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SC Court of Appeals

The Office of Court Administration
1220 Senate Street
Suite 201
Columbia, SC 29201

RE: Robert N. Baty v. Lydia B. Welling
Case No.: 2017-001620

Dear Sir or Madam:

Enclosed please find copies of the hearing transcripts for hearing dates 1/26/17 and 6/12/17 regarding the above-referenced matter.

If you have any questions, please contact me at (843) 266-6875.

Sincerely,



Samuel Cooper, Jr.
Attorney for Plaintiff

CC: Shana M. Stephens, Esq.
Johnny Stewart, Esq.
Claire Allen, SC Court of Appeals ✓

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PROCEEDINGS

CLERK OF COURT: Your Honor, position 94, 2016-1849
Baty versus Welling.

THE COURT: We're talking about Baty versus
Welling, is that correct?

MR. COOPER: Welling and Lockman, yes, Your Honor.

THE COURT: Who is here representing who?

MR. COOPER: Your Honor, Samuel Cooper for the
plaintiff, Robert Baty.

THE COURT: Okay.

MR. DRAZAN: Your Honor, Thomas Drazan for
defendant Lydia Welling.

MR. SULLIVAN: Your Honor, Andrew Sullivan on
behalf of defendant Amanda Lockman.

THE COURT: We've got a motion to compel, two
motions to compel and a motion to dismiss. Have y'all
settled the motion to compel?

MR. COOPER: No, Your Honor.

THE COURT: Neither one of them?

MR. COOPER: Pardon?

THE COURT: You haven't settled either one of them?

MR. COOPER: No, Your Honor.

THE COURT: We've got one by the plaintiff and one
by the defendant?

MR. COOPER: That's correct, Your Honor.

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1 MR. DRAZAN: Yes, Your Honor.

2 THE COURT: And then we've got a motion to dismiss
3 by which defendant?

4 MR. DRAZAN: Lydia Welling, Your Honor.

5 THE COURT: Pardon?

6 MR. DRAZAN: My defendant, Lydia Welling.

7 THE COURT: Weldon?

8 MR. DRAZAN: Welling.

9 THE COURT: Welling, okay. All right. What do
10 you want to hear first?

11 MR. COOPER: Your Honor, I think for the sake of
12 efficiency it might be better for the court to hear the
13 motion to dismiss and then if necessary then the motions
14 to ---

15 THE COURT: --- well, my question to you is would
16 what you're requesting to produce would that affect your
17 position on the motion to dismiss?

18 MR. COOPER: No, it won't, Your Honor.

19 THE COURT: Is the motion to dismiss a 12(b)?

20 MR. DRAZAN: It's for insufficiency of process.

21 THE COURT: It's for what?

22 MR. DRAZAN: Insufficiency of process, Your Honor.

23 THE COURT: No service?

24 MR. DRAZAN: No service, Your Honor.

25 THE COURT: All right. We'll hear that first.

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1 MR. DRAZAN: Your Honor, may I approach? I have
2 some briefs for the court.

3 THE COURT: Pardon?

4 MR. DRAZAN: May I approach? I have some briefs
5 and cases for the court.

6 THE COURT: Just tell me -- tell me why -- either
7 you've got service or you don't have service. It's not a
8 complicated legal issue. If you don't have service,
9 that's fine. If you do, that's different. I mean why is
10 it insufficient service?

11 MR. DRAZAN: Your Honor, by way of brief background
12 this case is a car accident. It happened in May 6th of
13 2013. The plaintiff filed the complaint on April 11,
14 2016.

15 THE COURT: April 11th '16?

16 MR. DRAZAN: Yes, Your Honor.

17 THE COURT: So within a couple of weeks of the
18 statute running, right?

19 MR. DRAZAN: Yes, Your Honor.

20 THE COURT: Well, it's about a month -- a little
21 less than a month but go ahead.

22 MR. DRAZAN: Yes, sir. Plaintiff was unable to
23 locate the defendant and made a motion for service by
24 publication to the Clerk. The Clerk signed an order for
25 publication on July 21, 2016. The order required service

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1 once a week for three weeks in the Charleston City Paper.
2 Subsequent to that publication or to that order by the
3 Clerk publication was only made on July 27th and August
4 the 3rd. There was no third week pursuant to the order.

5 What I anticipate plaintiff will say is they had a
6 summons put into the Charleston City Paper on July 20th
7 which is before the court signed an order granting
8 service by publication. The case law is pretty clear
9 that service by publication the statute must be followed.
10 It is a strict compliance standard.

11 Additionally, in our briefs there is some case law
12 from Dubose v Dubose, which is the South Carolina Supreme
13 Court discussing service. But as a part of discussing
14 service they state that any kind of order which needs to
15 be signed when an officer is performing administrative
16 duty of issuing a paper on compliance with certain
17 conditions prescribed by law his signature at the foot of
18 the paper he intended to sign is necessary to its
19 validity.

20 It's our position that because the Clerk hadn't
21 signed an order any publication prior to an order for
22 publication is meaningless. I believe the plaintiffs
23 could have rectified this defect by publishing it a third
24 time in compliance with the order but that never
25 happened. Additionally the Supreme Court has held in

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1 Dubose as well that the basis for the ability to serve by
2 publication is the order. Plaintiff has to make a
3 showing of affidavits that they have conducted due
4 diligence and were unable to locate the plaintiff.

5 We are not challenging the Clerk's decision to grant
6 an order by service of publication. What we are
7 challenging is the fact that that order was not complied
8 with and the statute of limitations has run. And
9 additionally the 120 days to file or to serve our client
10 after filing has also run.

11 THE COURT: The statute would run on May the 6th
12 2016 and the order for publication was on 7/27/16, is
13 that correct?

14 MR. DRAZAN: The order is 7/21/16 ---

15 THE COURT: --- 7/21/16. Now if the statute ran on
16 5/6/16 why isn't that within 120 days?

17 MR. DRAZAN: Because service was never completed.
18 The publication -- the ---

19 THE COURT: --- so you don't think signing the
20 order was sufficient to cover the 120 days, is that what
21 you're telling me?

22 MR. DRAZAN: I guess ---

23 THE COURT: --- even the last publication on July
24 the 20th was -- well, it was outside -- it was inside the
25 120 days.

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1 MR. DRAZAN: Your Honor, the ---

2 THE COURT: --- you've got four months, right?

3 MR. DRAZAN: Yes, sir.

4 THE COURT: So May, June, July, and August -- June,
5 July and August; I don't understand why you're saying its
6 outside 120 days.

7 MR. DRAZAN: Your Honor, the order granting service
8 by publication was signed on July 21st.

9 THE COURT: Okay.

10 MR. DRAZAN: That order ---

11 THE COURT: --- 2016?

12 MR. DRAZAN: 2016 ---

13 THE COURT: --- that was two months and one day,
14 excuse me two months and it looks like 15 days after the
15 statute had run?

16 MR. DRAZAN: Yes. And that order is within the time
17 to serve ---

18 THE COURT: --- and then the last time it was run
19 apparently was July -- when was the last publication?

20 MR. DRAZAN: So there were only two publications
21 that came after the order. The order in accordance with
22 15-9-740 ---

23 THE COURT: --- what were the two publications?

24 MR. DRAZAN: The two publications are on July 27th
25 and August the 3rd. The court required or the Clerk

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1 required three publications. One ---

2 THE COURT: --- I understand that. I understand
3 what you're saying. What I don't understand is why
4 you're saying that service was outside the 120 days.
5 That's what you said to me. Now, according to my math if
6 the statute ran on May the 6th 2016 they would have until
7 September the 16th to effect service; 120 days. I didn't
8 add in the 31 days but somewhere around September the 5th
9 or 6th. So how has 120 days been violated?

10 MR. DRAZAN: Your Honor, I think I may have gotten
11 ahead of myself.

12 THE COURT: Pardon?

13 MR. DRAZAN: I think I may have gotten ahead of
14 myself.

15 THE COURT: I mean tell me; I don't understand that
16 argument.

17 MR. DRAZAN: This is a motion to dismiss for
18 insufficiency of ---

19 THE COURT: --- I understand your argument is that
20 the first publication was before the order was signed but
21 you also told me it was outside the 120 days and that's
22 what I don't understand.

23 MR. DRAZAN: I'm sorry, Your Honor. I'm saying we
24 are now outside the 120 days ---

25 THE COURT: --- oh okay ---

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1 MR. DRAZAN: --- there has been no service
2 subsequent to those attempted services.

3 THE COURT: All right. Do you have any cases that
4 specifically address this where a publication was done it
5 looks like seven days before the order was actually
6 signed?

7 MR. DRAZAN: Your Honor, in ---

8 THE COURT: --- when was the request made?

9 MR. DRAZAN: The request I believe was made on July
10 the 18th.

11 THE COURT: July the 18th was the request?

12 MR. DRAZAN: July the 18th is when the plaintiff
13 signed the motion for service by publication.

14 THE COURT: And the order was signed by the Clerk
15 on July the 27th I believe you said.

16 MR. DRAZAN: The 21st, Your Honor.

17 THE COURT: The 21st, okay. So the first
18 publication ran one day before the order was signed is
19 that what you're saying?

20 MR. DRAZAN: Yes, Your Honor.

21 THE COURT: Okay. Do you have a case that says
22 when the publication is made prior to the order but after
23 the motion has been filed that is ineffective service of
24 counsel with those facts?

25 MR. DRAZAN: Your Honor, I do not have a case that

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1 directly states those facts.

2 THE COURT: Okay.

3 MR. DRAZAN: I have a case that states that when a
4 Clerk failed to sign an order at the foot of the order
5 endorsed the order on the back service was effectuated
6 properly by publication and then it was challenged. And
7 the Clerk had already gone back and signed the order as
8 to endorse that he merely forgot to sign the order and it
9 was his mistake. The court still denied that that was
10 effectuated service because the order was not valid until
11 signed.

12 THE COURT: Okay. So your position is the service
13 was invalid because the order had not been signed, is
14 that correct?

15 MR. DRAZAN: Yes, Your Honor. Additionally, we
16 have an argument that the order does not comply with 15-
17 9-740 stating what needs to be in the summons that is
18 published. It requires that both the date the complaint
19 is filed and where it is filed is published and that does
20 not appear in the plaintiff's published summons.

21 THE COURT: Okay. Thank you very much. Yes, sir?

22 MR. COOPER: Your Honor, Samuel Cooper, may it
23 please the court. Your Honor, first and foremost I
24 would object to the latter portion of counsel's argument
25 if I may. In the defendant's initial motion -- may I

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1 approach?

2 THE COURT: Yes, sir.

3 [Whereupon, Mr. Cooper provides documents to the
4 court]

5 MR. COOPER: In the defendant's initial motion they
6 cite only the defect of timing. They do not cite any
7 defect in the summons or complaint or the publication
8 itself. Plaintiff's counsel was not afforded an
9 opportunity to address this argument in its memorandum
10 which we supplied to the court on the 25th.

11 The first that we heard about this was yesterday --
12 that I heard about this was yesterday at 5 o'clock, so I
13 would object to the court hearing any matter as to
14 whether or not the pleadings themselves or the summons
15 itself as published was insufficient as we did not have
16 an opportunity to respond to that.

17 THE COURT: I'll give you an opportunity to respond
18 to that, okay. You can submit what you want. I'll leave
19 the record open to submit whatever you want, okay.

20 MR. COOPER: Thank you, Your Honor. Your Honor,
21 with regards to the motion that was declared by the
22 defendant ---

23 THE COURT: --- what did you actually publish in
24 the paper? Do you have a copy of it?

25 MR. COOPER: Yes, Your Honor, I do.

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1 THE COURT: When you submit whatever you're going
2 to submit unless you want to hand it to me now.

3 MR. COOPER: I have a copy.

4 [Whereupon, Mr. Cooper provides documents to the
5 court]

6 MR. COOPER: This is actually the defendant's
7 memorandum which does contain what we submitted.

8 THE COURT: Okay.

9 MR. COOPER: So, Your Honor what happened in this
10 particular instance is defense counsel is correct we did
11 submit the motion for publication on the 18th. We also
12 simultaneously sent it to the City Paper and they
13 published it on the 20th. The Clerk -- in the past the
14 Clerk has usually turned them over very quickly. In this
15 particular instance the Clerk signed it on the 21st and
16 the City Paper had already published it on the 21st. It
17 had published on the 20th.

18 Defense counsel cannot cite any case law that says
19 that a mere inadvertence in timing is fatal to the
20 plaintiff's case. In fact, they actually cite to Dubose
21 v Dubose. And in that case the court states that the
22 rules that the statutory requirements to a constructive
23 service by publication be strictly carried out does not
24 mean that an irregularity, however slight, is fatal. And
25 that's what they are attempting to argue in this

1 particular instance, Your Honor; that there was an
2 irregularity and that that is fatal. In the cases that
3 they cite in their memorandum in Dubose and Riker v Vonn
4 [phonetic] in Dubose and Riker v Vonn [phonetic] those
5 cases are distinguished from this case because the
6 defendants were prejudiced by the actions of the Clerk
7 and there not being any service.

8 In Riker the defendant was out of state and there
9 was absolutely no signature by the Clerk of Court. In
10 Dubose there was a signature which came completely after
11 the publication had occurred, all the publications that
12 occurred and then the Clerk re-endorsed them. And in
13 that case, Your Honor, the court didn't rule that it was
14 a fatal error. The courts merely ruled that the
15 defendants had an opportunity to be heard.

16 In Dubose what had happened was the defendants were
17 foreclosed upon and when they pointed out to the court
18 that they did not have an opportunity to respond the
19 court ruled against them. The Supreme Court ruled that
20 they needed an opportunity or they were entitled to an
21 opportunity to respond. They didn't go so far as to say
22 that the timing was flawed or that timing was a fatal
23 flaw. And counsel can't produce any case that timing was
24 a fatal flaw. Your Honor ---

25 THE COURT: --- was this an instate resident or an

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1 out of state resident?

2 MR. COOPER: This was an instate resident and
3 that's another distinction as well, Your Honor. In both
4 Dubose and in Riker they were out of state ---

5 THE COURT: --- was it a Charleston resident?

6 MR. COOPER: Ms. Welling?

7 THE COURT: Your case?

8 MR. COOPER: Ms. Welling was a Charleston resident
9 at her last known time -- at the last known time. The
10 last time at the D-M-V she said she was across -- we
11 don't know where she is now.

12 THE COURT: Okay.

13 MR. COOPER: But she was a Charleston resident when
14 we attempted service. We've been looking for her and
15 could not find her and we attempted service and we served
16 in the City Paper because she declared that she was a
17 Charleston resident.

18 And through inadvertence the Clerk signed it the day
19 before the City Paper began publishing it. There is no
20 prejudice to the defendant in this particular instance.
21 They knew -- we brought them online or at least Ms.
22 Welling's carrier had full opportunity to defend their
23 case and locate their insured and defend this case.

24 [Whereupon, the court reviews documents]

25 THE COURT: Okay. Go ahead.

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1 MR. COOPER: And one other distinction, Your Honor,
2 if the drafters had intended for it to be absolutely
3 clear that an order must be had before publication can
4 occur they would have done so like they did in the rule
5 for out of state service where you must obtain the order
6 and before publication can occur because they have to be
7 published together. But for in state residents that rule
8 is not clear.

9 So, for those reasons, Your Honor, we would ask that
10 you rule this as ministerial inadvertence and not a
11 fatality -- a fatal flaw to the case. Thank you, Your
12 Honor.

13 THE COURT: Let me ask you one question.

14 MR. COOPER: Yes, Your Honor.

15 THE COURT: And I'm going to give you time to
16 address it but my question to you is this. I believe the
17 statute says a summons as he said where you give
18 information of address and where and what's going on.
19 Now there is a rule that says you've got to file a
20 summons and complaint. And I believe its some cases that
21 say the rule is applicable. And looking at what you
22 presented to me all you filed was a summons.

23 MR. COOPER: Your Honor, yes ---

24 THE COURT: --- now the rule says summons and
25 complaint and I'm going to give you time to address that

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1 issue but that's my question to you, okay?

2 MR. COOPER: Okay.

3 THE COURT: Which is going to be applied; the
4 statute or the rule and the rule says summons and
5 complaint. And obviously what you presented to the court
6 all you filed was a summons, okay.

7 MR. COOPER: Okay.

8 THE COURT: I'm going to give you ten days to
9 address that, okay?

10 MR. COOPER: Okay. Thank you.

11 THE COURT: What do you want to address very
12 briefly on the issue of, and I'll give you the same ten
13 days to reply to his brief, on the issue of the summons
14 and complaint and what should have been filed with the
15 City Paper, okay.

16 MR. DRAZAN: Thank you, Your Honor.

17 THE COURT: Now, I'll be glad to very briefly hear
18 you on the summons -- excuse me, the publication running
19 one day before the order was signed because that's
20 basically what happened.

21 MR. DRAZAN: Yes, Your Honor. I appreciate that.
22 The statutes time and time again by the South Carolina
23 courts been stated to be strictly -- to require strict
24 compliance. And the section that Mr. Cooper just quoted
25 from Dubose the rule that statutory requirements as to

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1 constructive service by publication must be strictly
2 carried out does not mean that any irregularity, however
3 slight, is fatal. That is immediately followed by but it
4 seems clear that the signing of the order after
5 publication was unavailing because the statute expressly
6 requires that the order shall be the basis of
7 publication.

8 The only reason that Mr. Cooper is allowed to serve
9 Ms. Welling by publication is the order. The fact that
10 he publishes anything he wants in the newspaper before
11 that order does not actually mean that service is
12 effectuated. The order requires that he publish for
13 three weeks once a week which is the statutory minimum in
14 15-9-740 ---

15 THE COURT: --- Mr. Sullivan, you're just repeating
16 what you told me before. You've told me that about three
17 or four times. The only thing I asked you was to reply
18 to what he said, okay.

19 MR. DRAZAN: I apologize.

20 THE COURT: Thank you so very much.

21 MR. DRAZAN: Thank you.

22 THE COURT: Thank y'all very much. I'll give you
23 ten days Mr. Cooper and Mr. Sullivan I'll give you ten
24 days to reply to his brief, okay.

25 MR. DRAZAN: Thank you, Your Honor.

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1 THE COURT: Thank you very much.

2 MR. COOPER: Begging the court's pardon, Your
3 Honor, there is still the matter of the motion to compel
4 if the court wants to hear that and make a ruling
5 depending upon ---

6 THE COURT: --- well, I'll be happy to but if you
7 get removed from court that is going to be unnecessary.

8 MR. COOPER: That's correct, Your Honor.

9 THE COURT: Okay. So you want to hear it today or
10 do you want to address the issue because I've got a real
11 problem with you not filing the complaint.

12 MR. COOPER: That's not a problem, Your Honor.
13 Well, if ---

14 THE COURT: --- I don't have a real heartache with
15 what he is saying but I do have a real heartache when the
16 rules say summons and complaint and the statute says
17 where and when, okay? I'm going to give you time to
18 address it. I'll be happy to hear you on motion to
19 dismiss if you want me to hear it today.

20 MR. COOPER: No, Your Honor. I was bringing up the
21 motion to compel. I'm going to take the ten days that
22 the court has graciously given to us but there is still
23 the outstanding matter of the motion to compel.

24 THE COURT: I'll be glad to hear it.

25 MR. COOPER: Well, I was going to ---

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1 THE COURT: --- but I'm not going to rule until I
2 rule on the other one but I'll be glad to hear it today
3 if you want to hear it.

4 MR. COOPER: Well, I was going to suggest to the
5 court that I believe that the reason they have tendered
6 their discovery to us is because they believe they have a
7 valid -- or an out. So if they are held in would it be
8 more efficient for the court to issue an order that they
9 must comply with discovery within 30 days.

10 THE COURT: What have they not complied with;
11 anything?

12 MR. COOPER: They haven't complied with any
13 discovery; no discovery has been tendered.

14 THE COURT: I would assume after this motion is
15 ruled on you can respond to discovery within 30 days
16 can't you?

17 MR. DRAZAN: Yes, Your Honor.

18 THE COURT: Okay.

19 MR. DRAZAN: Yes, to all parties. Your Honor, we
20 did not answer discovery because of this pending motion
21 today ---

22 THE COURT: --- I understand. I'm not criticizing
23 you at all. I'll give you an opportunity. What I will
24 do on the motion to compel if I do deny your motion I'll
25 just do a very short order that you've got 30 days to

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1 comply with discovery, okay?

2 MR. DRAZAN: Thank you, Your Honor.

3 MR. COOPER: Thank you, Your Honor.

4 MR. SULLIVAN: Thank you, Your Honor.

5 THE COURT: From the time I've ruled on the other
6 motion, okay?

7 MR. DRAZAN: Yes, Your Honor.

8 THE COURT: All right. Thank you very much.

9 MR. COOPER: Thank you, Your Honor.

10 MR. DRAZAN: And Your Honor, do you want any of the
11 filings that we had printed?

12 THE COURT: Do I want what?

13 MR. DRAZAN: Any of the filings that were made?
14 I've got them all printed if you wanted copies.

15 THE COURT: You mean what he filed?

16 MR. DRAZAN: What each of us filed.

17 THE COURT: Yes, he gave me a copy. I've got a
18 copy of it.

19 MR. DRAZAN: Okay. Thank you, Your Honor.

20 *****END OF TRANSCRIPT OF RECORD*****

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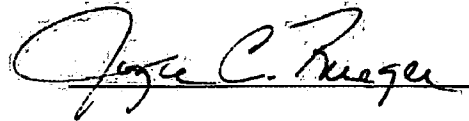
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C E R T I F I C A T E

I, the undersigned, Joyce C. Rueger, Official
Circuit Court Reporter for the Ninth Judicial Circuit of
the State of South Carolina, do hereby certify that the
foregoing is a true, accurate, and complete Transcript of
Record of the proceedings had and evidence introduced in
the trial of the captioned case, relative to appeal, in
the Court of Common Pleas for Charleston County, South
Carolina on the 26th day of January, 2017.

I do further certify that I am neither of kin,
counsel, nor interest to any party hereto.

August 11, 2017



Joyce C. Rueger, CVR-M

Court Reporter

Certified Transcript provided to Samuel B. Cooper, Jr.,
Esq., Green Law Firm, LLC

Certification reference # 081117 (Original)

STATE OF SOUTH CAROLINA)	COURT OF COMMON PLEAS
)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON)	
)	
ROBERT N. BATY,)	CASE NO. 2016-CP-10-01849
)	
PLAINTIFF,)	TRANSCRIPT OF RECORD
)	
VS.)	
)	
LYDIA B. WELLING AND)	
AMANDA L. LOCKMAN,)	
)	
DEFENDANTS.)	

RECEIVED
OCT 16 2017
SC Court of Appeals

June 12, 2017

Charleston, South Carolina

B E F O R E:

The Honorable J. C. Nicholson

A P P E A R A N C E S:

Samuel B. Cooper, Jr., Esquire
For the Plaintiff

Thomas Drazan, Esquire
For the Defendant Welling

Johnny Stewart, Esquire
For the Defendant Lockman

Certified Transcript Provided For: Samuel B. Cooper, Jr.

Phyllis Norton, CVR-Master, Nationally Certified Verbatim Court Reporter
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I N D E X

HEARING -- 03

EXHIBITS - None Proffered

CERTIFICATION OF TRANSCRIPT -- 15

If you need an additional copy of this transcript or a sealed transcript or if opposing counsel requires a copy of the transcript, you should contact the court reporter.

Certification will satisfy Rule 80, Stenographic Report of Transcript as Evidence.

1 THE COURT: If you would for the record, who is
2 representing who?

3 MR. COOPER: Your Honor, Samuel Cooper for the
4 plaintiff.

5 MR. DRAZAN: Your Honor, Thomas Drazan for Ms.
6 Welling.

7 MR. STEWART: Your Honor, Johnny Stewart for Amanda
8 Lockman.

9 THE COURT: Okay. This is a motion to reconsider;
10 is that correct?

11 MR. COOPER: That is correct, Your Honor.

12 THE COURT: All right. Dismissed cause of action
13 because of improper service; is that correct?

14 MR. COOPER: Yes, Your Honor.

15 THE COURT: Okay. And you filed a motion to
16 reconsider?

17 MR. COOPER: That is correct, Your Honor.

18 THE COURT: Raising the issue that the defendant had
19 waived the -- waived it, which he didn't raise
20 previously; is that correct?

21 MR. COOPER: That is correct, Your Honor.

22 THE COURT: Tell me why I should consider it now.

23 MR. COOPER: Well, Your Honor, the reason the court
24 should consider that is because personal jurisdiction
25 attached at the moment the defendant answered the summons

1 and complaint and did not reserve that right.

2 Your ruling was correct that our pleadings or our
3 service was insufficient at the time; but it was not
4 necessary since the defendant had answered the summons
5 and complaint and had not reserved ---

6 THE COURT: Well, I understand; but you could have
7 made that argument the last time we were here. And some
8 of the cases say if you -- you can't raise new issues on
9 motions to reconsider.

10 MR. COOPER: Well, it is not a new issue, Your
11 Honor.

12 THE COURT: Why not?

13 MR. COOPER: Because the issue is whether or not you
14 had jurisdiction at the moment that the argument was
15 being made and you did have jurisdiction -- that the
16 court did have jurisdiction at that time.

17 What we were hearing then was whether or not the
18 service was sufficient or insufficient. And that is a
19 separate issue.

20 Personal jurisdiction had already attached and can't
21 be frittered away and it can't be taken away. It
22 attached at the moment that they made their answer and
23 didn't reserve to themselves the right to plead it at a
24 later time.

25 There is case law that states that if the defendant

1 wants to preserve that right for themselves they have --
2 they cannot answer a general -- they cannot enter a
3 general answer. And in their answer they did enter a
4 general answer and then subsequently they made the
5 argument that there was insufficiency of service.

6 THE COURT: Well, why -- why did you -- why didn't
7 you raise this issue previously?

8 MR. COOPER: Your Honor, I don't have a very good
9 answer for that. I think an equal question though would
10 be why would they bring the motion when they knew they
11 had submitted a general answer, that jurisdiction had
12 already attached.

13 So I will admit that, yes, it was an oversight on my
14 part; but there was also an oversight on the defense part
15 because they tendered an answer that waived their rights.

16 And it would be a miscarriage of justice at this
17 point in time ---

18 THE COURT: I think they also participated in some
19 discovery; is that correct?

20 MR. COOPER: No, Your Honor. They ---

21 THE COURT: All right.

22 MR. COOPER: --- have not participated ---

23 THE COURT: They have not? Okay. All right. Okay.

24 MR. COOPER: --- in civil discovery. They -- they
25 did not.

1 THE COURT: All right. Let me hear you on the
2 argument of waiver then. Why do you think they have
3 waived it?

4 MR. COOPER: Well, Your Honor, in Strickland and in
5 Payne Towers the court indicates that you can - and there
6 is this case and there is a statute on point - that you
7 can waive your right -- you can waive personal
8 jurisdiction.

9 THE COURT: I understand that. But please tell me
10 why they have waived it.

11 MR. COOPER: Why they waived it, Your Honor?

12 THE COURT: Yes, sir.

13 MR. COOPER: Well, I don't know why they would waive
14 it. But I know that they did waive it. They waived it
15 because they answered the summons and complaint without
16 reserving to themselves -- without making a limited
17 answer. They didn't reserve to themselves that specific
18 defense.

19 If you are going to preserve for yourself that
20 specific defense there is case law ---

21 THE COURT: Did the answer address service?

22 MR. COOPER: Pardon?

23 THE COURT: Did the answer address service?

24 MR. COOPER: No, Your Honor, their answer did not
25 address service.

1 THE COURT: Okay. All right. Okay. The motion
2 came later, correct?

3 MR. COOPER: That came later, Your Honor.

4 THE COURT: What else have they done other than
5 answer?

6 MR. COOPER: They have done nothing else other than
7 answer.

8 THE COURT: And file their motion?

9 MR. COOPER: And then they filed the subsequent
10 motion.

11 THE COURT: So your position is the answer itself is
12 a waiver?

13 MR. COOPER: Yes, Your Honor, their initial answer
14 is their waiver.

15 THE COURT: Okay.

16 MR. COOPER: That they can't -- they can't -- that
17 jurisdiction doesn't evaporate away once they -- if they
18 make a motion. That personal jurisdiction attaches at
19 the moment they waive their answer.

20 THE COURT: Okay.

21 MR. COOPER: Or enter their answer I should say.

22 THE COURT: Anything else?

23 MR. COOPER: No, Your Honor, I think that is it.

24 THE COURT: Okay, Mr. Cooper. Thank you.

25 I will be glad to hear you, number one, on whether I

1 should hear the motion; and then I will listen to you on
2 the waiver issue.

3 MR. DRAZAN: Yes, Your Honor. I won't bleed through
4 the us challenging that it is proper for the 59(e). We
5 answered and then we filed an amended answer in
6 accordance with Rule 15(a). In that answer we included
7 our service defenses for 12(b)(4), (5).

8 South Carolina Rule of Civil Procedure 12(h) clearly
9 states that if an answer is amended in accordance with
10 Rule 15(h) any lack of personal jurisdiction defense is
11 preserved and is proper.

12 I would submit that it is an issue purely the South
13 Carolina Rules that we made no motion. We filed an
14 answer on June 9th and amended that answer in accordance
15 with Rule 15(a) on June 24th, 13 days later. We are
16 given 30 days under 15(h).

17 And Rule 12(h)(1) states just if it is neither made
18 by motion under this rule nor included in a responsive
19 pleading or an amendment thereof permitted by Rule 15(a)
20 to be made as a matter of course. It was made pursuant
21 to ---

22 THE COURT: You filed your answer and then filed
23 your motion later; is that correct?

24 MR. DRAZAN: No, we filed ---

25 THE COURT: You didn't file a motion?

1 MR. DRAZAN: No, we filed an answer and then an
2 amended answer that included the service defenses.

3 THE COURT: Okay. What was the defective service?

4 MR. DRAZAN: The defective service ---

5 THE COURT: Because I don't remember.

6 MR. DRAZAN: --- was the service of publication.

7 There had been an order by the clerk on July 22nd to ---

8 THE COURT: And he did it on the twenty- -- before
9 the clerk signed the order?

10 MR. DRAZAN: He did it before the -- first signed
11 the order. And then subsequently did not publish again.

12 THE COURT: So you are in agreement that the court
13 can hear the waiver; is that correct?

14 MR. DRAZAN: I am in disagreement, Your Honor. I
15 just want ---

16 THE COURT: Well, that is what I want to hear from
17 you. What is your disagreement?

18 MR. DRAZAN: My disagreement, sir, is that under
19 Hickman and Stevens an issue that is not waived, that is
20 not originally brought, is not proper for a 59(e) motion.

21 As Mr. Cooper in none of his memorandums - and you
22 gave us the opportunity to supplementally brief this
23 after the hearing - never raised this issue, never raised
24 any issue of waiver in our oral arguments. We do not
25 believe that it is now properly before the court.

1 THE COURT: Okay. All right. Looking at the
2 footnotes after Rule 59 -- I am referring to I guess Page
3 322 in the rule book. And the case is -- and I will
4 quote: A party cannot use Rule 59(e), South Carolina
5 Rules of Procedure, to preserve to the trial court an
6 issue the party could have raised prior to judgment but
7 did not.

8 Now in the very next paragraph the Court of Appeals
9 also says in another case: When an issue is neither
10 raised nor ruled upon by the trial court and is not
11 raised in a post-trial motion.

12 I mean those two cases don't really follow suit. On
13 the one hand they say you have got to raise it initially
14 and you can't raise it on a motion to reconsider; but
15 then they say for appellate purposes you have to raise it
16 on a post-trial motion.

17 This is a post-trial motion. Or maybe I am wrong on
18 it being a post-trial motion. Trial being -- granting
19 your motion initially. Although there was never any
20 trial in this particular case. Most of the cases are
21 referring to trials. On the issue of if you don't -- if
22 you don't reserve it at trial the court -- the appellate
23 court will not hear it.

24 MR. DRAZAN: Your Honor, I would agree with ---

25 THE COURT: In this case we have never had an actual

1 trial.

2 MR. DRAZAN: You are correct, Your Honor.

3 THE COURT: Okay.

4 MR. DRAZAN: I would submit that this is not a
5 post-trial motion. This was dismissed. If anything it
6 is a post-pretrial motion. I don't believe it would
7 constitute what is -- what the Appeals Court is looking
8 for under that.

9 THE COURT: Well, all the cases that address the
10 issue of not raising it under -- if you don't raise it
11 initially -- or I think it said you could have raised it
12 initially, you can't raise it with the 59(e).

13 MR. DRAZAN: That is correct, Your Honor. And I
14 have cited Stevens and Wilkinson of South Carolina verse
15 City of Columbia which is quoting Hickman and Hickman.
16 That is a 2014 case and a 1990 case. But I believe it
17 suggests that this is improper.

18 THE COURT: All right. Mr. Cooper, glad to hear you
19 in reply.

20 MR. COOPER: Your Honor, I believe the court is
21 correct in stating 59(e) is applicable here. This is
22 actually a post-trial motion because there is the same
23 finality in this hearing that there would be if this case
24 was tried.

25 Both -- the defendant would be dismissed. It would

1 be -- it would be as if there had been a defense verdict.
2 So in essence this is a post-trial motion. And I think
3 the court is right in its analysis.

4 Your Honor, one other thing I will point out in Rule
5 59(e) it states that the party cannot -- can bring up a
6 new issue. In this particular instance we are not
7 disaccord an order that affects the judgment.

8 In this particular instance, Your Honor, we are not
9 arguing the fact that defendant was correct, that our
10 attempts to serve were insufficient; but what we are
11 saying is that it was an issue that was not even
12 addressed but should be addressed is that jurisdiction
13 did attach. And that is why we have asked the court to
14 reconsider its ruling. Because its ruling was correct,
15 but the outcome is incorrect.

16 The outcome is that the defendant is allowed to
17 escape from this case when they did submit an answer and
18 they allowed jurisdiction to attach.

19 The defendant will not be barred from any of the
20 defenses which they pled in their original answer. Those
21 defenses will be preserved to Ms. Welling. She will be
22 able to argue those defenses.

23 But if the court allows her to escape jurisdiction
24 when she submitted to jurisdiction then Mr. Baty will be
25 denied his opportunity to have to bring his case against

1 her and Ms. Lockman equally, Your Honor.

2 So for that reason we ask the court once again to
3 consider that the issue here is waiver but also more
4 importantly it is the attachment of that personal
5 jurisdiction which was waived.

6 THE COURT: I mean you are almost saying that that
7 is almost making a special appearance on the issue of
8 jurisdiction under your argument.

9 MR. COOPER: Your Honor, that does appear -- that --
10 I am not using that words, but the case ---

11 THE COURT: Well, I know; but I am.

12 MR. COOPER: --- law does bear that out. Yes, I am
13 not going to argue with you; that is what the case law
14 does seem to bear out and the code seems to bear out that
15 if you are going to raise that -- if you are going to
16 raise personal jurisdiction as a defense you can only
17 raise that and you can't raise any other defenses; that
18 is your defense.

19 And there is a reason for that, Your Honor. Because
20 as plaintiff's counsel and at the court there needs to be
21 clarity. We need to know. This is an issue which we as
22 a defendant feel this bars this court from having
23 jurisdiction. There is a plain reason for that.

24 The rationale is so that there is no confusion on
25 the part of the court or opposing counsel that they are

1 going to raise this defense, which can bring a case to an
2 end.

3 If they are going to raise that defense they need --
4 it needs to be clear and there needs to be no other
5 confusion that they are submitting to jurisdiction and
6 they are going to enter a general answer.

7 And that is what they did in this particular
8 instance, they entered a general answer.

9 THE COURT: Entered within the 30 days?

10 MR. COOPER: Yes, Your Honor, they did amend within
11 the 30 days. But initially they -- they presented an
12 answer that waived it.

13 And you can't just -- the court can't be divested of
14 its personal jurisdiction by a simple amendment.

15 THE COURT: All right. Thank y'all very much. Let
16 me read a couple of these cases a little more carefully
17 and I will give you an opinion when I am ready.

18 MR. COOPER: Thank you, Your Honor.

19 MR. DRAZAN: Thank you, Your Honor.

20 (WHEREUPON, the hearing adjourned.)

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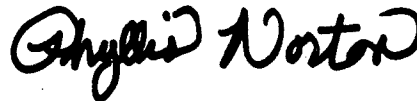
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SC Court of Appeals

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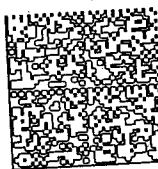
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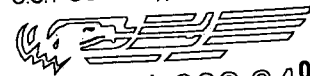
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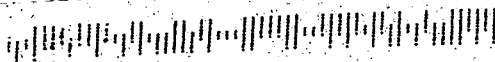
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