

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
2012207208

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2011-CP-07-2303

Jessica Caldwell Respondent

v.

Amy Wiquist Appellant

Case No. 2011-CP-07-2304

Brian Caldwell Respondent

v.

Amy Wiquist Appellant

FINAL APPELLANT'S BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in applying the *Yates* line of cases, where the Affidavits at issue here wholly failed to comply with S.C. Code § 15-9-740 and there was more than merely a dispute as to the weight of the evidence in the Affidavits?

SUGGESTED ANSWER: Yes.

2. Did the trial court err in applying the *Yates* line of cases, where service under those cases would violate the Due Process Clause?

SUGGESTED ANSWER: Yes.

3. Did the trial court err in applying the *Yates* line of cases, where there was at least some evidence suggesting the possibility of fraud or collusion?

SUGGESTED ANSWER: Yes.

4. Should the *Yates* line of cases be overruled?

SUGGESTED ANSWER: Yes.

5. Did the trial court err in denying Defendant's Motion to Set Aside Default where the Order of Service by Publication did not comply with S.C. Code § 15-9-740?

SUGGESTED ANSWER: Yes.

STATEMENT OF THE CASE

I. Background Facts

This consolidated appeal arises out of two lawsuits filed in the Court of Common Pleas of Beaufort County, South Carolina: *Jessica Caldwell v. Amy Wiquist*, 2011-CP-07-2303; and *Brian Caldwell v. Amy Wiquist*, 2011-CP-07-2304. In these actions, Plaintiffs Jessica and Brian Caldwell (collectively "Plaintiffs") seek to recover damages for injuries that they allege they sustained in an automobile accident. Specifically, Plaintiffs allege that on September 11, 2010, Plaintiff Jessica Caldwell, was a passenger in an automobile that her husband, Plaintiff Brian Caldwell, was operating. (*See* R. at p. 0036-37 ¶ 3; R. at p. 0041-42 ¶ 3). Plaintiffs allege that, while their vehicle was stopped in traffic, it was struck by the vehicle negligently operated by Defendant Amy Wiquist ("Defendant"). (*See id.*).

II. Procedural History

Plaintiffs commenced these actions by Complaint filed on May 26, 2011. (*See generally* R. at pp. 0034-43). These Complaints did not allege the address, or even the state or county of residence, of Defendant. (*See id.*). The record does not contain any evidence that Plaintiffs did anything to determine the Defendant's address – beyond reviewing the Traffic Collision Report for the accident.

On June 17, 2011, the Beaufort County Sheriff's Office executed Affidavits of Non-Service, stating that, as of June 16, 2011, the Sheriff's Office had been unable to complete service on Defendant at 215 White Oak Cir., Bluffton, South Carolina, providing the following explanation: "ADDRESS VACANT." (*See* R. at pp. 0044-45). The Affidavits of Non-Service do not state how the Sheriff's Office obtained the address where service was attempted or why it had reason to believe that the Defendant would be located there. (*See id.*). The Affidavits of Non-Service do not contain any suggestion that the Beaufort County Sheriff's office undertook its own search to determine Defendant's address. The record contains no evidence that Plaintiffs undertook any

efforts to serve process on the Defendant prior to the efforts referenced in the Affidavits of Non-Service.

On June 27, 2011, Colden R. Battey, Esq., counsel for Plaintiffs, executed Affidavits of Publication, affirming *in toto*:

1. He is a member of the law firm of Harvey & Battey, P.A., with offices at 1001 Craven Street, Beaufort, South Carolina 29902, and makes this Affidavit on behalf of the Plaintiff in this cause seeking an Order of Publication against the non-resident Defendant.

2. This action has been commenced and is now pending in the Court of Common Pleas for Beaufort County, South Carolina, for injuries arising out of an automobile collision that occurred in Beaufort County on September 11, 2010.

3. The Defendant who is a non-resident of Beaufort County, South Carolina, cannot be served a copy of the Summons in Beaufort County, and it is necessary and proper to serve her by publication.

(See R. at pp. 0046-49). Notably, these Affidavits of Publication did not identify, describe or even mention any due diligence that Plaintiffs undertook in an effort to locate Defendant. Moreover, the Affidavits of Publication did not attach the Traffic Collision Report for the accident. These Affidavits of Publication do not even state the last known address of Defendant.

On June 30, 2011, Jerri Ann Rosenau, Clerk of Court for Beaufort County, entered an Order of Publication providing, in relevant part, that it appeared to her satisfaction from the Affidavit of Publication that:

1. A cause of action exists in favor of the Plaintiff and against the Defendant named herein.

2. The parties named are necessary or proper parties to this action, which relates to an automobile accident which occurred on September 11, 2010.

3. It appears the Defendant has moved from her last known residence listed on the Traffic Collision Report, 215 White Oak Circle, Bluffton, SC 29910, and has left no forwarding address.

4. The Plaintiff has attempted without success to serve the Defendant,

Amy Wiquist, with a copy of the Summons and Complaint filed with the Court on May 26, 2011.

5. The Affidavit of Non-Service has been filed with the Clerk of Court for Beaufort County, a copy of which is attached hereto and made a part hereof.

(See R. at pp. 0001, 0004). In light of these findings, the Clerk ordered that service be made by publication in *The Beaufort Gazette* and that:

Should the Plaintiff or his attorney be able to ascertain the address of the Defendant in this cause, a copy of the Summons and Complaint shall be mailed by certified mail to the Defendant at such address, if he is nonresident; and that personal service be made upon any resident defendant if he (sic) can be located within the State of South Carolina.

(See *id.*). These Orders of Publication: (a) made no finding with regard to whether Plaintiffs exercised due diligence in attempting to locate Defendant; and (b) do not explain the basis for the statement that Defendant "moved from her last known residence listed on the Traffic Collision Report, 215 White Oak Circle, Bluffton, SC 29910, and has left no forwarding address". Moreover, the Orders of Publication do not reference a hearing on the record, any testimony provided in support of service by publication or any other evidence considered beyond the Affidavits of Non-Service and the Affidavits of Publication.

On August 3, 2011, Plaintiffs filed Affidavits stating that notice of these actions was published in *The Island Packet* and *The Beaufort Gazette* on July 7, 14 and 21, 2011. (See R. at pp. 0050-51). Subsequently, on August 22, 2011, Plaintiffs filed Affidavits of Default, stating, in part: "More than thirty days have elapsed since service by publication upon said Defendant, Amy Wiquist. There has been no answer or other responsive pleading served upon said Plaintiff, and said Defendant, Amy Wiquist, is now in default." (See R. at pp. 0052-57). Subsequently, on September 22, 2011, Plaintiffs moved for a default judgment in these actions. (See R. at pp. 0058-63).

On October 3, 2011, the trial court conducted a hearing on damages. Notice of this hearing — which was not received until *after the hearing* — was Defendant's first

actual notice of the events occurring in the lawsuit. On October 4, 2011, the trial Court entered Orders of Default Judgment (collectively the "Default Judgments") against Defendant, awarding Plaintiff Brian Caldwell \$100,000.00 (\$85,000.00 in compensatory damages and \$15,000.00 in punitive damages) and Plaintiff Jessica Caldwell \$20,000.00 (\$15,000.00 in compensatory damages and \$5,000.00 in punitive damages). (*See R.* at pp. 0007-17).

Promptly upon receipt of the Orders of Default, Defendant filed Motions to Set Aside Default on October 25, 2011. (*See R.* at pp. 0064-91). Attached to these Motions was an Affidavit of Amy Wiquist, setting forth — for the first time on the record — the true facts concerning her whereabouts:

2) On September 11, 2010, the date of the accident giving rise to this action, I lived with my parents at 215 White Oak Circle, Bluffton, SC 29910. That address was listed as my address on the S.C. Traffic Collision Report relating to the September 11, 2010 accident.

3) My father died earlier this year and in early June 2011, my mother and I moved from our old address at 215 White Oak Circle, Bluffton, SC 29910 to our new address at 1 Plumgrass Street, Bluffton, SC 29910 which is where we currently reside. When we moved, the U.S. Post Office was given forwarding instructions for any mail sent to our old address.

4) I never received a copy of the Summons and Complaint in this action by mail or by personal service.

5) On October 4, 2011, I received by mail a Notice of Motion and Motion dated September 22, 2011 informing me that a default damages hearing was to be held on October 3, 2011. The Notice of Motion and Motion was mailed to my old address, 215 White Oak Circle, Bluffton, SC 29910, and subsequently forwarded to me by the U.S. Post Office.

6) I never received any other mail from the Plaintiff, her attorney, or anyone else on their behalf and any mail sent to my old address would have been received by me.

7) Since September 11, 2010, the date of the accident giving rise to this action, I have never attempted to conceal my whereabouts or my new home address from anyone and I could have been easily contacted and located by mail or inquiry at the local U.S. Post Office.

(October 25, 2011 Motion to Set Aside Default (Affidavit of Amy Wiquist) in *Jessica Caldwell v. Amy Wiquist*, 2011-CP-07-2303 ¶¶ 2-7; October 25, 2011 Motion to Set Aside Default (Affidavit of Amy Wiquist) in *Brian Caldwell v. Amy Wiquist*, 2011-CP-07-2304 ¶¶ 2-7). Plaintiffs have never proffered any evidence that contradicts a single fact set forth in the Affidavit of Amy Wiquist.

On December 28, 2011, the trial judge entered Orders Denying Motions to Set Aside Default (collectively the "Orders") in these actions. (*See R.* at pp.0018-33). Defendant filed a timely appeal. (*See R.* at pp.0118-21). For the reasons set forth herein, this Court should reverse the Orders, vacate the Default Judgments and remand this action for further proceedings.

ARGUMENTS

I. Standard of Review

“The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial [court].” *Roberson v. S. Fin. of S.C., Inc.*, 365 S.C. 6, 9, 615 S.E.2d 112, 114 (2005). “The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion.” *Id.* An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. *See In re Estate of Weeks*, 329 S.C. 251, 259, 495 S.E.2d 454, 459 (Ct. App. 1997). However, public policy favors the disposition of cases on their merits rather than on technicalities. *See Micronics, Inc. v. South Carolina Dep't of Rev.*, 345 S.C. 506, 511, 548 S.E.2d 223, 226 (Ct. App. 2001).

II. The Trial Court Erred in Denying Defendant's Motion to Set Aside Default Judgment for Lack of Personal Jurisdiction (Rule 60(b)(4))

A. Service by Publication Was Not Appropriate in This Case

For the reasons set forth herein, the trial court erred in denying Defendant's Motions for Relief from Default pursuant to South Carolina Rule of Civil Procedure 60(b)(4).

Under South Carolina law, “[o]n motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment” if, among other reasons, “the judgment is void.” *See S.C.R.C.P.*, Rule 60(b)(4). “The definition of ‘void’ under the rule only encompasses judgments from courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction.” *Linda Mc Co. v. Shore*, 390 S.C. 543, 552, 703 S.E.2d 499, 503 (2010) (*quoting McDaniel v. U.S. Fid. & Guar. Co.*, 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996)). As discussed herein, the trial court lacked personal jurisdiction over Defendant because Plaintiffs did not serve original process in compliance with the

law.

The South Carolina Rules of Civil Procedure set forth the manners in which original process may be served upon a party, including as follows:

(d) **Summons: Personal Service.** The summons and complaint must be served together. . . . Service shall be made as follows:

(1) **Individuals.** Upon an individual other than a minor under the age of 14 years or an incompetent person, by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process. . . .

(8) **Service by Certified Mail.** Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c), including a sheriff or his deputy, by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt. . . . If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

See S.C.R.C.P., Rule 4(d)(1) & (8). "Rule 4, SCRCF serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action." *See Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209, 456 S.E.2d 897, 899 (1995).

In certain very limited circumstances, the legislature permits substitute, alternative service by publication:

When the person on whom the service of the summons is to be made cannot, after due diligence, be found within the State and (a) that fact appears by affidavit to the satisfaction of the court or judge thereof, the clerk of the court of common pleas, the master, or the probate judge of the county in which the cause is pending and (b) it in like manner appears that a cause of action exists against the defendant in respect to whom the service is to be made or that he is a proper party to an action relating to real property in this State, the court, judge, clerk, master, or judge of probate may grant an order that the service be made by the publication of the summons in any one or more of the following cases: . . . (3) when the

defendant is a resident of this State and after a diligent search cannot be found

See S.C. Code § 15-9-710(3). Plaintiffs attempted the service by publication in this lawsuit pursuant to this statute.

Plaintiffs sought to serve via publication, even though there was no evidence that Defendant had fled the state or was attempting to avoid service. Plaintiffs sought to serve by publication, even though they had not undertaken any steps to locate her – even the bare minimum step of trying to reach her by mail. Moreover, there was never any evidence that Defendant could not be found with the exercise of due diligence. In fact, she was openly living a stone’s throw from her previous residence. She even left a forwarding address with the post office, such that — if Plaintiffs would have taken the meager step of sending her the Complaint in the mail — she almost certainly would have received it. Instead of effecting actual service, Plaintiffs very quickly resorted to service by publication — although the reality was that this method would most likely deprive Defendant of actual notice. Plaintiffs then used this unfair procedure, which was not designed to maximize the likelihood of actual notice, to obtain a default judgment against Defendant.

In reality, the legal fiction underlying service by publication — that people read the legal notices in newspapers — would not have even existed in the instant case. Defendant would have had no reason to regularly read the legal notices, because she did not fit the statutory description of someone eligible to be served by publication. As an open resident of Bluffton, her reasonable expectation was that, if she was sued, she would receive actual notice through actual service of process. She was, thus, not accorded even the fictitious notice and opportunity to be heard that service by publication provides.

In her Motions to Set Aside Default, Defendant argued that the Plaintiffs had failed to make the required showing and were not permitted under the statute to serve original process by publication. (*See* R. at pp. 0064-91). Defendant further argued that

Plaintiffs' failure to fulfill the requirements of the statute caused the resort to service by publication to be a violation of Due Process. (*See id.*) The trial court refused to grant relief from the Default Judgments on the ground of the impropriety of service by publication, stating:

The well settled rule in South Carolina regarding the finality of an order of publication is that "in the absence of fraud or collusion, the decision of the officer ordering service by publication is final." *Montgomery v. Mullins*, 325 S.C. 500, 506, 480 S.E.2d 467, 470 (Ct. App. 1997); *Yates v. Gridley*, 16 S.C. 496 (1882). The Defendant here does not allege either fraud or collusion. As such, relief on this ground must be denied.

(*See R.* at pp. 0023-24, 0032). For the reasons that follow, the trial judge erred in denying the Motions for Relief from Default Judgments under the *Yates* line of cases.

1. The *Yates* Line of Cases Does Not Apply to Permit Service by Publication in the Instant Case, Because the Clerk Did Not Make a Determination of Diligence and the Affidavit of Default Did Not Comply With the Law

First, the trial court erred in holding that *Yates* and its progeny rendered the Clerk's decision to permit service by publication immune from review. As discussed below, the instant case is distinguishable – factually and philosophically – from the *Yates* line of cases in an important and controlling way.

The trial court's denial of Defendant's Motion to Set Aside Default was based primarily on a line of cases dating back to the 1882 case of *Yates v. Gridley*. In *Yates*, the Court held that a Clerk's analysis of the sufficiency of an affidavit to determine whether a plaintiff engaged in "due diligence" is final:

Section 158 of the code provides that where a party is a nonresident, but has property in the State, and the court has jurisdiction of the subject-matter of the action, he may be made a party by publication, where it is made to appear by affidavit, to the satisfaction of the officer ordering such publication, that defendant cannot after due diligence be found within the State, and that a cause of action exists against him *** a copy of the summons to be forthwith deposited in the post-office directed to the person, to be served at his residence, unless it appears that such residence is neither known to the party making the application nor can with reasonable diligence be ascertained by him.

All that this section requires is, that it be made to appear by affidavit to the satisfaction of the officer who directs the publication, that the defendant has property in the State, that he cannot be found therein after due diligence, and that a cause of action exists against him. And if the post-office is known, or can with reasonable diligence be ascertained, the order must direct also that the party be served at his residence through the post-office.

In this case the clerk of the court who ordered the publication, we must suppose, was satisfied with the affidavit submitted to him. His duty was somewhat of a judicial character, which he could perform upon being satisfied by affidavit that the conditions demanding the publication were present. The act does not specify the *character of the facts and circumstances which must be stated in the affidavit, or the quantity of evidence necessary to satisfy the officer, before ordering publication. It simply requires that it must appear by affidavit to his satisfaction.* It seems to be left to his discretion, and, in the absence of fraud and collusion, can his judgment be overruled?

There is nothing in the act directing that the summons should be placed in the hands of the sheriff, and non est returned thereon, nor is there anything defining what facts should exist probative of the jurisdictional facts. All this seems to have been left to the officer, and when he is satisfied, in the absence of fraud and collusion, it is final.

See Yates v. Gridley, 16 S.C. 496, 499-500 (1882) (emphasis added).

Yates was applied and construed by the Court in *Montgomery v. Mullins*, 325 S.C. 500, 480 S.E.2d 467 (Ct. App. 1997), also cited by the trial judge. In *Montgomery*, this Court applied *Yates* to deny review of a Clerk's finding of due diligence in the face of an affidavit detailing efforts to locate the defendant:

Counsel for Montgomery stated by affidavit that after the sheriff's department notified him of non-service, he contacted the Mullinses' insurance carrier to obtain a current address. He also testified he made other efforts to locate the whereabouts of the Mullinses, which included calling the phone number he secured, contacting the power and phone utilities, contacting the Office of the Chief of Navy Personnel in Washington, D.C. in order to locate Mr. Mullins, and calling the business number on the Uniform Traffic Accident Report only to be told Mr. Mullins did not work there. When all of these efforts failed, Montgomery petitioned for an order of publication. . . .

Service of process by publication is authorized by S.C. Code Ann. § 15-9-710(3) (Supp.1995) where the defendant is a resident of this state, but after

a diligent search cannot be found in this state. . . . As to the determination of whether the order of publication was valid based on Montgomery's lack of diligence in attempting to locate the Mullinses, we hold the trial court was without authority to overrule the finding of the clerk of court that the Mullinses could not, "after due diligence, be found in the County and State of their last known residence."

See id., 325 S.C. at 504-06, 480 S.E.2d at 469-70 (emphasis added).

The South Carolina Supreme Court further applied and construed *Yates* in *Ingle v. Whitlock*, 282 S.C. 391, 318 S.E.2d 367 (1984). *Ingle* involved an automobile accident, as in the instant action. There, the plaintiff obtained permission to serve via publication, premised upon an affidavit from a private process server detailing numerous steps undertaken to locate the defendant:

The affidavit attached to the petition recited that the professional process server diligently attempted to locate appellant at his last known address and another address; contacted the mail carriers who delivered mail to appellant; contacted appellant's stepmother; made several neighborhood inquiries and contacted Duke Power Company, Spartanburg Water Works and Correctional Release Center, all to no avail.

Counsel for appellant's Insurer states in his Brief that the Insurer has also been unable to locate appellant.

See id., 282 S.C. at 392, 318 S.E.2d at 368. The South Carolina Supreme Court refused to quash service, because "[t]he facts and circumstances related in the petition and affidavit attached thereto were sufficient to satisfy the clerk of court who ordered publication." *See id.*

Both *Montgomery* and *Ingle* have a common thread: the affidavits supporting requests for service by publication included at least *some* facts concerning efforts to locate the defendant. Thus, the issue was simply whether the facts set forth were sufficient to amount to "due diligence." Similarly, other cases in the line of *Yates'* progeny involve affidavits containing *some* evidence — or at least conclusory statements — regarding diligence (*i.e.*, facts concerning efforts to locate a defendant). *See Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 428, 535 S.E.2d 128, 130 (2000)

("[T]he process server's affidavit *reflects due diligence by her.*") (emphasis added); *Yarbrough v. Collins*, 293 S.C. 290, 292, 360 S.E.2d 300, 301 (1987) (refusing to consider issue of due diligence where affidavit contained "conclusory statement that due diligence had been exercised," even though it "failed to set forth any facts showing that diligence had, in fact, been exercised."). In all of these cases, the rule set forth is that the Court cannot examine or question the Clerk's analysis, consideration or weighing of actual, existing evidence of diligence in an affidavit. At their heart, these cases prevent second-guessing of judgment calls.

However, the *Yates* line of cases does not address the circumstances presented in the instant appeal. Unlike *Yates* and its progeny, this case does not involve a mere question as to the sufficiency of evidence concerning efforts to locate the Defendant. This case does not involve the question of whether the various Affidavits contain *enough* facts. Rather, in the instant matter, the Affidavits are devoid of *any* evidence of *any* effort to locate Defendant. To say that the Affidavits of Non-Service and Affidavits of Publication are factually lacking is an understatement. In reality, the Affidavits are so far deficient that they should not be protected by the *Yates* line of cases. There was no "judgment call" here. The Affidavits are blatantly and facially flawed, to the extent that they do not fulfill the statutory requirement of supporting affidavits.

Plaintiffs' Affidavits of Non-Service only state that the Sheriff attempted service at an address, and that that address was vacant. (*See R.* at pp. 0044-45). The Sheriff's Office did not affirm how it obtained that address or even that it had any reason to believe that Plaintiff resided there. Moreover, Plaintiffs' Affidavits of Publication by its counsel state only that "Defendant who is a non-resident of Beaufort County, South Carolina, cannot be served a copy of the Summons in Beaufort County." (*See R.* at p. 0046 ¶ 3; *R.* at p. 0048 ¶ 3). None of this suggests, in even the slightest degree, that Defendant could not be located or that Plaintiffs made *any effort* to find her.

The Affidavits of Publication by Plaintiffs' counsel contain *absolutely no evidence*

of any effort to locate Defendant (or even that she could not be found), let alone a diligent effort. In fact, they do not even state in conclusory fashion that the Plaintiffs acted with due diligence in attempting to locate Defendant. They do not state how Plaintiffs obtained the address given to the Sheriff's Office. They do not even use the word "diligence."

Unlike *Yates'* progeny, the Affidavits of Publication are devoid of *any* effort to locate Defendant. By way of example only, there is no suggestion that Plaintiffs undertook such reasonable, simple steps as:

- Sending mail to Defendant at her last known address;
- Calling the last known phone number of the Defendant;
- Contacting the police officers issuing the accident report;
- Requesting drivers' license records;
- Requesting voter's registration records;
- Requesting information from any governmental entity;
- Researching property ownership records;
- Researching UCC filings;
- Contacting Defendant's insurance company to request updated information;
- Contacting power, telephone or other utilities;
- Contacting mail carriers or postal authorities;
- Contacting Defendant's relatives;
- Making inquiries in Defendant's neighborhood;
- Checking court dockets;
- Researching online telephone directories;
- Researching social media websites (Facebook, etc.); or
- Hiring a private investigator.

If the Affidavits contained evidence that Plaintiffs had undertaken *any* of these steps — or any of a multitude of other potential steps available to them — the trial judge's

application of *Yates* might be well-taken. Under such circumstances, the issue would be a question of *degree of diligence and the sufficiency of the Affidavits* — a judgment call.

The issue in this case is not whether the Affidavits were *sufficient to prove due diligence*; rather, the issue here is that the Affidavits do not even attempt to fulfill the requirements of the statute. Plaintiffs have failed to even attempt to carry their burden. Under the law, Plaintiffs were required to present "by affidavit" evidence that Defendant "cannot, after due diligence, be found within the State." See S.C. Code § 15-9-710(3). Here, the Affidavits did not even purport to do so. The instant appeal does not second-guess the Clerk's exercise of discretion; rather, Defendant's point on appeal is that there was no discretion to be exercised; there was only one possible result, since Plaintiffs failed to satisfy the statute.

Therefore, this Court should reverse the trial court's denial of Defendant's Motion to Set Aside Default Judgment.

2. The *Yates* Line of Cases Can Not Apply to Permit Service by Publication Consistent With the Due Process Clause

In addition to the foregoing, this Court should reverse the trial court's application of *Yates* and its progeny, because the application of those cases in the instant case violated the constitutional guarantee of Due Process.

Under both the federal and State constitutions, parties are entitled to the protection of Due Process. See U.S. Const. Amd. XIV § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law "); S.C. Const. art. I, § 22 ("No person shall be finally bound by a judicial or quasi judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard.").

"The requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review." *Ogburn-Matthews v. Loblolly Partners (Subdivision)*, 332 S.C. 551, 562, 505 S.E.2d 598, 603 (Ct. App. 1998). "Due process is

flexible and calls for such procedural protections as the particular situation demands.'" See *id.*, 332 S.C. at 561, 505 S.E.2d at 603 (quoting *Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health & Envtl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 341 (1991)).

In a seminal case discussing service by publication, the United States Supreme Court discussed the requirements of Due Process in that context:

This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest. . . . *An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.* . . .

But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, *compare Hess v. Pawloski*, 274 U.S. 352, 47 S. Ct. 632, 71 L. Ed. 1091, *with Wuchter v. Pizzutti*, 276 U.S. 13, 48 S. Ct. 259, 72 L. Ed. 446, 57 A.L.R. 1230, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint.

See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950) (emphasis added). Thus, in order for service by publication to pass constitutional muster,

the procedure must be "reasonably calculated" to provide actual notice of the lawsuit.

Numerous courts have applied *Mullane* to hold that publication service is only constitutionally permissible in rare circumstances, where all other methods of service or notification fail. See *United States v. Borromeo*, 945 F.2d 750, 752 (4th Cir. 1991) ("[S]ervice by publication is constitutionally insufficient *where actual notice by mail is feasible.*") (emphasis added); *Securities and Exchange Commission v. Tome*, 833 F.2d 1086, 1094 (2d Cir. 1987) ("Certainly, if a defendant's name and address are known or may be obtained with reasonable diligence, service by publication will not satisfy the requirements of due process"); *Montgomery v. Scott*, 802 F. Supp. 930, 935 (W.D.N.Y. 1992) ("If the name and address of an individual is reasonably ascertainable, then notice by publication is insufficient to satisfy due process.").

When the application of the *Yates* line of cases to the instant lawsuit is viewed through the prism of the Due Process Clause, it becomes clear that the trial court erred in denying Defendant's Motion to Set Aside Default. There is no evidence of reasonable efforts made to locate the Defendant and provide her with notice of these cases. There is no evidence of any steps reasonably calculated to ensure that Defendant would receive actual notice of this case. To the contrary, the evidence shows that — if Plaintiffs would have sent notice of the lawsuit prior to default to Defendant via mail to her last known address — she would have most likely received it, since her mail was being forwarded. (See R. at pp. 0072-73 ¶¶ 2-7; R. at pp. 0086-87 ¶¶ 2-7). Far from being the "last resort," Plaintiffs made service by publication one of their first options. Neither Plaintiffs nor the Clerk undertook any steps to ensure that it was undertaken in a way designed to get notice to Defendant.

Under these fundamentally unfair circumstances that conspired to deprive Defendant of notice of these lawsuits, there was nothing in the procedure that was reasonably calculated to provide her with notice. Plaintiffs have not been held to account for their absence of effort to locate Defendant; the Clerk's unsupportable decision was

held immune from *any* review. If anything, it appears that this procedure was designed to ensure that Defendant never received notice of the lawsuits until it was too late.

The teaching of *Mullane* is that publication service is rarely, if ever, effective to provide actual notice. That being the case, Due Process requires that it be the "last resort," undertaken only after all reasonable efforts to serve by other means are exhausted. In this case, there were no such steps. In reality, it is apparent from the record that service by publication was undertaken early in the game, with no factual basis. To compound all of this unfairness, Defendant now cannot even challenge service. This is not consistent with the intended protections of the Due Process clause. Irrespective of the implication of *Yates*, the Constitution makes clear that the trial court erred in allowing service by publication without any assurance that other routes for service had been exhausted.

Therefore, this Court should reverse the trial court's denial of Defendant's Motion to Set Aside Default Judgment.

3. There Is Enough of a Question of Fraud or Collusion That the Trial Court Should Have Fully Analyzed the Circumstances Leading to the Order of Publication

The trial court dismissed any suggestion of fraud or collusion in connection with the Order of Publication. However, because the record suggests at least a good possibility of fraud or collusion, the trial court erred in refusing to consider the merits of Defendant's Motion to Set Aside Default.

The record establishes, without dispute, that the Order of Publication expressly finds facts that were not in the record. Specifically, the Order of Publication concludes, *inter alia*, that "[i]t appears the Defendant has moved from her last known residence listed on the Traffic Collision Report, 215 White Oak Circle, Bluffton, SC 29910, and has left no forwarding address." (*See R.* at pp. 0001, 0004). The Clerk's inclusion of this finding in the Orders of Publication is puzzling, because the Affidavits are *devoid of any*

evidence of these facts.

The Affidavits of Non-Service and Affidavits of Publication *do not* reference the "Traffic Collision Report." Those Affidavits do not state that the listed address was Defendant's "last known address." The Affidavits do not state (incorrectly) that Defendant "left no forwarding address." In reality, Defendant actually did leave a forwarding address with the United States Post Office, which resulted in mail being forwarded to Defendant. (*See* R. at pp. 0072-73 ¶¶ 2-7; R. at pp. 0086-87 ¶¶ 2-7). There was nothing in the record properly before the trial court that would have supported, or even suggested, any of these facts.

Therefore, it would appear that the Clerk might have learned the "facts" included in her Order of Publication from some source outside of the proper record. Simply put, it is apparent from the face of the record that there is at least some possibility of fraud or collusion. As a result, the Clerk's Order of Publication should not be protected from any review by *Yates* and its progeny. Therefore, the trial court abused its discretion in denying Defendant's Motion to Set Aside Default without fully reviewing the Clerk's issuance of the Order of Publication.

Therefore, this Court should reverse the trial court's denial of Defendant's Motion to Set Aside Default Judgment.

4. The *Yates* Line of Cases Should Be Overruled

In the event this Court concludes that the trial court properly applied *Yates* and its progeny, Defendant respectfully submits that *Yates* should be overruled as it is an unfair and outdated rule.

Yates was decided in 1882, 130 years ago. It was decided before the time of ready access to databases via the internet. It was decided before the era of WestLaw and Lexis/Nexis. It was decided before federal laws permitting access to information in government databases. It was decided before telephonic communications. It was decided

before the age of electronic communication. It was decided before the *Mullane* decision clarified the requirements of due process. *Yates* was a product of its time, a time when information was much more difficult to find. Today, information is so readily available that *Yates* is not a necessary rule. Today, there is so much information available at a party's fingertips that a deeper scrutiny *should be applied* to Plaintiffs who claim that they cannot locate a Defendant.

Yates threatens — as in this case — an unduly harsh result upon innocent Defendants. Defendant is unaware of any other jurisdiction in the United States with such an inflexible rule regarding service by publication. Simply put, Defendant respectfully posits that South Carolina should reject the *Yates* rule and permit an actual review of a Clerk's decision to permit service by publication.

Defendant would suggest that the spirit of *Yates* can be harmonized with a more fair approach that will help to ensure that parties are more likely provided notice of actions asserted against them. Overruling *Yates* does not necessarily have to mean that decisions to permit service by publication will be open to widespread second-guessing. Specifically, Defendant suggests that *Yates* should be overruled to permit a trial court to reexamine a Clerk's (or other person's) granting of an order to serve by publication under a deferential abuse of discretion standard. This will preserve the primary teaching of *Yates* — that the initial weighing of the affidavits should not be questioned — while preventing unfair and unjust results. In cases such as the instant case, where the Affidavits are facially insufficient in that they fail to state *any* diligence or other facts supporting service by publication, such an examination could prevent an obvious miscarriage of justice. There is nothing in the history of the *Yates* line of cases that would suggest that such an examination would be adverse to the policy of this State.

Therefore, this Court should reverse the trial court's denial of Defendant's Motion to Set Aside Default Judgment.

B. The Order of Service by Publication Did Not Comply With South Carolina Statute

In addition to the foregoing, and as a separate ground, the Orders of Publication were improper because they failed to comply with the requirements of South Carolina statute. Therefore, the trial court erred in denying Defendant's Motions to Set Aside Default.

Under South Carolina law, there are certain requirements for orders permitting service of process by publication:

The order of publication shall direct the publication to be made in one newspaper, to be designated by the officer before whom the application is made, most likely to give notice to the person to be served and for such length of time as may be deemed reasonable not less than once a week for three weeks. The court, judge, clerk, master or judge of probate *shall also direct that a copy of the summons be forthwith deposited in the post office directed to the person to be served at his place of residence, unless it appears that such residence is neither known to the party making the application nor can, with reasonable diligence, be ascertained by him.*

See S.C. Code § 15-9-740 (emphasis added). The Orders of Publication fail to fulfill the highlighted requirement.

The Orders of Publication state that:

Should the Plaintiff or his attorney be able to ascertain the address of the Defendant in this cause, a copy of the Summons and Complaint shall be mailed by certified mail to the Defendant at such address, if he is nonresident; and that personal service be made upon any resident defendant if he (sic) can be located within the State of South Carolina.

(*See* R. at pp. 0002, 0005). However, this language is not consistent with the requirements of the statute, in that it does not simply require that a copy of process be mailed to the Defendant. As set forth above, if Plaintiffs would have mailed process to Defendant at the same time they undertook publication, in all likelihood Defendant would have received *actual notice* of these lawsuits. This would have resulted in a decision on the merits, rather than an unfair and hyper-technical decision based on the legal fiction of service by publication.

Therefore, this Court should reverse the trial court's denial of Defendant's Motion to Set Aside Default Judgment.

CONCLUSION

For all of the reasons set forth herein, this Court should reverse the trial court's denial of Appellant's Motion to Set Aside Default and remand this matter for further proceedings consistent herewith.

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals
2012207208

APPEAL FROM BEAUFORT COUNTY
In The Court of Common Pleas

Marvin H. Dukes, III, Circuit Court Judge

Case No. 2011-CP-07-2303

Jessica CaldwellRespondent

v.

Amy WiquistAppellant

Case No. 2011-CP-07-2304

Brian Caldwell.....Respondent

v.

Amy WiquistAppellant

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Final Appellant's Brief complies with Rule 210(b), SCACR.



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v.

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PROOF OF SERVICE

I certify that on the 21st day of May, 2012, I served three (3) bound copies of Final Appellant's Brief on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, addressed as follows:

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