

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

Joseph M. Strickland, Master in Equity

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Case No. 2016-CP-40-02457

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Appellate Case No. 2017-002410

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**RECEIVED**

APR 11 2018

SC Court of Appeals

MidFirst Bank, ..... Respondent,

v.

Richard Brady; State of South Carolina; and Richland County Clerk of Court, Defendants, of  
whom Richard Brady is ..... Appellant.

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INITIAL REPLY BRIEF

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April 6, 2018

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## APPELLANT'S COUNTER TO RESPONDENT'S STATEMENT OF THE CASE

1. Attempted service of Mr. Brady at 1816 Haviland Circle was unsuccessful, and MidFirst Bank's counsel was informed early-on that this property was "tenant occupied." (R.Brief, p.2) (R.p. \_\_\_)

2. The "Final Report – No New Address" (R.p. \_\_\_) does state the "[t]he most current address being attempted for Mr. Brady is "Unknown," but said Report also states that, "**[t]he only current address listed to this defendant in our reports is: 3240 Dreher Shoals Road, Irmo, SC 29063.**" (emphasis added)

3. The Brief of Respondent ignores another process server's report ("Affidavit of Diligent Search and Inquiry") (R.p. \_\_\_), which informed MidFirst Bank's counsel, in May 2016: "LAST KNOWN ADDRESS OF SUBJECT: 3240 Dreher Shoals Road, Irmo, SC 29063."

4. MidFirst Bank's counsel, after investigating a 2014 foreclosure suit against Mr. Brady and reviewing the reports from his process server (mentioned above), was aware that 3240 Dreher Shoals Road was Mr. Brady's last known address. (R.p. \_\_\_)

5. Mr. Brady's actual residence (213 Kirkstone Road, Irmo, South Carolina 29063) was also easily ascertainable. It was reflected as such, as early as December 14, 2015, on TLO, a popular search engine to locate people. A TLO report was attached to Mr. Brady's Affidavit. (R.p. \_\_\_)

6. Mr. Brady never utilized 1816 Haviland Circle as his residence. This property was used exclusively as a leased-property since before the subject mortgage loan was closed on February 22, 1994. (R.p. \_\_\_)

7. Although 1816 Haviland Circle was determined to be a "bad address" and 3240 Dreher Shoals Road was determined to be "the last known address" for Mr. Brady, the Affidavit prepared and submitted by MidFirst Bank's counsel in support of his request for an Order of

Publication fails to mention any address for Mr. Brady other than 1816 Haviland Circle.

8. Although not in evidence (and not mentioned in said Affidavit), an Affidavit of Non-Service (R.p. \_\_\_\_), which was attached as an exhibit to Plaintiff's Return to Defendant's Motion for Relief from Judgment and Sale, indicated that service of Mr. Brady was attempted at 3240 Dreher Shoals Road. This service was unsuccessful, and MidFirst Bank's counsel was informed by said Affidavit of Non-Service that this property was unoccupied and was being marketed for sale by Exit Realty. (R.p. \_\_\_\_)

9. The Affidavit, on which the Order of Publication was supposedly based, makes no specific mention of any effort made by MidFirst Bank to effect personal service other than the erroneous assertion that the "defendant could not be located for service at the last known address: 1816 Haviland Cir., Columbia, SC 29210."

10. The Order of Publication (prepared by Plaintiff's counsel) fails to mention any attempts to serve Mr. Brady at any address other than 1816 Haviland Circle and, contrary to MidFirst Bank's counsel's knowledge of the circumstances, erroneously identifies 1816 Haviland Circle as Mr. Brady's last known address.

11. In the Order filed on May 10, 2017 (prepared by MidFirst Bank's counsel), the Master in Equity concluded that, "[t]he property at 3240 Dreher Shoals Road was the Defendant's last known address." (R.p. \_\_\_\_)

12. The best address for Mr. Brady was known by MidFirst Bank to be P.O. Box 727, Irmo, SC 29063-0727, which address was the exclusive address utilized by the mortgage servicer to communicate with Mr. Brady (R.p. \_\_\_\_), but nowhere (in the paperwork related to the service by publication or anywhere else) is this address mentioned. This address is also reflected on the Richland County Assessor Data View, which was attached as an exhibit to Plaintiff's Return to

Defendant's Motion for Relief from Judgment and Sale. (R.p. \_\_\_\_ ) No effort was made by MidFirst Bank's counsel to serve, or to even just try to contact, Mr. Brady using this address.

13. The mailings of the Notice of Hearing and the Judgment and Notice of Sale were, again, sent to Mr. Brady "at the subject property." (R.Brief, pp. 2-3) Even as late as August 2016, no improvement had been made on MidFirst Bank's counsel's efforts to actually provide notice to Mr. Brady.

### REPLY TO RESPONDENT'S ARGUMENTS

1. MidFirst Bank's argument that, "[t]he Affidavit in Support of Service by Publication and resulting Order were not rendered facially defective because they contained incorrect statements regarding Appellant's last known address," and asserting that, "exacting compliance is not required" (R.Brief, pp. 5-6), indicates that MidFirst Bank believes that incorrect statements (no matter how serious; no matter how misleading) should be overlooked.

2. MidFirst Bank cites *Caldwell v. Wilquist*, 402 S.C. 565, 741 S.E.2d 583 (Ct. App. 2013), for the proposition that "the affidavit must support some factual basis upon which the court issuing the order of service by publication can find that the defendant cannot, after due diligence, be found within the state." (R.Brief, p. 7-8) Reviewing the Affidavit for "some factual basis," i.e. some facts concerning efforts to locate Mr. Brady, the only statement of fact to be found is, "the aforementioned defendant could not be located for service at the last known address: 1816 Haviland Cir., Columbia, SC 29210." That's it. Just a single address, which was known by MidFirst Bank and its counsel not to be the last known address or any other address for Mr. Brady.

3. From a close reading of the Affidavit (R.p. \_\_\_\_), one will see that MidFirst Bank's counsel does not state that, after an unsuccessful attempt to locate Mr. Brady for service at 1816 Haviland Circle, proper due diligence was performed and Mr. Brady could still not be located (that

is, within the state). He effectively states that “proper due diligence” was first performed (without elaboration) and then, after proper due diligence, Mr. Brady could not be located at said address, which he erroneously claims was found to be Mr. Brady’s “last known address.” In other words, the Affidavit reflects that nothing occurred after attempting service at the mortgaged property which would constitute “proper due diligence.”

4. In *Caldwell*, this Court held that the underlying affidavits requesting service by publication were facially defective. According to *Caldwell*, p. 575, “facially defective” means “the affidavits requesting service by publication did not meet the statutory requirements.” In *Caldwell*, this Court, after acknowledging that it was guided by this state’s policy “to resolve cases on the merits” and that “strict compliance with publication statutes is appropriate,” held that the court issuing the order of service by publication must be informed of some factual basis upon which it “can find that the defendant cannot, after due diligence, be found *within the state*.” p. 574. (emphasis added) The words “within the state” are taken directly from S.C. Code Ann. §15-9-710. The affidavit requesting publication must set forth a factual basis whereby the court could conclude that the defendant cannot be found “within the state” in order to satisfy the statutory requirements for service by publication. Just because the defendant cannot be located at a particular address doesn’t mean the statutory requirements have been met. In *Caldwell*, the affidavits requesting service by publication provided, “[t]he Defendant who is a non-resident of Beaufort County, South Carolina, cannot be served a copy of the Summons in Beaufort County and it is necessary and proper to serve her by publication.” (p. 572) This Court found those affidavits to be defective on their face. There is little difference when considering the factual basis set forth in the Affidavit in this case, as it likewise failed to describe any effort whatsoever to find Mr. Brady “in this state” after the attempt to locate Mr. Brady at the mortgaged property was unsuccessful.

5. MidFirst Bank asserts that, “the best means of putting Appellant on notice of the proceedings was employed in accordance with the rules.” (R.Brief, p. 6) The “best means”?! To the contrary, if counsel had intended not to provide Mr. Brady with notice of this suit, he could not have done a better job. The best means would have been to personally serve Mr. Brady, who is a long-time resident of the area and whose addresses were already known to MidFirst Bank and/or its counsel (and which addresses were readily ascertainable even if not known).

6. This case is factually comparable to *Belle Hall Plantation Homeowner’s Ass’n v. Murray*, 419 S.C. 605, 799 S.E.2d 310 (Ct.App. 2017), where this Court affirmed the decision of the Master in Equity, who found that the failure to notify the defendant was “negligence” and “grossly negligent,” and therefore constituted defective service. (pp. 613-14) In *Belle Hall*, the underlying publication affidavit was found to be insufficient and the Order of Publication was declared to be facially defective because service was attempted on the defendant at wrong addresses. In the present case, the Affidavit effectively declared that the only attempt to locate Mr. Brady for personal service was at the address of the mortgaged property (R.p. \_\_\_\_), which address, although erroneously identified by MidFirst Bank’s counsel as Mr. Brady’s last known address, was never an address of Mr. Brady. In *Belle Hall*, service of the defendant was, at least, attempted at three (3) different addresses, each of which was an address for the defendant’s father for whom the defendant served as trustee. In the present case, the one, and the only, address where the service of Mr. Brady was attempted (according to the Affidavit) was a wrong address, as it was the address of Mr. Brady’s tenant. The result in *Belle Hall* can be easily applied in the present case.

7. The issue is whether or not MidFirst Bank complied sufficiently with the requirements of S.C. Code Ann. §§15-9-710 and 740.

- Was due diligence (a diligent search) to locate Mr. Brady within the state performed?

- Did that fact (due diligence) appear by affidavit?
- Was the address utilized for mailing the pleadings to Mr. Brady “his place of residence” or his “the last known residence”?
- If the address utilized was not Mr. Brady’s actual residence, was such residence “neither known . . . nor can [it], with reasonable diligence, be ascertained”?

Another related question is, did MidFirst Bank comply with the directive in the Order of Publication that the pleadings be mailed to Mr. Brady’s last known address? (The Order of Publication “finds” that the pleadings were previously mailed to Mr. Brady at his “last known address” (a factually incorrect finding) and then the Order, nevertheless, goes on to direct MidFirst Bank to mail the pleadings to Mr. Brady “at the last known address: 1816 Haviland Cir., Columbia, SC 29210” (R.p. \_\_\_\_); but MidFirst Bank’s counsel failed to comply with this directive.)

Although one of the foregoing questions answered in the negative should doom the service by publication, Mr. Brady submits that the answers to every one of the questions is No.

8. Contrary to the assertion in the Brief of Respondent (p. 9) that, “[t]he Affidavit at issue in this matter is most closely related to the Affidavit that was the subject of the decision in *Player*,” it is quite clear that the affidavit in *Wachovia Bank of South Carolina, N.A. v. Player*, 341 S.C. 424, 535 S.E.2d 128 (2000), involved an inconsequential, typographical error (alleging that service was attempted by the Sheriff when it was actually attempted by a private process server), which, when evaluating due diligence, had no real effect. In this case, there was no typing mistake or other inconsequential error. There was a complete absence of due diligence in actually try to locate Mr. Brady.

9. The Brief of Respondent (p. 9) quotes from *Roche v. Young Bros., Inc., of Florence*, 318 S.C. 207, 456 S.E.2d 897 (1995), as follows:

Rule 4, SCRCP serves at least two purposes. It confers personal jurisdiction on the

court and assures the defendant of reasonable notice of the action. We have never required exacting compliance with the rules to effect service of process. Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings.

Actually, this quote is incomplete. Between the third and fourth sentences, there are citations to two very old cases. These cases provide assistance in understanding what is meant by, “[w]e have never required exacting compliance with the rules to effect service of process.” As cited, these cases provide authority as follows:

*Foster v. Crawford*, 57 S.C. 551, 36 S.E. 5 (1900) (when officer’s return defective as to time and place of service, it can be amended to state facts); *Saunders v. Bobo*, 2 Bailey 492 (1831) (sheriff’s incomplete return that was not sworn to may be amended).

Clearly, non-substantive errors, especially those errors which can be corrected by amendment, will be tolerated and will have no adverse effect on the service of process. By implication, errors of a substantive nature, as in the present case, would require more exacting compliance (if not precisely exact compliance) with statutory requirements.

10. Contrary to the Brief of Respondent (p. 10), the Record does not “demonstrate that Respondent sufficiently complied with the rules” and does not demonstrate that “Appellant had notice of the proceedings.” MidFirst Bank’s counsel failed: (1) to make the effort to serve Mr. Brady at the various, known addresses and (2) to prepare the paperwork (the Affidavit and the Order of Publication) to cite the correct “last known address” (and then to comply therewith). There was no actual notice, and there was no legal, technical or constructive notice.

11. The Brief of Respondent almost avoids altogether mentioning Mr. Brady’s post office box. MidFirst Bank’s only response is that it had no “duty” to serve Mr. Brady using a post office box address (p. 13). At all relevant times, the post office box was a viable address for Mr. Brady, which was known, and regularly utilized, by MidFirst Bank’s servicer to communicate with

Mr. Brady; and it would likely have provided notice to Mr. Brady, if a letter had been sent by regular mail to this address. The point is that MidFirst Bank should have, at a minimum, investigated, and attempted service at, every known address for Mr. Brady before it determined that Mr. Brady cannot be found. Anything less would not be proper due diligence.

12. After being informed that the subject property (1816 Haviland Circle) was tenant-occupied, that Mr. Brady did not reside there and that 3240 Dreher Shoals Road was the “only current address listed to this defendant” (R. Brief, p. 2), MidFirst Bank’s counsel not only mailed the pleadings to Mr. Brady directed only to the wrong address (1816 Haviland Circle) but also sent them to said address via certified mail - restricted delivery (R.p. \_\_\_\_), knowing that the tenant could not receive and potentially redirect the mailing or otherwise react in a manner whereby Mr. Brady could possibly be informed of the mailing, as the mail would routinely be returned to sender if the addressee is unavailable to accept delivery, and sign for, the mail. The mailing in this manner was no better than no mailing at all.

### **RESPONDENT’S QUESTIONABLE MOTIVE**

The Respondent’s request to include the Master’s Deed (R.p. \_\_\_\_ ) and Lien Satisfaction Order (R.p. \_\_\_\_), both of which were recorded on November 7, 2016, as a part of the Record on Appeal was curious. It can only be assumed that the purpose of including these documents is to show that the foreclosure suit had completely run its course. The interesting thing is the timing of the recording. They were recorded 2 ½ weeks after receipt of Mr. Brady’s Motion to Vacate Judgment of Foreclosure and Sale (served on October 20, 2016) (R.p. \_\_\_\_). In other words, instead of suspending the issuance/recording of the Deed and Satisfaction in light of Mr. Brady’s jurisdictional argument, which would be the expected reaction, MidFirst Bank ignored the pending Motion altogether and proceeded to take title. You have to wonder why it was so important to

MidFirst Bank to take title to the subject property. You also have to wonder why MidFirst Bank is fighting so hard to have a foreclosure judgment and sale sustained, when it is clear that Mr. Brady had no actual notice of the proceedings until after the sale. Why wouldn't MidFirst Bank simply allow Mr. Brady to defend the suit and ultimately to reinstate or pay off the loan? Could it be that this lender intended (conspired) to take the property and resell it for a large profit? Consider that MidFirst Bank bid \$36,965.73 (effectively its full judgment debt) to purchase the mortgaged property, on which – 22 ½ years earlier – \$49,149.00 was loaned to Mr. Brady to refinance the property. Then, on or about, November 22, 2017 (after the Notice of Appeal was served/filed), MidFirst Bank closed on the sale of the subject property for a consideration of **\$67,700.00** – an almost \$31,000.00 profit on its judgment debt.<sup>1</sup> Earning interest – even interest at the rate of 8.5% per annum (as in this case) – is, apparently, not enough for MidFirst Bank. This profit is, of course, Mr. Brady's equity, which he built up over decades.

### CONCLUSION

For the reasons stated, this Court should reverse the appealed Orders and vacate the Judgment of Foreclosure and Sale.

Respectfully submitted,



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<sup>1</sup> It is noted that title to the subject property was reacquired by MidFirst Bank on or about January 19, 2018.

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APPEAL FROM RICHLAND COUNTY  
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Joseph M. Strickland, Master in Equity

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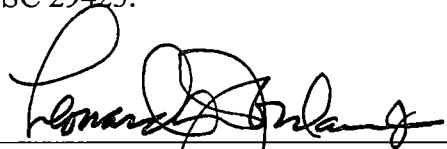
MidFirst Bank, ..... Respondent,

v.

Richard Brady; State of South Carolina; and Richland County Clerk of Court, Defendants, of  
whom Richard Brady is ..... Appellant.

PROOF OF SERVICE

I, Leonard R. Jordan, Jr., attorney for Appellant, Richard Brady, hereby certify that I have,  
this 6<sup>th</sup> day of April, 2018, served the Initial Reply Brief upon the attorney for Respondent,  
MidFirst Bank, by mailing a copy thereof, postage prepaid, directed to Magalie A. Creech, Esquire,  
Finkel Law Firm, LLC, P.O. Box 41489, Charleston, SC 29423.

  
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April 6, 2018

The Honorable Jenny Abbott Kitchings  
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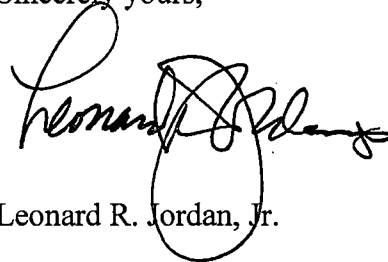
Dear Ms. Kitchings:

Enclosed for filing are the original and one copy of the Initial Reply Brief and Proof of Service. Please file the original and return the copy (marked Filed) in the attached, self-addressed, stamped envelope.

If you have any questions regarding this matter, please do not hesitate to contact me.

Thanking you in advance for your cooperation with this matter, I am

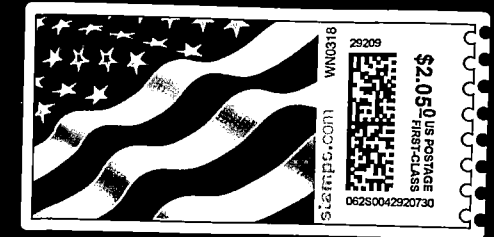
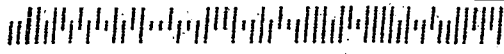
Sincerely yours,



Leonard R. Jordan, Jr.

LRJjr/km  
Enclosure

cc: Magalie A. Creech, Esquire  
Mr. Richard Brady



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