from the judgment and order that was entered in this action on or about February 4, 2011 Ihe grounds for this motion are that summary judgment was entered on the basis of plaintiff's Requests for Admissions, which the Giannatos did not receive, and to which the Giannatos were unable to timely respond, constituting excusable neglect. Although the record appears to show that the requests were served by regular mail, as shown in the attached affidavit, the Giannatos never received them Ihe Giannatos received the notice of hearing, which was sent by the York County Clerk to the same address as indicated in the requests, but cannot explain why they did not receive the requests, which were not sent by certified mail.

The Giannatos are ready, willing and able to present a substantive defense to the plaintiff's claims, including evidence of payment retained by the plaintiff and not credited to their account, and inequitable conduct by the plaintiff and others. Had the Giannatos received the requests, they would have served responses and denied that they owe the plaintiff the sum of $21,467 72, plus interest at the rate of $8 52 per diem for each day after April 29, 2009, as stated in Request No. 10.

Lukas Giannatos

Stacy Giannatos

February 24, 2011

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT FOR
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
Jackie Hartley,	)	Case No. 09-CP-46-1941
	)	
Plaintiff,	)	
	)	
v	)	AFFIDAVIT OF LUKAS GIANNATOS
	)	
A P. Karra, LLC d/b/a/ Eat Well Family Restaurant, Andrew P. Karagounis, Lucas Giannatos and Stacy Giannatos	)	
Defendant	)	
	)	

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DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

Personally appeared before me, Lukas Giannatos who first being duly sworn says:

1. I am a resident of Charlotte, North Carolina, and my mailing address is 1416 Sagestone Court, Charlotte, NC, 28260. I was born in Greece, but have lived in the United States for many years. The matters set forth in this affidavit are based upon my personal knowledge or belief.

2 I have reviewed the Notice and Motion for Summary Judgment filed by the Plaintiff and dated December 6, 2010, and the Requests for Admission that are attached to it. The first time I ever saw these two documents was at the hearing last month. I never received a copy of the Requests in the mail, and never received a copy of the Motion until I was handed a copy in court. Both of these documents show that they were sent to me at my address in

STATE OF SOUTH CAROLINA	)	IN THE CIRCUIT COURT FOR
	)	SIXTEENTH JUDICIAL CIRCUIT
COUNTY OF YORK	)	
Jackie Hartley,	)	Case No. 09-CP-46-1941
	)	
Plaintiff,	)	
	)	
v	)	AFFIDAVIT OF STACY GIANNATOS
	)	
A.P Karra, LLC d/b/a/ Eat Well Family Restaurant, Andrew P Karagounis, Lucas Giannatos and Stacy Giannatos	)	
Defendant	)	
	)	

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2011 MAR -1 PM 4:23
DAVID HAMILTON
CLERK OF COURT
YORK COUNTY, SC

Personally appeared before me, Stacy Giannatos who first being duly sworn says:

1 I am a resident of Charlotte, North Carolina, and my mailing address is 1416 Sagestone Court, Charlotte, NC, 28260. I was born in Greece, but have lived in the United States for many years The matters set forth in this affidavit are based upon my personal knowledge or belief.

2 I have reviewed the Notice and Motion for Summary Judgment filed by the Plaintiff and dated December 6, 2010, and the Requests for Admission that are attached to it. The first time I ever saw these two documents was at the hearing last month. I never received a copy of the Requests in the mail, and never received a copy of the Motion until I was handed a copy in court. Both of these documents show that they were sent to me and my husband at our address in

Charlotte, and I cannot explain what happened, but we never received these documents in the mail, and therefore were unable to respond to them.

3. I have received other documents from the court and from the plaintiff's attorney when they were sent to me by certified mail, including the notice of hearing, and the notice of trial date. My husband and I work from early morning until late at night, and while we regularly check the mail every day, my neighborhood has had problems with strangers intercepting mail from mailboxes. I cannot say whether that happened in this case, but can only say that I never received these papers.

4. I request the opportunity to present our defense to the plaintiff's case, which would include evidence of payment by me to the plaintiff of deposits of $12,000.00 that have not been credited to me, and the fact that I had nothing to do with the plaintiff's replacement of the HVAC system in the building rented by A.P. Karras, and should not be responsible for any costs charged for it.

Stacy Giannatos

Sworn to before me this
28 day of February, 2011.

Carolyn Mayton
Notary Public for South Carolina
My commission expires: 2017

1 (ON THE RECORD THURSDAY, JUNE 16, 2011 AT 10:00 AM.)
2 THE COURT: All right, this is the defendants motion,
3 they are now represented by Mr. Foster.
4 MR. FOSTER: Yes, sir.
5 THE COURT: Yes, sir, go ahead.
6 MR. FOSTER: Your Honor, to recite the background of
7 this, if the Court wishes to cut any of this off, it's up
8 to him.
9 THE COURT: Go ahead.
10 MR. FOSTER: Your Honor, there was a hearing on this
11 matter on January 27th. If I'm allowed to say, I happened
12 to be here at that time and not representing these folks.
13 As I understand the dispute at that time was whether they
14 had actually received a Request for Admissions - - -
15 THE COURT: Yes.
16 MR. FOSTER: - - - which had not been responded to.
17 THE COURT: Correct.
18 MR. FOSTER: The questions they had not responded to,
19 Mr. Melville, Plaintiff's summary judgment was based, as I
20 read it, solely upon that failure to respond to the Request
21 for Admissions. That was what it was based on.
22 The Court was presented -- I did not see what it was
23 presented with, but I believe it was a Certificate of
24 Service, and on that basis, as I understand it, did issue -
25 - well, did issue -

1 THE COURT: Well, it's -- my recollection is that the
2 Defendants acknowledged that the address where the Request
3 for Admissions were sent was their address.
4 MR. FOSTER: Yes.
5 THE COURT: That they were served at that address,
6 that they received notice of the hearing at that address.
7 MR. FOSTER: Right.
8 THE COURT: And -- as well as the Motion - - -
9 MR. FOSTER: Yes.
10 THE COURT: - - - for Summary Judgment at that
11 address.
12 MR. FOSTER: I believe that is correct.
13 THE COURT: And said that the Motion for Summary
14 Judgment is the first notice they received.
15 MR. FOSTER: I believe, yes, as to the Request for
16 Admission, yes, sir, that is my understanding. And I
17 believe - -
18 THE COURT: And they did not at that time produce
19 anything other than their bare -- I don't want to minimize
20 by saying bare, but their bare denial that - - -
21 MR. FOSTER: Yes, sir.
22 THE COURT: - - - they didn't get it.
23 MR. FOSTER: Yes. I believe, although I'm going by
24 memory, all that is correct. There was a denial of a
25 receipt, and that was the -- that became the question, to

1 go on with my recitation. The Court is quite correct about
2 what I recall as the colloquy between the Court and these
3 folks. There was the presentation to the Court I believe
4 with Certificate of Service showing by that basis that
5 there was service.
6 THE COURT: Yes, sir.
7 MR. FOSTER: To go on to what's happened since then,
8 we have the Court's order granting summary judgment which,
9 to my knowledge, simply states boldly in terms of what
10 we're here to discuss today that no service occurred. That
11 was on 2/4/11.
12 THE COURT: Hang on just a minute. I've got the order
13 right here.
14 MR. FOSTER: February the 4th, '11, I believe is
15 correct, or at least the date that it was sent out.
16 THE COURT: The finders of fact says that on March 5,
17 2010, the Plaintiffs served Request for Admissions by
18 mailing.
19 MR. FOSTER: Right.
20 THE COURT: And the certificate of that service was
21 included in the motion.
22 MR. FOSTER: Yes.
23 THE COURT: Okay. Go ahead.
24 MR. FOSTER: The Defendants', pro se, sent a letter to
25 the Court by certified mail dated February 7th. That is, I

1 believe, in the file and proof of knowledge.

2 After that, the Defendants went to a friend of theirs.

3 I believe I'm allowed to have to say it was Mr. Belue and

4 submitted a more formal motion dated -- well, I believe

5 it's dated February 24th and filed March 1st.

6 THE COURT: Went to whom?

7 MR. FOSTER: Mr. Belue, Dan Belue.

8 THE COURT: Oh, oh, oh, all right.

9 MR. FOSTER: Who helped them prepare a pro se motion

10 based upon the ruling of this Court.

11 THE COURT: I understand. Go ahead.

12 MR. FOSTER: Yes, sir.

13 To begin with, to make my argument that I believe the

14 standard we're dealing with here is that of Rule 59 because

15 the letter which essentially sets out their argument was

16 sent timely within 10 days. I would argue that even when

17 we're looking at the standard -

18 THE COURT: You mean good cause?

19 MR. FOSTER: Yes, sir.

20 THE COURT: Rule 55?

21 MR. FOSTER: Rule 59, yes, sir.

22 THE COURT: No. Rule 59 is this motion.

23 MR. FOSTER: Yes, sir.

24 THE COURT: What are you saying? Are you saying I

25 should have judged -- by what standards should I have

1 judged -

2 MR. FOSTER: No, sir, not past tense, present tense.

3 THE COURT: All right.

4 MR. FOSTER: I was trying to say poorly that there was

5 a motion within ten days.

6 THE COURT: Oh, Rule 59 Motion.

7 MR. FOSTER: Right, right. And that later Mr. Belue,

8 who I believe, if I'm allowed to say from my conversations,

9 was not aware of that letter invoked Rule 60. We do

10 believe it will be allowable if we make these arguments on

11 both standards, we'll go into that if the Court wishes.

12 Your Honor, I would like to hand up what the Court may

13 be aware of, which is the 2008 case from the Court of

14 Appeals, McClure versus Deaton. I'm sorry to say I do not

15 have the thing marked, but it is page 96, I believe, if I

16 can find it, and they discuss what happens -- here it is,

17 if I may turn to it and hand it to the Court. The

18 discussion on that page has to do with what proof of

19 service is and how it occurs, what effects is has.

20 On page 96, they state, that a compliance with the

21 rules of civil procedure on service, which I will certainly

22 concede a Certificate of Service is, raise the presumption

23 of proper service. Obviously, it is our contention that

24 that presumption can be rebutted.

25 THE COURT: Well, it also says -- cites a case that

1 says that that presumption cannot be impeached by the mere
2 denial of service.
3 MR. FOSTER: Yes, sir, and -- but in some cases that
4 is what is available to the client. And I believe in that
5 case, I believe, if I recall correctly, the one Court the
6 is citing that they are also referring to a case where
7 we're talking about an officer service which creates, I
8 believe, a prior presumption. Here we are talking about a
9 Certificate of Service.
10 My understanding, Your Honor, the Court obviously is
11 here to make such decisions, is that I understand the
12 modern rulings and the modern trend to be that if there is
13 a good faith question as to service, especially when we're
14 dealing with pro se clients, I believe that in itself
15 raises a situation which is proper to ask for a leave from
16 the Court. That is what we do here today. I would point
17 out a situation here which, I believe, goes further than a
18 mere denial that perhaps opposing counsel can explain it.
19 While perhaps it means nothing, I have examined the
20 documents that the Gviannots have on this case. They
21 showed me a copy of the Request for -- to Admit, which they
22 have stated to me as they've stated in their affidavit,
23 they were given only at the time of the hearing on the
24 other matter. They did however have, perhaps this can
25 explain, and I'm going to show this to counsel, what

1 appears to be an original mailing to Mr. Bradford, who at
2 that time represented other counsel -- other defendants in
3 the case.
4 Now, there may be a reason -- but if I may approach,
5 Your Honor.
6 THE COURT: Yes, sir.
7 MR. FOSTER: I'll show this to the Court. There may
8 be a reason, perhaps fulfillment of what was understood to
9 be the civil procedure rules for my clients to have what
10 appears to be an original mailing to Mr. Bradford. But it
11 would seem to me to raise a question, is it possible on the
12 basis of that document, which the Court will notice from
13 the cover page and throughout, does not include the Request
14 to Admit and which is, in fact, the discovery request to
15 Mr. Bradford's client that possibly some mistake in mailing
16 took place. I cannot speak to the practice of the Spencer
17 Firm as to how such things are done but that was in their
18 possession.
19 THE COURT: This is simply offered -- this is a copy
20 that was in the possession of the Defendants Gviannots?
21 MR. FOSTER: Yes, sir.
22 THE COURT: Of material mailed to - - -
23 MR. FOSTER: The office.
24 THE COURT: - - - to Mr. Bradford?
25 MR. FOSTER: Well, yes, sir. I believe the date is

1 the same as the matter in question, March 5, 2010. It
2 would seem at least to raise the question of whether there
3 might have been a mistake in the mailing.
4 THE COURT: You mean in the Certificate of Mailing?
5 MR. FOSTER: Well, yes, in the fact and in the matter
6 of the proved fact, yes, sir.
7 Your Honor, my argument -- I'm sorry.
8 THE COURT: Are you saying that this is -- that an
9 inference is raised that this is what was sent to the
10 Gviannots, not Request for Admission?
11 MR. FOSTER: Yes, sir, that they received the wrong
12 mailing.
13 THE COURT: But this is to Mr. Bradford.
14 MR. FOSTER: Yes, sir. That is my point.
15 THE COURT: But the mailing that I'm -- that I recall
16 was a mailing -- I do not recall. I better I say that.
17 Whether the mailing that they relied upon was a mailing to
18 Mr. Bradford and the Gviannots.
19 MR. FOSTER: The Certificate of Service does state
20 they have mailed the Request for Admissions to -- direct to
21 the Giannotos, to both the Giannotos and to Mr. Bradford.
22 THE COURT: Who was not their lawyer?
23 MR. FOSTER: Who was not their lawyer. It was a
24 lawyer for another defendant.
25 THE COURT: Right, an LLC.

1 MR. FOSTER: Actually of several defendants, I
2 believe.
3 That, however, is the document they received, and it
4 would seem to me to raise the presumption that there was,
5 in fact, a mistake in mailing. That, in fact, was what was
6 mailed rather than the Request for Admission.
7 THE COURT: All right.
8 MR. FOSTER: Your Honor, in cases like this, it's a
9 simple fact that sometimes the post office makes mistakes.
10 My clients have no ability to prove a negative by any
11 mechanism other -- this was not certified mail -- by any
12 mechanism other than what they've submitted to this Court,
13 sworn affidavits from both of them. That is with the
14 motion that was prepared.
15 THE COURT: Actually, there was a Court of Appeals
16 case within the last week that says, again, that absent
17 proof of -- to support a claim that you didn't receive
18 something by mail, you don't get relief.
19 MR. FOSTER: Well, sir, all I can -
20 THE COURT: I don't remember the name of it.
21 MR. FOSTER: I understand that. All I can respond,
22 especially since the Court is more up on this than I am in
23 terms of last week's rulings, is to repeat my argument, my
24 clients can only go so far to prove a negative.
25 THE COURT: I agree with that.

1 MR. FOSTER: And that document to me at least raises a
2 question as to what they were actually mailed,
3 THE COURT: Let me go back to your first one, to your
4 procedural posture here.
5 MR. FOSTER: Yes, sir.
6 THE COURT: I ruled against them.
7 MR. FOSTER: Yes, sir.
8 THE COURT: They were served with -- they were served
9 with the order.
10 MR. FOSTER: Yes.
11 THE COURT: Within the requisite time to receipt of
12 that they sent this letter dated, which I have in the file
13 here, dated February the 7th.
14 MR. FOSTER: To yourself, to the Court and to Mr.
15 Melville.
16 THE COURT: And what you're saying is that -- let me
17 be sure I'm speaking correctly. You're saying that that
18 puts them in a procedural position of having made a 59 (E)
19 motion.
20 MR. FOSTER: Yes.
21 THE COURT: Not having to make a 60 (B) motion to just
22 turn the judgment upside down.
23 MR. FOSTER: Yes, although I do argue they would be
24 eligible under both standards.
25 THE COURT: The position that they're taking even

1 under 59(E) would not permit them to introduce new
2 evidence. 59(E) rests on the record, does it not?
3 I guess what I'm saying is this is new.
4 MR. FOSTER: Yes, sir. Well -
5 THE COURT: Because I asked them -- I've forgotten the
6 exchange. I don't recall that they presented anything to
7 me like this.
8 MR. FOSTER: No, sir, I don't believe they did. They
9 argued simply their statements to you. I'm going by the
10 fact that I was sitting behind -
11 THE COURT: I understand. I understand.
12 MR. FOSTER: No, sir, that was not presented, that is
13 quite true.
14 THE COURT: Okay. All right. Go ahead.
15 Well, I mean, I understand what you're saying.
16 Anything else?
17 MR. FOSTER: Well, I argue -
18 THE COURT: I understand your position.
19 MR. FOSTER: I argued, of course, their pro se was --
20 their pro se status in the matter. They obviously were not
21 capable of understanding any conceivable effect of that
22 document, if it has any. And I again repeat what I said
23 before which is, what is required of any defendant to prove
24 a negative?
25 THE COURT: I believe that in many ways the rule puts

1 them in that position.

2 MR. FOSTER: I would only say to Your Honor that also

3 puts the Court in a position to administer what it sees as

4 equitable.

5 THE COURT: All right. Mr. Melville, let's go back to

6 the beginning. Tell me about this service. I'm trying to

7 reconstruct this in my mind.

8 MR. MELVILLE: If we need to go back, obviously I

9 would object to the argument that the letter of February

10 7th was a motion for 59 -- a Rule 59 motion so I just want

11 to put that on the record that I did have a notice of that

12 at - -

13 THE COURT: Well, let's assume for the moment that it

14 is.

15 MR. MELVILLE: Okay. I'll go back to that just since

16 you requested it. We actually -- that was discussed at the

17 hearing.

18 THE COURT: What was discussed?

19 MR. MELVILLE: The document, the -

20 THE COURT: The March 5th - - -

21 MR. MELVILLE: Correct.

22 THE COURT: - - - 2010, letter?

23 MR. MELVILLE: Correct. Basically, and as I discussed

24 there, the factual background for that is that at that

25 moment there were multiple defendants. Mr. Bradford was

1 representing, I forget the other names of the defendants at
2 that moment.
3 MR. FOSTER: Cowers.
4 MR. MELVILLE: And so I served -- since the Gviannots
5 had served an Answer they're entitled to be on services
6 with an attorney for any of the correspondence. So they
7 received -- on the same day I sent out a request for
8 production, interrogatories to Mr. Bradford for the other
9 defendants. That was the same day that I sent Request for
10 Admissions, Request for Production and interrogatories to
11 the Gviannots. So that explains why they have a copy of
12 that.
13 THE COURT: Mr. Foster, I'm looking at the motion --
14 the package, the original motion package.
15 MR. FOSTER: Yes, sir.
16 THE COURT: And it has a second -- whereas what you
17 handed me is addressed to Mr. Bradford with copies to Mr.
18 and Mrs. Giannotos, which apparently they received. This
19 letter is addressed to Mr. And Mrs. Giannotos of the same
20 date at the same address to which the letter to Mr.
21 Bradford was sent a - -
22 MR. FOSTER: I've seen the letter, sir. It's in the
23 file.
24 THE COURT: And they received it on the -- they said
25 that they received what you handed me.

1 MR. FOSTER: Yes, sir. That is what they had told me.
2 THE COURT: What you handed me, which was material
3 sent to Mr. Bradford - - -
4 MR. FOSTER: Yes, sir.
5 THE COURT: - - - as well as copies to Mr. And Mrs.
6 Gviannots.
7 MR. FOSTER: That is apparently what -
8 THE COURT: It also was sent to Stacey and Lucas
9 Giannotos at 1416 Sage Stone Court, Charlotte 28260.
10 MR. FOSTER: Yes, sir.
11 THE COURT: By letter of the same date addressed only
12 to the Giannotos with a copy to Mr. Bradford with a
13 different cover letter.
14 MR. FOSTER: Yes, that's what I understand. I've seen
15 the cover letter. It's in the file.
16 THE COURT: Serving the request for admission. There
17 is a Certificate of Service saying that the -- that those
18 documents, their Request for Admissions and other material,
19 was sent to them at the same address that I just read from
20 the other document.
21 MR. FOSTER: Yes.
22 THE COURT: On the same day.
23 MR. FOSTER: Yes, sir.
24 THE COURT: Okay.
25 MR. FOSTER: In fact, I believe you -

1 THE COURT: And you're saying they're saying they
2 didn't get that.
3 MR. FOSTER: Say it adamantly, yes, sir.
4 THE COURT: I understand.
5 Go ahead.
6 MR. MELVILLE: Okay. And if I would have -- if I may
7 get kind of to the heart of this, and it's kind of apparent
8 now in that basically Mr. Foster is arguing what it boils
9 down to is he is discussing what probably should have been
10 discussed and actually was discussed at the Motion for
11 Summary Judgment. I mean, there was a hearing on the
12 Motion for Summary Judgment.
13 THE COURT: Yes, sir.
14 MR. MELVILLE: These issues are all issues, if not
15 discussed there, they -- that was the forum for discussing
16 them, and once the order was in place, you know, once you
17 had everything in front of you, Your Honor made a decision
18 and entered the judgment. So I would argue that, getting
19 back to what is really at issue, if this idea of excusable
20 neglect, which is not really addressed in this one, but I
21 wanted to address it here because the Request for
22 Admissions basically is there's -- after, even if we
23 assume, let's say, they didn't get this, or we go that far
24 in this case, which I'm not saying that that's the case,
25 but if we just assume for the purpose of this motion that

1 for some reason it got lost in the mail as he said, under
2 the procedurals rules once -- they definitely got notice of
3 the hearing. We know that.
4 So in terms of excusable neglect, there was a three-
5 week period where they could have made a motion to amend or
6 withdraw the admissions. They could have done procedural
7 things prior to the summary judgment motion, which would
8 have at least put everything in front of the other. What
9 I'm arguing is this is not the proper way to challenge what
10 should have been dealt with before the Motion for Summary
11 Judgment, they had a hearing on the Motion for Summary
12 Judgment.
13 Presenting affidavits after the order's already
14 entered, this is akin to an attempt to trying to basically
15 get a second bite at the apple is the way I feel about
16 this. And without getting into too much law, I would just
17 say that fair not under the 60 (B) and excusable neglect,
18 the case law is that a party has a duty to monitor the
19 progress of his case. Lack of familiarity with legal
20 proceedings is unacceptable, and the Court will not -- will
21 not hold a layman to any lesser standard than is applied to
22 an attorney.
23 So the way I look at it is if this -- if Mr. Foster
24 had been the attorney, which he was not at the time, at the
25 time of the motion -- the hearing on the Motion for Summary

1 Judgement, and all this was argued there in the same way it
2 was argued, basically this would just be re -- I mean, it's
3 kind of rearguing the same thing. And I feel that any
4 break that would be given would be because the defendants
5 were acting pro se at the time, but the case law -- and
6 giving them relief because maybe they didn't follow every
7 procedural rule they should have and present all the
8 evidence that maybe could have put forward. Whether or not
9 it would change your opinion, I'm not sure, but basically
10 that's kind of what the argument is getting to, is that had
11 they been represented, maybe things would have been
12 differently. But under the law, that fair or not, that
13 doesn't change the fact that the neglect -- if there is any
14 neglect, that is not -- it doesn't fall under the category
15 of excusable.
16 And I think that really explains the Plaintiff's
17 position here.
18 THE COURT: All right. Brief reply)
19 MR. FOSTER: Very briefly, I would simply cite to the
20 Court , this may or may not seem relevant to the Court, but
21 I'm going to hand it up. I did manage to look up some of
22 the requirements about service with regard to default
23 judgments, which, of course, have the same type of language
24 that we're urging here, which is the need of the Court to
25 reach the issues involved. And I believe the fact that we

1 argue in here with pro se clients, I don't think anyone can
2 claim that there's been an attempt to provoke harm or to
3 cause delay on the part of the Plaintiff.
4 THE COURT: No.
5 MR. FOSTER This is simply a case of whether there is
6 a factual, an honest factual dispute about whether a
7 document was received. And to the extent it makes a
8 different report, I will inform, and I trust that Mr.
9 Melville will agree, that we have supplied answers to these
10 requests to him this week, as soon as I was engaged.
11 THE COURT: I'm still not for sure about considering -
12 -let's say it this way. If I considered the motion as made
13 under 59 (E) based on their February 7th letter, the
14 standard would be that they would ask me to alter or amend
15 the judgment based upon some error of law or failure to
16 address in the order some issue that was raised that would
17 have been, may have been dispositive in their favor. I
18 find no such error of law or failure to address an issue.
19 Thus, if we treat it as a 59(E) motion, the motion is
20 denied. If we treat it as a 60 (B) motion, I find that
21 there is no excusable neglect. Oh, and by the way, 59 (E),
22 there's no new evidence presented -- there can be no new
23 evidence presented for the Court's consideration.
24 Having reviewed, however, what you've presented and
25 having looked again at the documentation that went with the

1 motion, I find two things: One, no excusable neglect for
2 failure to deal with it in an appropriate way on the part
3 of defendants. Number two, there's been no showing of any
4 -- There's been no satisfactory explanation to rebut the
5 presumption that arises by reason of the service in
6 accordance with the rule. So I deny the motion.
7 However, in fact, I -- this would be, but it seems to
8 me the fact that they received something on the same day
9 from the same law firm at the same address as the recorded
10 Request for Admissions, on the same day they were sent to
11 the same -- from the same law firm at the same address
12 seems to tighten the noose rather than loosen it.
13 Now, e-mail me an order, please.
14 MR. MELVILLE: Thank you, Your Honor.
15 - END OF TRANSCRIPT OF HEARING -
16
17
18
19
20
21
22
23 NO EXHIBITS WERE ENTERED INTO THE RECORD.
24
25

jmfoster@comporium.net, ensmith@comporium.net

Jul 2011 (Eastern Time)

Sun	Mon	Tue	Wed	Thu	Fri	Sat
26	27	28	29	30	1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
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31	1	2	3	4	5	6

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Aug 2011 (Eastern Time)

Sun	Mon	Tue	Wed	Thu	Fri	Sat
31	1	2	3	4	5	6
7	8	9	10	11	12	13
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STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM YORK COUNTY
Court of Common Pleas

S. Jackson Kimball, Special Circuit Judge

Case No. 2009-CP-46-01941

Jackie Hartley, ... Respondent,

v.

A.P. Karras, LLC d/b/a Eat Well Family Restaurant,
Andrew P. Karagounis,
Lucas Giannatos and Stacey Giannatos,

of whom
Lucas Giannatos and Stacey Giannatos are ..... Appellants.

PROOF OF SERVICE

I certify that I have served the **Reply to Motion to Dismiss and Motion for Extension of Time,** dated August 1, 2012, on the following counsel or persons of record:

W. Chaplin Spencer, Jr.
Jeremy D. Melville
Spencer & Spencer, PA
Post Office Box 790
Rock Hill, SC 29731-6790

by depositing the same with the United States mail, with sufficient first class postage attached, properly addressed to the clerk of the Court, and with a copy also directed to the respective last known address(es) of those attorney(s) and/or persons set out below; or

by hand delivering copies of the same to the following persons, or by leaving the same at that person's office with that person's clerk or some other person in charge thereof, or by leaving it in a conspicuous place therein; of if the office was closed or the person to be served has no office, by leaving a copy at that person's dwelling place or usual place of abode with some person of suitable age and discretion then residing therein, all pursuant to Rule 262(b), S.C.A.C.R.

August 1, 2012

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August 1, 2012

The Honorable Jenny Abbott Kitchings
Clerk of the South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Jackie Hartley, Respondent,
v. A.P. Karras, LLC d/b/a Eat Well Family Restaurant,
Andrew P. Karagounis,
Lucas Giannatos and Stacey Giannatos,
of whom Lucas Giannatos and Stacey Giannatos are Appellants.

Case No. 2009-CP-46-01941

Dear Ms. Kitchings:

In accordance with Rule 240(a), S.C.A.C.R., enclosed herewith please find the original and seven (7) copies of the Appellants' Reply to Motion to Dismiss and Motion for Extension of Time, together with Certificate of Service for the same in the above referenced case. I also enclose our check for the Motion fee of $25.00.

By copy of this letter, I am serving the attorney for the Respondents with copies of the said Motion, as evidenced by the Certificate of Service.

Please return the extra conformed copy to my office in the enclosed self-addressed, stamped envelope. As always, thank you, and your staff, for your assistance in these matters.

Sincerely yours,

John Martin Foster

JMF/es
enclosures
cc: W. Chaplin Spencer, Jr.
Jeremy D. Melville
Spencer & Spencer, PA
Attorneys for Respondent
Post Office Box 790
Rock Hill, SC 29731-6790

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AUG 03 2012
SC Court of Appeals