

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2017-001620

Robert N. Baty
Appellant,

v.

Lydia B. Welling
Respondent.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities 2

Statement of Issues on Appeal 3

Statement of the Case 3

Statement of the Facts..... 6

Arguments 8

 I. This Court should rule that the defendant waived personal jurisdiction by submitting an Answer to the Pleadings without a limitation as to Personal Jurisdiction.....8

 II. This Court should reverse the trial court’s discretionary ruling to that respondents publication of the Summons did not comply with SCCA 15-9-7409

Conclusion.....10

TABLE OF AUTHORITIES

STATUTES

Rule 4(d) SCRCF8

CASES

Moosally v. W.W. Norton & Co.,

358 SC 320, 594 S.E.2nd 878,(Ct. App. 2004). 8

Ex parte Cannon

385 S.C. 643; 685 S.E.2d 814 (Ct. App. 2009) 8

Strickland v. Consolidated Energy Products Co.

274 S.C. 554; 265 S.E.2d 682 (S.C. 1980) 9

Payne v. Holiday Towers, Inc.

283 S.C. 210; 321 S.E.2d 179 (Ct. App. 1984). 9

Caldwell v Wiquist

402 S.C. 565; 741 S.E.2d 583 (Ct. App. 2013) 9

Montgomery v. Mullins

325 S.C. 500; 480 S.E.2d 467 (Ct. App. 1997) 10

Watts v. Metro Security Agency

346 S.C. 235; 550 S.E.2d 869 (Ct. App. 2001) 10

STATEMENT OF ISSUES ON APPEAL

- I. Whether the trial court improperly dismissed the Appellant’s case for lack of personal jurisdiction?**

STATEMENT OF THE CASE

This is an appeal from the trial Judge’s dismissal of Plaintiff’s case for lack of personal jurisdiction when the Respondent had already made a voluntary appearance by

Answering the Appellant's summons and complaint. The trial Court ruled as follows:

I. Plaintiff did not comply with the Order for Publication.

Plaintiff failed to comply with the Order for Publication, only publishing two out of the three weeks required both by the Order and S.C. Code Ann. § 15-9-710. As stated by the Court in Dubose, the "statute expressly requires that the order shall be the basis of the publication." Du Bose v. Du Bose, 90 S.C. 87 (1911) "Shall be the basis" in its simplest definition means pre-exists or comes first. The Order must be signed before it is valid. "[W]hen an officer is performing the ministerial duty of issuing a paper on compliance with certain conditions prescribed by law, his signature at the foot of the paper he intended to sign is necessary to its validity." Id. Publication before the officer has signed the order to publish is therefore invalid.

Plaintiff argued that service should be valid despite only publishing a notice on two dates, July 27, 2016 and August 3, 2016, after the Clerk's Order granting Plaintiff permission to begin service by publication. The Order requires publication once a week for three weeks, the minimum allowed by SC Code Ann. § 15-9-740. Orders constitute the basis of many of the actions in the legal profession and justice system. Their importance in conducting court business should not be underestimated. As the Order of the Clerk is the basis of publication, stating in which periodical and duration of time publication is required, attempts to publish before an Order is issued are insufficient and invalid.

II. Plaintiff did not comply with S.C. Code Ann. 15-9-740 as to the contents of the Summons.

S.C. Code Ann. 15-9-740 requires that, "In all cases in which publication is made the complaint must first be filed and the summons, as published, must state the time and place of such filing." None of Plaintiff's published notices includes the time and place of the Complaint's filing, April 11, 2016 at the Charleston County Court of Common Pleas.

Service by publication demands strict compliance with the statute. "Service by publication of the summons... is in derogation of the common law, and the statute must be strictly construed." Tenney v. American Pipe Mfg. Co. 96 F. 919 (C.C.D.S.C. 1899). "[T]here must be a strict compliance with the statutes and rules on constructive service; compliance is jurisdictional, and if any essential statutory step is omitted, the decree rendered on such service is void." Caldwell at 574 quoting, Sanders v. Sanders, 12 Md. App. 441, 278 A2.d 615, 618 (Md. Ct. Spec. App. 1971).

South Carolina Rule of Civil Procedure 4 requires that the Summons and Complaint must be served together to effectuate service and establish jurisdiction over a Defendant. In this case, the Complaint was not served nor published. Instead, a Summons was ordered to be published by the Clerk of Court in accordance with S.C. R. Civ. P. 4(e). Service by publication in South Carolina is controlled by S.C. Code Ann. § 15-9-710 & S.C. Code Ann. § 15-9-740.

The South Carolina Supreme Court has addressed the issue of a Summons failing to comport with the statutory requirements stating, "The purpose of a

summons is to inform the defendant. When an action is commenced by the use of a summons only, it should be in keeping with the statute.” Crawford v. Murphy, 260 S.C. 411, 415 (1973). South Carolina requires strict compliance with statutes allowing service by publication. As Plaintiff’s published Summons did not include the date and place of filing, the Summons was deficient.

III. Failure to serve Defendant Welling within the Statute of Limitations.

South Carolina Rule of Civil Procedure 3(a) requires that a Summons and Complaint are filed within the Statute of Limitations and service is effectuated within the Statute of Limitations or not later than 120 days after the filing of the action if service is not completed within the Statute of Limitations. S.C. Code Ann. § 15-3-530(5) provides for a three year statute of limitations for an action on any injury to the person, establishing the proper statute of limitations for this action. Plaintiff filed this action on April 11, 2016 and as such had until August 9, 2016 to perfect service. Service was not properly perfected for the reasons stated above.

However, the Trial Court could have and should have considered that Respondent entered an Answer on June 9, 2016; and in that Answer, Respondent did not raise a lack of Personal Jurisdiction, thus ruled that personal service had already been waived by Respondent and improper service by publication was moot.

STATEMENT OF THE FACTS

On May 6, 2013 in Charleston County, the Appellant was involved in a motor vehicle collision with Respondent, Lydia Welling, and Amanda Lockman. On April 11,

2016, your Appellant filed suit naming each as a Defendant. Plaintiff perfected service upon Defendant Lockman by US postal service April 18, 2016 and filed an Affidavit of Service on May 5, 2016. Plaintiff attempted service upon Respondent using her last address known to the South Carolina Department of Motor Vehicles. Appellant attempted by way of the US postal service, but was unsuccessful. Appellant attempted service through the Charleston County Sheriff, but was unsuccessful as Respondent had moved and provided no forwarding address or locale. On June 9, 2016, Respondent entered a general Answer, did not raise jurisdiction or service, made a general appearance, and requested relief from the Court. On June 23, 2016, Respondent amended her pleadings. Appellant petitioned for service by publication July 18, 2016, which was Ordered on July 21, 2016, and filed with Charleston County Clerk on July 22, 2016. The Summons and Complaint were published in the Charleston City Paper on July 20, 2016 through July 26, 2016, July 27, 2016 through August 2, 2016 and August 3, 2016 through August 9, 2016. On August 3, 2016, Defendant's counsel contacted Plaintiff's counsel requesting copies of all documents filed with the Court due to the Defendant's appearance in the case. An affidavit of publication was filed August 25, 2016. Respondent entered a Motion to dismiss November 7, 2016. The Hearing was conducted on January 26, 2017. An Order of Dismissal was entered on March 14, 2017. A Motion to Reconsider was filed on March 14, 2017. The Motion to Reconsider was heard on June 12, 2017. The Motion to reconsider was denied July 7, 2017. A Notice of Appeal entered July 25, 2017.

ARGUMENTS

I. THIS COURT SHOULD RULE THAT RESPONDENT WAIVED PERSONAL JURISDICTION BY SUBMITTING AN ANSWER TO THE SUMMONS AND PLEADING WITHOUT ANY LIMITATIONS AS TO THE COURT'S PERSONAL JURISDICITON, AND AS SUCH PERSONAL JURISDICTION OVER RESPONDENT APPLIED.

The standard of review is whether a court may exercise personal jurisdiction over a non-resident defendant is one that must be resolved upon the facts of each particular case. Moosally v. W.W. Norton & Co., 358 SC 320, 327, 594 S.E.2nd 878, 882 (Ct. App. 2004). “The decision of the trial court should be affirmed unless unsupported by the evidence or influence by an error of law.” *Id.* Service of process is not a prerequisite to this Court having Personal Jurisdiction. “Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance.... Voluntary appearance by a defendant is equivalent to personal service.... Rule 4(d) SCRPC. “A defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and appearing to defend his case. Ex parte Cannon, 385 S.C. 643 (2009).

Personal jurisdiction may be waived by a party. A general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process.... a defendant, by his

appearance, “asks any relief which can only be granted on the hypothesis that the court has jurisdiction of his person, then he has made a general appearance. Strickland v. Consolidated Energy Products Co., 274 S.C. 544 (1980).

If the defendant wishes to preserve an objection to personal jurisdiction he cannot request any relief which may be granted only if the court has jurisdiction. When he [defendant] enters a general appearance he submits himself to the jurisdiction of the court. Payne v Holiday Towers, Inc. 283 SC 210 (1984).

**II. THIS COURT SHOULD REVERSE THE TRIAL COURT’S
DISCRETIONARY RULING TO THAT APPELLANT’S
PUBLICATION OF THE SUMMONS DID NOT COMPLY
WITH SCCA §15-9-740.**

The Code is silent as to the timing and if an Order must be signed before publication may be initiated. There are more substantial issues that are key to protecting the rights an interest of a potential party opponent. Because a party opponent may not see pleadings that are published, the Code demands diligence in locating the party opponent, and documentation of that effort to dissuade fraud.

The Court has adjudicated several questions of insufficient service by Publication. Caldwell v. Wiquist 402 SC 565 (2013) the question was diligence. The court held, “Where a party contests the validity of an Order of publication based on lack of diligence in attempting to locate the party, the court has held that the trial court is without authority to overrule the finding of the clerk of Court, In Montgomery v. Mullins 325, SC 500, 505-06 480 S.E.2d 467 (Ct.App 1997). The question was "In the absence of fraud or collusion, the decision of the

officer ordering service by publication is final." Id. at 506, 480 S.E.2d at 470.

An opponent is entitled to fair notice of an action that may prejudice their interest. The Court held in Watts v. Metro Security Agency 346 S.C. 235 2001 "The purpose of a pleading is fair notice to the opponent and the court."

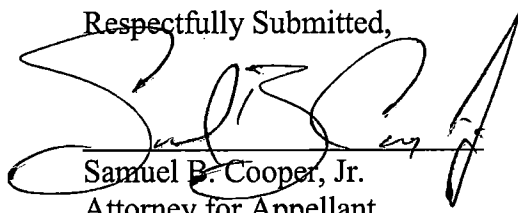
Furthermore, Appellant's service complies with the SCCA 15-9-740's requirement that the summons be published once a week for three weeks. In the case at hand, Appellant engaged the Charleston City Paper to publish the Summons. The Charleston City Paper prints once per week to be published throughout the week. The Summons in the case at hand may have been printed one day prior to the Clerk signing the Order of Publication; however the printed issue of the Charleston City Paper was still published and available to the public for the remainder of the week, six (6) days. An issue printed on July 21, 2016 would not be removed and replaced until July 28, 2016.

CONCLUSION

This court should reverse the trial court's discretionary rulings:

1. Finding that the Respondent made a voluntary appearance and therefore, the Court had Personal Jurisdiction; and
2. Appellants Publication was carried out once per week for three weeks as required.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Samuel B. Cooper, Jr.', written over a horizontal line. The signature is stylized and cursive.

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November 10, 2017

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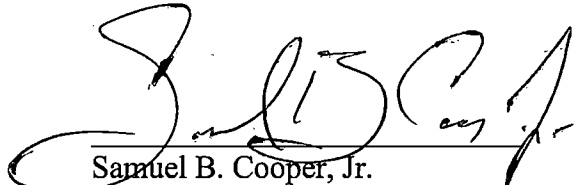
Robert N. Baty
Appellant,

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Lydia B. Welling
Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Appellant complies with Rule 208, SCACR.



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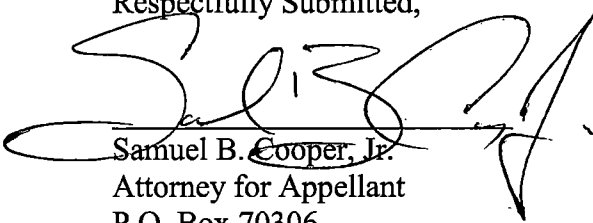
Robert N. Baty Appellant,

v.

Lydia B. Welling Respondent.

PROOF OF SERVICE

I certify that I served the Brief of Appellant on Lydia Welling, Respondent, by depositing a copy of it in the United States Mail, postage prepaid, on November 10, 2017, addressed to her attorney of record Shanna M Stephens of Anderson, Reynold & Stephens 37 ½ Broad Street Charleston South Carolina 29401.

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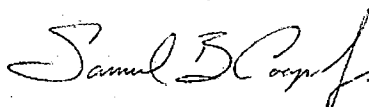
RE: Robert N. Baty v. Lydia B. Welling and Amanda L. Lockman
Case No.: 2017-001620

Dear Sir or Madam:

Enclosed please find the Brief of Appellant, Designation of Matters to be included in the Record on Appeal, and Proof of Service for the above-referenced matter along with one (1) copy of the same. Upon filing, please return the copy to me in the envelope provided herein.

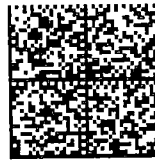
If you have any questions, please contact me at (843) 266-6875.

Sincerely,



Samuel Cooper, Jr.
Attorney for Plaintiff

CC: Shana M. Stephens, Esq.
Office of Court Administration



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