

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable J.C. Nicholson, Jr., Circuit Court Judge

**RECEIVED**  
MAR 23 2018  
SC Court of Appeals

Case No.: 2016-CP-10-1849  
Appellate Court Case No. 2017-001620

Robert N. Baty.....Appellant,

v.

Lydia B. Welling ..... Respondent.

**INITIAL BRIEF OF RESPONDENT LYDIA B. WELLING**

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**STATEMENT OF ISSUES ON APPEAL**

- I. DID THE TRIAL COURT PROPERLY RULE THAT APPELLANT FAILED TO PRESERVE HIS ARGUMENT FOR APPEAL THAT RESPONDENT MADE AN APPEARANCE AND AVAILED HERSELF TO THE COURT'S JURISDICTION?
- II. DID RESPONDENT PRESERVE HER SERVICE DEFENSES BY INCLUDING THEM IN HER AMENDED ANSWER THAT WAS PROPERLY PRESERVED AND FILED UNDER S.C.R.C.P. 15(a) AND S.C.R.C.P. 12(h)(1)?
- III. DID THE TRIAL COURT PROPERLY RULE THAT APPELLANT FAILED TO SERVE RESPONDENT BY PUBLICATION IN COMPLIANCE WITH THE STATUTE?

## STATEMENT OF THE CASE

This case arises out of an automobile accident occurring on or about May 6, 2013. Appellant filed their Complaint against Respondent Lydia B. Welling and Co-Defendant Amanda Lockman on April 11, 2016 in the Charleston County Court of Common Pleas. Respondent filed an Answer on June 9, 2016. (R. \_\_\_\_). Respondent filed an Amended Answer, asserting service defenses and moving for dismissal, on June 24, 2016. (R. \_\_\_\_). Respondent filed a “hard” Motion to Dismiss on November 8, 2016. (R. \_\_\_\_).

Approximately one month after Respondent filed her Amended Answer, on July 22, 2016, Appellant filed a Motion for Service by Publication and two supporting affidavits: 1) an Affidavit of Non-Service by Charleston County Sherriff’s deputy Kevin Rudy filed July 22, 2016 and 2) an Affidavit of Due Diligence by Plaintiff’s Counsel filed July 22, 2016. An Order for Service by Publication was filed on July 22, 2016 granting Appellant permission to begin service via publication on Respondent. Per the Order, publication was to be made in the Charleston City Paper once a week for three weeks. Appellant’s Affidavit of Publication from the Charleston City Paper states that the “summons” Appellant provided was published on July 20<sup>th</sup>, 27<sup>th</sup>, and August 3<sup>rd</sup> of 2016.

Respondent filed a Memorandum in Support of her Motion to Dismiss on January 25, 2017. (R. \_\_\_\_). A hearing on Respondent’s Motion to Dismiss was held on January 26, 2017 in front of the Honorable J.C. Nicholson, Jr. (*See generally the transcript*, R. \_\_\_\_). After the hearing, both Appellant and Respondent were given an opportunity to submit supplemental memorandum. On February 6, 2017, Respondent filed a Supplemental Memorandum in Support of Motion to Dismiss and submitted a copy to the presiding Judge. (R. \_\_\_\_). Respondent Welling was dismissed from this action by Order signed March 9, 2017 and filed March 14,

2017. (R. \_\_\_\_). The March 14<sup>th</sup> Order dismissed Respondent for Appellant's failure to publish the notice in compliance with the Order for Service by Publication; failure for the notice to comply with the statutory requirements on content of the notice; and for failure to perfect service on Respondent within the time allotted under the applicable three year statute of limitations, S.C. Code Ann. §15-3-530(5), and Rule 3(a) of the S.C.R.C.P. *Id.*

On March 27, 2017, Appellant filed a Motion for Reconsideration pursuant to South Carolina Rule of Civil Procedure 59(e). Respondent filed a Memorandum in Opposition to Appellant's Motion for Reconsideration on April 11, 2017. (R. \_\_\_\_). A hearing on Appellant's Motion for Reconsideration was held on June 12, 2017. (*See the transcript generally*, R. \_\_\_\_). The Honorable J.C. Nicholson, Jr. signed an Order, dated July 5, 2017, filed July 7, 2017, denying Appellant's Motion for Reconsideration. (R. \_\_\_\_). On July 25, 2017, Appellant sent their Notice of Appeal for filing.

### ARGUMENT

#### **I. APPELLANT FAILED TO PROPERLY PRESERVE FOR APPEAL HIS ARGUMENT THAT RESPONDENT MADE AN APPEARANCE AND AVAILED HERSELF TO THE COURT'S JURISDICTION**

Appellant's first basis for his appeal is Respondent's alleged waiver of service of process defenses. However, Appellant did not preserve that argument for appeal. On January 24, 2017, Appellant submitted to Respondent, but did not file, a Memorandum in Opposition to Defendant's Motion to Dismiss. Appellant's Memorandum did not make a single reference to an alleged waiver of service defenses by Respondent. The Court heard oral arguments on January 26, 2017. During oral arguments, not once did Appellant argue the alleged waiver of service defenses by Respondent. (*See generally the transcript*, R. \_\_\_\_). Appellant submitted a Supplemental Memorandum in Opposition to Respondent's Motion to Dismiss on February 3,

2017. Nothing contained in the supplemental memorandum referenced an alleged waiver of defenses. Appellant never once argued the alleged waiver until his Memorandum in Support of the Motion for Reconsideration.

South Carolina case law is clear that SCRCF Rule 59(e) motions for reconsideration are not a chance for the moving party to raise new issues or give parties a second bite at the apple. "A party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the Circuit Court prior to Judgment but, did not." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) quoting, *Hickman v. Hickman*, 301 S.C. 455, 456-57, 392 S.E.2d 481, 482 (Ct. App. 1990).<sup>1</sup> The Circuit Court denied Appellant's Motion for Reconsideration on this exact issue writing:

Upon review of the pleadings, memoranda, and arguments at the hearing on 6/12/17, Plaintiff's Motion to Reconsider filed on 3/27/17 is respectfully **denied**... It is not properly before the Court because the waiver argument was not raised until the motion to reconsider. A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not. *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849,854 (2005) (finding issue raised for first time in Rule 59, SCRCF, motion is not preserved for review); *Kiawah Prop. Owners Grp. v. Public Serv. Comm'n.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating an issue raised for first time in petition for rehearing not preserved). *Poch v. Bayshore Concrete Prod./S.C., Inc.*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009), aff'd as modified, 405 S.C.359, 744 S.E.2d 757 (2013). (R. 2).

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<sup>1</sup> *Hickman* additionally cites the following: "See *Natural Resources Defense Council v. U.S. E.P.A.*, 705 F. Supp. 698, 701 (D. D.C. 1989), vacated on other grounds, 707 F. Supp. 3 (D. D.C. 1989) ("Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier."); *Smith v. Stoner*, 594 F. Supp. 1091, 1118 (N. D. Ind. 1984) ("Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of Rule 59(e) relief; the issues are waived."); *Johnson v. City of Richmond*, 102 F.R.D. 623, 623 (D.D. Va. 1984) ("I do not conceive of Fed. R. Civ. P. 59(e) as serving the office of providing a disappointed suitor which a post-judgment opportunity to argue that which could have been argued pre-judgment.").

Appellant now attempts to bring to the Court of Appeals the exact issue the Circuit Court determined was not preserved in denying Appellant's S.C.R.C.P. 59(e) motion to alter or amend. The lower court properly ruled that Appellant did not preserve the waiver argument. Therefore, this issue is not properly preserved for the appellate court to consider.

**II. RESPONDENT DID NOT MAKE AN APPEARANCE AND/OR AVAIL HERSELF TO THE COURT'S JURISDICTION AS RESPONDENT'S SERVICE DEFENSES INCLUDED IN HER AMENDED ANSWER WERE PROPERLY PRESERVED AND FILED UNDER S.C.R.C.P. 15(a) AND S.C.R.C.P.12(h)(1)**

Despite Appellant's failure to preserve their waiver of service argument for appeal, Appellant's Motion for Reconsideration was also properly denied on the merits. Respondent filed an Answer to Plaintiff's Complaint on June 9, 2016. (R. \_\_\_\_). Though Respondent's initial pleading did not contain defenses pursuant to SCRCP 12(b)(4) and (5), Respondent filed an amended pleading on June 24, 2016, within the 30 days allowed under SCRCP 15(a). (R. \_\_\_\_). Respondent's Amended Answer *did* assert improper service defenses under SCRCP 12(b)(4) and (5). *Id.* Appellant incorrectly asserts that Respondent waived her service-related defenses even though she included them in her Amended Answer, filed just two weeks after the initial Answer. South Carolina Rule of Civil Procedure 12(h)(1)(B) clearly states that a defense is not waived if included in an amended pleading made in accordance with SCRCP 15(a):

“A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties for the same claim is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.” South Carolina Rule of Civil Procedure 12(h)(1).

By including defenses pursuant to S.C. R. Civ. P. 12(b)(4) and (5) in her Amended Answer timely filed in accordance with S.C. R. Civ. P. 15(a), Respondent did not waive her defenses and those relevant defenses were/are properly before the Court. Further, Appellant had to admit in the Motion to Reconsider hearing that Respondent never once engaged in any written discovery or activity whatsoever that could be deemed to equate making an appearance in the case. (*See transcript, pages 5, 6, R. \_\_\_\_\_*).

### **III. APPELLANT FAILED TO PROPERLY SERVE RESPONDENT BY PUBLICATION IN COMPLIANCE WITH THE STATUTE**

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. South Carolina 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. Appellant filed this action on April 11, 2016 and as such had 120 days, until August 9, 2016 to perfect service. Appellant did not perfect service within the allotted time, nor has Appellant perfect service to this day.

S.C. R. Civ. P. 4 controls methods of service for the summons and Complaint. S.C. R. Civ. P. 4(e) allows for service by other means for individuals who are not inhabitants or able to be found within the state as prescribed by statute, rule, or order.

South Carolina Courts have long held, and continue to affirm, that statutes outlining service of process by publication require strict compliance. *See Riker v. Vaughan*, 23 S.C. 187 (1885), *Du Bose v. Du Bose*, 90 S.C. 87, 72 S.E. 645 (1911), *Caldwell v. Wiquist*, 402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013). “[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).

For instance, The South Carolina Supreme Court has held service by publication was not effectuated when a clerk neglected to sign an Order for Publication at the foot of the page but, endorsed the back of the order and signed after publication was made, in accordance with the unsigned order, as an additional endorsement of the order. *Dubose* at 89. The Court continued addressing directly the issue at bar in this matter, “it seems clear that the signing of the order after publication was unavailing because the statute expressly requires that the order ***shall be the basis of the publication*** (bold italics added).” *Dubose* at 89. “Shall be the basis,” in its simplest definition means pre-exists or comes first. The Order must be signed before it is valid.

South Carolina Code Ann. § 15-9-710 clearly requires a showing of diligence in attempting to serve a party be made to “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.” The ability to serve a party by publication requires Plaintiffs first make a showing sufficient to receive an order allowing service by publication, and then comply with the order as to the publication in which to publish, the frequency, and the duration of the notice.

Merely publishing a notification in a newspaper of general circulation even if formulaically compliant with SC Code Ann. § 15-9-740, without an order, would not effectuate process. As stated by the Court in *Dubose*, the “statute expressly requires that the order shall be the basis of the publication.”

Regardless if service complies with the eventual order of a Clerk of Court, 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.

Appellant’s brief focuses on the validity of the clerk’s order, which Respondent does not challenge. The clerk clearly has the power to order service by publication but, as stated in *Dubose*, the order is the *basis* from which to publish. Until a valid order is signed, publication has no effect. Orders constitute the basis of many of the actions in the legal profession and justice system. Their import in conducting court business should not be underestimated. Appellant’s failure to publish in accordance with the Clerk’s Order is a fatal error.

Appellant suggests that because the newspaper in which the notice was published is only published once a week and available to the public for a week it was “published” the remaining days in the week after the order was signed. Appellant fails to note that the Clerk directs where and for what duration a notice must be published. The fact that Appellant published the notice in the local periodical referenced in the Order does not satisfy the fact that there was no order directing the service before publication began. Additionally, the periodical chosen for the notice contains a single volume, issue, and date on the front page. It is not published for the ‘week of’ but instead published once a week, each publication having its own issue number and date. By Appellant’s logic, the publication of a notice in a magazine which releases monthly issues but was available on newsstands for four weeks would have equally satisfied the order. This is not the intention of the legislature, nor strict compliance with the Statute.

Appellant argues in this case 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 which requires publication once a week for three weeks, the minimum allowed by SC Code Ann. § 15-9-740. Appellant advances this argument on the false belief that notice published on July 20, 2016,

*before* an issued or signed order of the Clerk, should be considered to suffice for one of the required publication dates. It is clear from over one hundred years of South Carolina Courts' precedent that Appellant's attempt at service is deficient.


Additionally, Appellant has failed to comply with the requirements for the notice to be published. SC 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.*" (emphasis added). None of Appellant's published notices included the time and place of the Complaint's filing, April 11, 2016 at the Charleston County Court of Common Pleas. Again Appellant has failed to comply with the strictly construed statutory requirements for service by publication.

### CONCLUSION

Appellant argues that 1) Respondent waived personal service by voluntarily availing herself to jurisdiction and 2) that Appellant's service by publication was not deficient. Appellant failed to preserve their waiver argument. Even if Appellant had properly preserved their waiver argument, the South Carolina Rules of Civil Procedure clearly state that such service defenses are not waived if included in an amendment by right under S.C. R. Civ. P. 15(a). Appellant further argues their pre-mature service by publication, *before* an Order allowing such publication existed, should be allowed. South Carolina Courts have continued to hold strict compliance is necessary when effectuating service by process because of its natural defects in providing effective notice. Appellant failed to serve the Respondent for three consecutive weeks after the imposition of the order and therefore the Circuit Court's Dismissal is proper.

Lastly, the Circuit Court properly held that the notice published did not comply with the statutory requirements to identify the time and place of the filing. It does not appear that

Appellant has challenged this basis for dismissal in their Initial Brief. Therefore, the Circuit Court's dismissal on those grounds is unchallenged. For all the reasons stated above, Respondent respectfully requests the Appellate Court affirm the Lower Court's Order of Dismissal.



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Dated: March 19, 2018

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Robert N. Baty.....Appellant,

v.

Lydia B. Welling ..... Respondent.


**PROOF OF SERVICE**

The undersigned hereby certifies that on the date indicate below, she served the following counsel with a copy of the Initial Brief of Respondent Lydia B. Welling by mailing copies of same via United States Mail with first class postage prepared to the following addresses:

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**VIA U.S. MAIL ONLY**

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MAR 23 2018

SC Court of Appeals

Re: Robert N. Baty v. Lydia B. Welling and Amanda L. Lockman  
Case #: 2016-CP-10-1849  
Appellate Case No.: 2017-001620  
Claim #: 01-B1G7749D-100005  
AR & S #: 20160.26

Dear Ms. Kitchings:

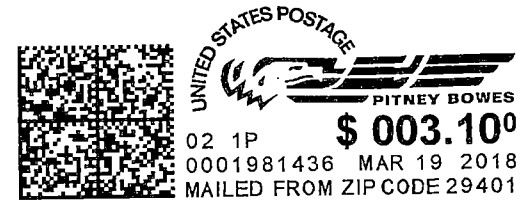
Please find enclosed the original and two (2) copies of Respondent Lydia B. Welling's Initial Brief and Respondent's Designation of Matters to be Included in the Record on Appeal along with the corresponding Proofs of Service in the above-referenced matter. Upon filing the original, please return the clocked copies of the Initial Brief and Designation of Matters to me in the self-addressed, postage paid envelope enclosed.

Sincerely yours,

  
Thomas F. Drazan

TFD/lp  
Enclosure

cc: **VIA EMAIL AND U.S. MAIL**  
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