

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

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SC Court of Appeals

Jessica Caldwell Respondent

v.

Amy Wiquist Appellant

Case No. 2011-CP-07-2304

Brian Caldwell Respondent

v.

Amy Wiquist Appellant

APPELLANT'S FINAL REPLY BRIEF

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ARGUMENTS

I. Defendant Properly Preserved Her Due Process Argument for Appellate Review

Defendant's opening Brief argues, *inter alia*, that the trial court's entry of default judgments (and denial of Defendant's Motions to Set Aside Default) was in error because the procedure used to authorize substituted service was insufficient to satisfy the requirements of due process. In response, Plaintiffs argued that this issue was not preserved for review because the trial court "did not rule on this issue." (*See Resps.' Init. Br.*, at p.11 (*citing I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000))). For the reasons that follow, Plaintiffs' assertion that this issue was not preserved for appellate review is without merit.

The record reflects that Defendant explicitly argued that the default judgment should be set aside because of due process concerns. For example, in Section (1) (a) of Defendant's Motions to Set Aside Default, she argued that "[t]he issuance of an Order of Publication based upon the affidavits submitted in this case was unsupported by the facts, constituted an error of law, and has deprived the Defendant of her constitutional right to due process under the law." (*See R.* at pp. 0065, 0079). Moreover, in the following Section of her motions, Defendant clearly set forth that the default judgments in these cases were counter to the Due Process Clause:

An elementary and fundamental requirement of due process is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action. And notice by publication is not reasonably calculated to inform interested parties who can be notified by more effective means such as personal service or mailed notice. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). If the name and address of a party are reasonably ascertainable, then notice by mail or other means as certain to insure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of any party. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983). Any other rule that allows the Defendant to be deprived of notice of an action and an opportunity to be heard is

manifestly unfair and violates the Defendant's constitutional right to due process.

(*See R.* at pp. 0068, 0082). As a result, in order to fully and completely deny Defendant's Motions to Set Aside Default, the trial court was required to reject Defendant's argument that the default judgment was contrary to the requirements of due process.

The trial judge's Order Denying Motions to Set Aside Default begins by noting that "Defendant argues three grounds (more particularly set forth in her motion) for setting aside the default judgment." (*See R.* at pp. 0019, 0027). The Court defined those issues by stating, essentially verbatim, the headings used in Defendant's Motions to Set Aside Default — including the headings for subsections (1)(a) and (1)(b), wherein Defendant argued that the default judgment offended due process. (*See R.* at pp. 0019-20, 0027-28).

As the issues were framed, the trial court necessarily had to rule on (and reject) Defendant's due process argument to deny the Motions to Set Aside Defaults. The trial court denied Defendant's Motions to Set Aside Defaults in their entirety. The trial judge — by referencing all of the headings used in the Motions to Set Aside Defaults — plainly was aware of all of the arguments that Defendant had made in those Motions. The trial court essentially ruled that the **only grounds** to challenge an order permitting service by publication are fraud and collusion. There is nothing to suggest that the trial court did not consider — and reject — Defendant's due process argument in its decision to deny the Motions to Set Aside Default. The **only** way that the trial court could refuse to set aside the default was to reject the due process argument. It is apparent from the face of the record that the trial judge did, indeed, rule upon Defendant's due process arguments.

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

II. Contrary to Plaintiffs' Arguments, Service by Publication Does Not Pass Due Process Muster Because the Record Is Devoid of Any Evidence to Support That It Was Not Possible or Practicable to Give More Adequate Warning

Plaintiffs' arguments that the use of publication "service" in these cases satisfied the requirements of due process are without merit.

As Plaintiffs correctly state in their Respondents' Initial Brief:

According to the United States Supreme Court in *Mullane*, "This Court has not hesitated to approve of resort to publication as a customary substitute in [a] class of cases where it is not reasonably possible or practicable to give more adequate warning." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 317, 70 S. Ct. 652, 658 (1950) "Thus it has been recognized that, in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights." *Id.*

(*See Resps.' Init. Br.*, at pp. 11-12). However, Plaintiffs can point to **nothing** in the record supporting their contention that this is part of the "class of cases where it is not reasonably possible or practicable to give more adequate warning."

As Defendant has previously argued, service by publication in these cases offended due process because there was **nothing whatsoever in the record to even suggest that** Defendant could not be given actual notice of these cases. If anything, the record leads to the conclusion that, had Plaintiffs undertaken the most basic step of mailing process to Defendant's last known address, she most likely would have received it. Without making **any** showing that Defendant could not be located, Plaintiffs pursued service by publication as one of their first alternatives. Neither Plaintiffs nor the trial court took any steps to ensure that service by publication would only be authorized in the absence of any other reasonably possible or practicable method of service available. One could scarcely conceive of facts more offensive to the protections of due process than the instant case.

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

III. Defendant's Due Process Argument Supersedes the *Yates* Rule Relied Upon by the Trial Court

Plaintiffs' arguments in their Initial Brief — and the ruling of the trial judge — are without merit because they fail to give sufficient deference to the United States Constitution's requirement of due process. Both Plaintiffs and the trial judge apply the state common law reflected in *Yates v. Gridley*, 16 S.C. 496 (1882), to displace and supersede the federal Constitution. By arguing that, under *Yates*, the **only** imaginable bases for challenging an order of publication are fraud and collusion, Plaintiffs essentially gut the due process protections of notice and an opportunity to be heard. For this reason, this Court should reverse the trial court's denial of Defendant's Motions to Set Aside Default.

"The Supremacy Clause provides that '[t]his Constitution . . . shall be the supreme Law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' It is basic to this constitutional command that all conflicting state provisions be without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (*quoting* U.S. Const. art. VI, cl. 2). Therefore, despite what *Yates* might say, service of process must nevertheless comply with constitutional due process.

If the trial judge's order is allowed to stand, service by publication in these cases will establish just how little effort is required to meet the due diligence requirement of the statute and the only inquiry remaining would be whether the Plaintiffs procured the order by fraud or collusion. However, the law requires more when the constitutional right to notice and an opportunity to be heard is brought into play. Plaintiffs seek to use *Yates* to avoid having to engage in **actual** due diligence, as due process requires. Whether or not Plaintiffs are correct that *Yates* permitted only review for fraud and collusion, Defendant was still entitled to notice and an opportunity to be heard in accordance with due process. The trial judge failed to ensure that Defendant was granted that protection, holding instead that the only relevant inquiry was under *Yates*.

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

IV. Stare Decisis Does Not Counsel Against Overruling *Yates* As Applied in This Case

As set forth in her opening Brief, Defendant has correctly contended that the rule of *Yates* is no longer viable and should be rejected. Plaintiffs argue that this Court must blindly adhere to *Yates* under the doctrine of *stare decisis*. As set forth herein, Plaintiffs' argument is meritless.

The South Carolina Supreme Court recently discussed — in great detail — some of the doctrine of *stare decisis* and some of its boundaries:

We are not unmindful of the imprimatur of correctness which *stare decisis* lends to that decision. However, *stare decisis* is not an inexorable command: “There is no virtue in sinning against light or persisting in palpable error, for nothing is settled until it is settled right. ... There should be no blind adherence to a precedent which, if it is wrong, should be corrected at the first practical moment.” *Smith v. Daniel Const. Co.*, 253 S.C. 248, 255–56, 169 S.E.2d 767, 771 (1969) (Bussey, J., dissenting) (quoting *Sidney Spitzer & Co. v. Comm'rs of Franklin County*, 188 N.C. 30, 123 S.E. 636, 638 (1924)). Furthermore,

[w]hen the court is asked to follow the line marked out by a single precedent case it is not at liberty to place its decision on the rule of *stare decisis* alone, without regard to the grounds on which the antecedent case was adjudicated. ... An original case could not possibly gain authority by a mere perfunctory following on the principle of *stare decisis*.

State v. Williams, 13 S.C. 546, 554–55 (1880). In that vein, *stare decisis* is far more a respect for a body of decisions as opposed to a single case standing alone. See *Langley v. Boyter*, 284 S.C. 162, 180, 325 S.E.2d 550, 560 (Ct. App. 1984), *quashed on other grounds*, 286 S.C. 85, 332 S.E.2d 100 (1985) (“The doctrine of *stare decisis* says that where a principle of law has become settled by a series of court decisions, it should be followed in similar cases.” (emphasis added)). This is not to say that a single case garners no protection from *stare decisis*, for even in those circumstances we should hesitate to revisit and reverse our decisions without good cause to do so. Our precedents simply make clear, however, that such a case is not rendered immutable by *stare decisis*.

Therefore, “[s]tare decisis should be used to foster stability and certainty in the law, but[] **not to perpetuate error.**” *Fitzer v. Greater Greenville S.C. Young Men's Christian Ass'n*, 277 S.C. 1, 4, 282 S.E.2d 230, 231 (1981), *superseded by statute on other grounds*, S.C. Code Ann. § 33-55-200 *et seq.* (2006). *Stare decisis* applies with full force with respect to questions of statutory interpretation because the legislature is free to correct us if we misinterpret its words. *Layton v. Flowers*, 243 S.C. 421, 424, 134 S.E.2d 247, 248 (1964). However, the doctrine is at its weakest with respect to constitutional questions because only the courts or a constitutional amendment can remedy any mistakes made. *Agostini v. Felton*, 521 U.S. 203, 236, 117 S. Ct. 1997, 138 L.Ed.2d 391 (1997).

See McLeod v. Starnes, 723 S.E.2d 198, 202-03 (S.C. 2012) (emphasis added). "Where the issue is a rule of procedure, the Court is even less constrained by precedent because a procedural rule does not serve as a guide to lawful behavior and does not alter primary conduct." *Green v. Maynard*, 349 S.C. 535, 540, 564 S.E.2d 83, 85 (2002).

Contrary to Plaintiffs' arguments, Defendant respectfully posits that this is an appropriate case for the Court to depart from *stare decisis*.

As previously argued, *Yates* was decided in a time of far different technological resources, when it was much more difficult to locate people. In the late 1800's, it is not surprising that the Court would not want to engage in a multi-level analysis of whether a plaintiff engaged in "due diligence." Today, however, there is so much data available that it is more reasonable to permit the Court to review a clerk's determination for more than mere fraud or collusion. By refusing to conduct any meaningful review of the Clerk's determination, the trial court has visited an extremely unfair result upon Defendant — who received no notice of these cases.

Moreover, as Defendant has already argued, the record in this case presents a different issue from that before the Court in *Yates*. Here, there was not merely a dispute over whether Plaintiffs' efforts were enough to satisfy the statute. To the contrary, Defendant contends that *Yates* should not apply because the record is indisputable that Plaintiffs undertook **no efforts** to locate Defendant. It is beyond doubt that even the most basic of efforts — trying to mail process to Defendant's last known address — would

have provided notice of this lawsuit. Instead, Plaintiffs did nothing at all and, as a result, Defendant was deprived of any actual notice of this lawsuit. Unlike *Yates*, the issue is not the quantity of diligence; rather, the issue is whether Plaintiffs made any effort at all. Therefore, to the extent *Yates* could be construed to apply to the facts of this case, it should be overruled or distinguished.

Defendant does not seek to impose an unworkable standard or burden on the courts or litigants. Rather, Defendant posits that fairness dictates that *some* review be permitted where, as here, the record plainly shows a grave miscarriage of justice. To the extent *Yates* would permit Defendant to suffer such an injustice, it is simply no longer tenable as precedent in this State.

Yates is far from strong, well-accepted precedent. A cursory examination of *Yates* itself discloses that its standard of review was set forth without any substantive analysis or citation of authority. In addition, as Plaintiffs admit, although *Yates* has been around for 130 years, it has only been cited six times by Courts in this State — less than once every 20 years. None of those cases conducted any meaningful analysis of the reasoning behind the *Yates* rule or considered the wisdom of that rule. Moreover, the most recent case citing *Yates* was twelve years ago — an eon ago in terms of the rapid development of technology and availability of information. *See Wachovia Bank of S.C., N.A. v. Player*, 535 S.E.2d 128, 341 S.C. 424 (2000).

Plaintiffs suggest that *Yates* should be given deference because it deals with an issue of statutory interpretation. (See Resps.' Init. Br., at p.13 (citing *Wehle v. South Carolina Retirement Sys.*, 363 S.C. 394, 402, 611 S.E.2d 240, 244 (2005) ("[I]f any change in the statutory law is desired, the General Assembly may readily accomplish it."))). However, *Yates* does not interpret the statute itself or govern the application of the statute. To the contrary, *Yates* simply states a procedural rule to be followed in this Court in the review of a determination under the statute. The statute does not itself answer the procedural question of what standard of review should be applied to a clerk's

determination. Because the *Yates* rule is one of procedure (as opposed to a substantive law that governs how people engage in business or other activities), it is entitled to little deference. This also counsels in favor of departing from *stare decisis* in this case.

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

CONCLUSION

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

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CERTIFICATE OF COMPLIANCE

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



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PROOF OF SERVICE

I certify that on the 21st day of May, 2012, I served three (3) bound copies of Appellant's Final Reply 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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