THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
R. Knox McMahon, Circuit Court Judge

Case No.: 2017-CP-32-00507

LM Insurance Corporation, Plaintiff,
v.

Josh Steele, Defendant, Third-Party Plaintiff, ... Appellant,
v.
Ernie Yarborough d/b/a Yarborough
Insurance Agency, Third-Party Defendant ..... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This case arose out of a breach of contract and collection action filed in Lexington County Circuit Court by LM Insurance Corporation ("LM Insurance"), the plaintiff below, against Appellant Josh Steele ("Steele"). The Complaint, filed February 13, 2017, alleged that Steele had purchased workers' compensation insurance from LM Insurance for the periods July 26, 2012 to July 26, 2013, from August 2, 2013 to July 26, 2014, and July 26, 2014 to July 26, 2015. Audits performed by LM Insurance produced audit adjustments that resulted in additional amounts due from Steele to LM Insurance. LM Insurance alleged that the total principal sum of $345,064.00 plus interest was due to it from Steele. (Complaint, filed Feb. 13, 2017, R. pp. 7-12).

Steele answered the Complaint denying various allegations and alleging counterclaims against LM Insurance. In addition, Steele named Ernie Yarborough d/b/a Yarborough Insurance Agency ("Yarborough" or "Respondent") as a third-party defendant alleging negligence, breach of fiduciary duty, negligent misrepresentation, civil conspiracy, fraud, violation of the SCUTPA, breach of contract, and conversion. (Answer & Third Party Complaint, filed April 20, 2017, R. pp. 13-32) ("Third-Party Complaint").

The Certificate of Service attached to the Third Party Complaint indicates that Ernie Yarborough was served "Via Certified Mail, Restricted Delivery." A later-filed Affidavit of Service of Third-Party Summons indicates that the return receipt was signed by Sandra L. Pike ("Pike") on April 21, 2017. (Affidavit of Service and Exh. A, R. pp. 75-77).

On June 20, 2017, Yarborough filed a Motion to Dismiss the Third-Party Complaint against him based on Steele's insufficient service of process by certified mail. In the Motion to Dismiss, Yarborough stated that he was not in the office on the day the certified letter was presented and that Pike was not authorized to sign certified mail directed to him. Yarborough did not authorize Pike to sign the certified letter on his behalf and her duties as a sales and service representative do not include signing certified mail on behalf of him or his business. Counsel for Yarborough attempted to resolve the problem regarding service with Steele's counsel prior to filing the Motion to Dismiss, but was unable to reach a resolution. (Motion to Dismiss, filed June 20, 2017, R. pp. 63-67).

Attached to the Motion to Dismiss were sworn affidavits signed by Yarborough and Pike. In his affidavit, Yarborough stated that Pike is a sales and service representative who works in the front of Yarborough's office. Pike signed for the certified letter containing the Third Party Complaint without Yarborough's knowledge or authority. Yarborough did not discover the existence of the Third Party Complaint until May 31, 2017 when he immediately reported it to his insurance carrier. In her affidavit, Pike stated that she does not normally sign for certified letters and Yarborough has never authorized her to do so. She did not recall signing for the certified letter and did not open the package to see what it contained. Yarborough also filed a Memorandum in Support of Motion to Dismiss. (Memorandum in Support of Motion to Dismiss, filed July 31, 2017, R. pp. 68-83).

Steele did not file a response to the Motion to Dismiss. Instead, on July 28, 2017, just days before the scheduled hearing on the Motion to Dismiss, he attempted a second service of process on Yarborough. Neither Steele nor his counsel advised either the

Circuit Court or Yarborough's counsel of this attempt until the hearing. Steele submitted an Affidavit of Service to the Court at the August 2, 2017 motions hearing before the Honorable R. Knox McMahon, alleging personal delivery of the Summons and Third-Party Complaint on Yarborough on July 28, 2017.

When Steele's counsel raised the issue of the alleged second attempt to serve the Third-Party Complaint and Summons, Judge McMahon stated that the issue of whether the July 28, 2017 service was effective was not before him. (R. p. 49, lines 7-25; p. 57, lines 20-23). Steele's counsel also advised the Court that he wanted to take Yarborough and Pike's depositions in order to verify the statements made in their affidavits. (R. p. 53, line 17 – p. 54, line 8; p. 55, lines 3-9). The Court agreed to take the matter under advisement and allowed 30 days for Steele to take the depositions of Yarborough and Pike. (R. p. 59, lines 1-16; p. 60, line 21 – p. 61, line 4).

On September 19, 2017, the Court issued an Order granting Yarborough's Motion to Dismiss. The Court ruled that Steele's attempt to serve Yarborough pursuant to Rule 4(d)(8), SCRCP, on April 21, 2017 by certified mail restricted delivery was defective, as Pike did not have express, apparent or implied authority to accept service on behalf of Yarborough. The Court noted that, despite having been granted 30 days to take the depositions of Yarborough and/or Pike, Steele failed to present any evidence to the Court to contradict their sworn statements. (Order Granting Third-Party Defendant Ernie Yarborough d/b/a Yarborough Insurance Agency's Motion to Dismiss, filed Sept. 19, 2017, R. pp. 1-5) ("Order").

Steele moved for reconsideration, taking issue with one sentence in the Court's September 19, 2017 Order and arguing that the July 28, 2017 attempted service of process was effective. (Motion for Reconsideration, filed Sept. 25, 2017, R. pp. 84-85).

Yarborough opposed Steele's Motion for Reconsideration, pointing out that Steele had not sought leave nor did the Court allow him to amend his original service of process pursuant to Rule 4(i), SCRCP. Steele's only request at the hearing was to depose Yarborough and Pike, and his attempt to present evidence of an amended proof of service was improper. (Third-Party Defendant's Response in Opposition to Third-Party Plaintiff's Motion for Reconsideration, filed Sept. 28, 2017, R. pp. 86-87).

The Court issued an order on October 16, 2017 noting that "[t]he narrow issue before the court was the sufficiency of service as to the certified mail." In order to clarify its prior order, the Court revised a sentence in the September 19 Order that had read, "Subsequently, Yarborough has not been personally served or any other manner contemplated by the Rules of Civil Procedure," (Sept. 19 Order, R. p. 2), with "Third Party Defendant Yarborough was not properly served by certified mail or in any other matter as of the date of the alleged attempted service on Sandy Pike on April 21, 2017." (Order, filed Oct. 16, 2017, R. p. 6) ("Order on Rehearing").

Steele timely appealed to this Court.

BACKGROUND FACTS

Yarborough is the owner and operator of Ernie Yarborough Insurance Agency ("Agency"). The Agency's staff consists of three employees, including two sales and service representatives and one associate agent. (Yarborough Affid. ¶¶ 2 & 3, R. p. 82).

Pike is a sales and service representative, who sits at the front of the office. Her duties do not include signing for certified mail on behalf of Yarborough or the Agency, although she often receives mail that is brought to the office. Yarborough has never authorized Pike or any of his employees to sign for certified mail on his behalf or on behalf of the Agency. (Yarborough Affid. ¶¶ 4, 8, 9 & 10, R. pp. 82-83).

Pike confirmed that, although she often receives mail for the Agency, given the location of her desk, she does not normally sign for certified letters. Yarborough has never authorized or given her permission to sign for certified letters on his behalf. (Pike Affid. ¶¶ 2, 3, 4 & 6, R. p. 79-80).

On April 21, 2017, the Third-Party Complaint was sent to Yarborough's office via certified mail, restricted delivery. Yarborough was not in the office that day. Pike signed for the certified letter without Yarborough's knowledge or authority. Pike has no independent recollection of signing for the certified letter and did not open the package she signed for on April 21, 2017. Pike placed the certified letter in a stack of other documents and Yarborough did not discover its existence until approximately May 31, 2017. (Yarborough Affid. ¶¶ 6, 7 & 9, R. p. 83) (Pike Affid. ¶¶ 4, 5, R. pp. 79-80).

When Yarborough discovered the Third-Party Complaint, his counsel attempted to work out the service issue with Steele's counsel, to no avail. (Motion to Dismiss, R. p. 64).

At the motions hearing, Yarborough's counsel noted that, on the Friday before the August 2, 2017 motions hearing, Steele had attempted another service. She explained that, Steele's counsel, "Mr. Dodson had a legal process server come out and serve Mr. Yarborough individually. She sat in the office and waited until he was off the phone and

served him with the third party complaint. My belief is that he has now been effectively served on that for terms of the time running from Friday when he got the summons and the third party complaint served on him this past Friday. **So I would argue that there has been another – there has been another attempt to serve him.** That service was this past Friday and time should run from this past Friday." (R. p. 48, line 20 – p. 49, line 5) (emphasis added). Yarborough's counsel again clarified that, "the pivoting or twisting in this case, arose from the fact that Mr. Dodson served the complaint on Mr. Yarborough this past Friday. **If that's effective service**, then the 30 days starts to run from this past Friday." (R. p. 56, lines 1-5) (emphasis added). Judge McMahon advised that whether Steele's second attempt to serve Yarborough was effective service was not before him. (R. p. 49, lines 7-25; p. 57, lines 20-23).

Steele's counsel then proceeded to argue that the attempt to serve Yarborough by certified mail was effective, and told the Court, "[s]o I'm going to take [Yarborough's] deposition. I'm going to take the other – the Sandy Pike who also submitted an affidavit." (R. p. 53, line 12 – p. 54, line 6). Mr. Dodson continued, "[a]nd so I think we'll get to the bottom of the facts a lot sooner once I take those depositions and I'm allowed to ask them my own questions, not just have an affidavit that their attorney writes and that they sign and they essentially go unquestioned ..." (R. p. 55, lines 3-8).

Judge McMahon confirmed that Steele's counsel wanted to take Yarborough's and Pike's depositions. (R. p. 58, line 23 – p. 59, line 18). As a result, Judge McMahon took the matter under advisement for 30 days in order to give Steele's counsel time to take the depositions. (R. p. 60, line 21 – p. 61, line 4). No depositions were noticed or taken, however.

STANDARD OF REVIEW

"Questions of fact arising on a motion to quash service of process for lack of jurisdiction over the defendant are to be determined by the court." Brown v. Carolina Emerg. Phys., P.A., 348 S.C. 569, 593, 560 S.E.2d 624, 631 (Ct. App. 2001). "The findings of the circuit court on such issues are binding on the appellate court unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law." Moore v. Simpson, 322 S.C. 518, 524, 473 S.E.2d 64, 67 (Ct. App. 1996). In other words, the "trial court's findings of fact regarding validity of service of process are reviewed under an abuse of discretion standard." Graham Law Firm, P.A. v. Makawi, 396 S.C. 290, 294-295, 721 S.E.2d 430, 432 (2012).[1]

ARGUMENTS

The Circuit Court properly granted Yarborough's Motion to Dismiss, holding that the attempted service of process on April 21, 2017 was ineffective and dismissing the Third-Party Complaint against Yarborough. Steele failed to comply with the

[1] Appellant mis-states the Standard of Review in this case by quoting only part of this Court's statement in Cole Vision Corp. v. Hobbs, 384 S.C. 283, 680 S.E.2d 923 (Ct. App. 2009), *overruled on other gds* 394 S.C. 144, 714 S.E.2d 537 (2011). The entire sentence reads, "[t]he appellate court applies the same standard of review as the trial court in reviewing the dismissal of an action pursuant to Rule 12(b)(6), SCRCP," 384 S.C. at 287, 680 S.E.2d at 925. Clearly, the inquiry into and standard of review for a motion to dismiss pursuant to Rule 12(b)(5), SCRCP, for insufficiency of service of process is not the same as for a motion to dismiss pursuant to Rule 12(b)(6), failure to state facts sufficient to constitute a cause of action. A Rule 12(b)(5) motion to dismiss for ineffective service requires factual findings regarding how the service was attempted, *etc.*, whereas a Rule 12(b)(6) motion to dismiss tests the legal sufficiency of factual allegations set forth in a complaint. *Compare* Graham Law Firm, 396 S.C. at 295, 721 S.E.2d at 433 (whether service of process via certified mail was effective depends on whether it was signed for by person with apparent authority to receive process), *with* Cole Vision, 384 S.C. at 287, 680 S.E.2d at 925 (viewing the facts in a light most favorable to the plaintiff, whether the "facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case").

requirements of Rule 4(d)(8), SCRCP, when he attempted to serve Yarborough with the Summons and Third-Party Complaint on April 21, 2017. Yarborough's employee, Pike, who did not have actual, apparent, or implied authority to accept service of process of this pleading, signed the return receipt card instead of the restricted addressee, Yarborough. Steele's attempted service failed to satisfy the requirements of Rule 4(d)(8). As a result, Steele's Third-Party Complaint against Yarborough properly was dismissed.

I. The Circuit Court properly granted Yarborough's Motion to Dismiss the Third-Party Complaint because the attempted service on April 21, 2017 pursuant to Rule 4(d)(8), SCRCP, was ineffective.

Steele's Brief fails to address the issue of whether the April 21, 2017 attempted service by certified mail was effective. As a result, he has abandoned this issue on appeal. Simmons v. SC Strong, 402 S.C. 166, 173 n.2, 739 S.E.2d 631, 634 n.2 (Ct. App. 2013) (argument not preserved for appellate review where it was raised for the first time in a reply brief); Lister v. NationsBank of Delaware, N.A., 329 S.C. 133, 494 S.E2d 449 (Ct. App. 1997) ("an appellant may not use the reply brief to argue issues not argued in the appellant's initial brief"). This Court can and should affirm on this basis alone.

Out of an abundance of caution, however, Respondent addresses this issue in more detail. Rule 4, SCRCP, provides various methods by which a Summons and Complaint can be served to effectuate process on a defendant in order to confer personal jurisdiction on the court. "The principal object of service of process is to give notice to the defendant corporation of the proceedings against it." Burris Chemical, Inc. v. Daniel Const. Co., 251 S.C. 483, 487, 163 S.E.2d 618, 620 (1968). "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." Roche v. Young Bros., Inc. of Florence, 318 S.C.

207, 209, 456 S.E.2d 897, 899 (1995). Exacting compliance with the rules is not required to effectuate service of process. Instead, the court inquires "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." Id. at 210, 456 S.E.2d at 899. According to Rule 4(d)(8), a plaintiff may serve a Summons and Complaint on a corporate defendant "by registered or certified mail, return receipt requested **and restricted to the addressee."** Rule 4(d)(8), SCRCP (emphasis added).

For service to be effective under Rule 4(d)(8), SCRCP, a plaintiff must serve the addressee or "an authorized person" for the individual. The class of persons who may receive service of process on behalf of an individual or corporation as set forth in Rule 4(d)(8) is limited. Graham Law Firm, 396 S.C. at 297, 721 S.E.2d at 434. To accept service of process, "an agent's authority must be either express, implied, or apparent." Roberson v. Southern Fin. of SC, Inc., 365 S.C. 6, 10, 615 S.E.2d 112, 115 (2005), *citing* 2A CJS Agency § 132 (2004). Express or actual authority exists where "authority is expressly conferred upon the agent by the principle." While it is unsettled whether apparent authority can suffice to demonstrate authorization to accept service under Rule 4, apparent authority exists "when the principal knowingly permits the agent to exercise authority, or the principal holds the agent out as possessing such authority." Apparent authority is established based on manifestations by the principal, not the agent. Finally, for an agent to possess "implied authority," the agent must believe she had such authority. Roberson, 365 S.C. at 11, 615 S.E.2d at 115.

In the present case, the certified letter explicitly stated that it was restricted for delivery to Yarborough. However, the restricted addressee, Yarborough, did not sign for

the mailing. Instead, Pike, a sales and service representative who sits near the front of the office, signed for it. The evidence is clear that Pike did not have express, apparent, or implied authority to accept service of process for Yarborough. Yarborough's affidavit establishes that he did not give and has never given Pike express permission to accept service of process for the company. (Yarborough Affid. ¶¶ 4, 8, 9 & 10, R. pp. 82-83). Pike admits that she did not have permission to sign for certified mail on behalf of Yarborough. (Pike Affid. ¶¶ 2, 3, 4 & 6, R. pp. 79-80). Also, there is no evidence that would support any argument that Pike had apparent or implied authority to accept service of process for Yarborough. *See* Roberson, 365 S.C. at 10-11, 615 S.E.2d at 115 (finding that a clerical employee who signed the return receipt card did not have apparent authority because there was no evidence that the employee had such authority, and that the employee did not have implied authority because the employee had never been authorized to accept service in the past).

Although Steele indicated to the Circuit Court that he intended to take Yarborough's and Pike's depositions in order to test the accuracy of their sworn affidavits, (R. p. 53, line 17 – p. 54, line 8; p. 55, lines 3-9), and the Court took the matter under advisement for 30 days in order to provide Steele the opportunity to take the depositions, (R. p. 59, lines 1-16; p. 60, line 21 – p. 61, line 4), none were ever noticed or taken. Thus, the statements made in Yarborough's and Pike's Affidavits are uncontroverted.

All of the evidence in this case indicates that Steele failed to comply with the service requirements of Rule 4(d)(8) because he failed to serve the restricted addressee, Yarborough, or any agent with authority to accept service of process of the Summons and

Third-Party Complaint. Although Yarborough was the restricted addressee on the certified mailing, Pike signed for it, and the evidence is clear that Pike did not have express, apparent, or implied authority to accept service of process on behalf of Yarborough. Consequently, the Circuit Court properly granted Yarborough's Motion to Dismiss Steele's Third-Party Complaint due to insufficient service of process pursuant to Rule 4(d)(8), SCRCP. As a result, Yarborough did not receive timely notice of the Third-Party Complaint, the Circuit Court did not obtain personal jurisdiction over Yarborough, and the Third-Party Complaint properly was dismissed.

II. Steele's attempt to serve the Third-Party Complaint on Yarborough on July 28, 2017, while the Motion to Dismiss the same Third-Party Complaint was pending, was both ineffectual and improper.

Steel argues to this Court that the Circuit Court improperly dismissed his third-party action pursuant to Rule 12(b)(5) because he alleges that it is undisputed that Yarborough was personally served on July 28, 2017. However, his argument fails for a number of reasons.

First, his argument overstates and misconstrues the statements made by Yarborough's counsel at the hearing. In fact, Yarborough's counsel's statements were qualified at each point. The relevant testimony recounts that Steele's counsel, "Mr. Dodson had a legal process server come out and serve Mr. Yarborough individually. She sat in the office and waited until he was off the phone and served him with the third party complaint. My belief is that he has now been effectively served on that for terms of the time running from Friday when he got the summons and the third party complaint served on him this past Friday. **So I would argue that there has been another – there has been another attempt to serve him.** That service was this past Friday and time should

run from this past Friday." (R. p. 48, line 20 – p. 49, line 5) (emphasis added). Yarborough's counsel again clarified that, "the pivoting or twisting in this case, arose from the fact that Mr. Dodson served the complaint on Mr. Yarborough this past Friday. **If that's effective service**, then the 30 days starts to run from this past Friday." (R. p. 56, lines 1-5) (emphasis added). There is no unequivocal admission of proper service, as Steele would have this Court believe.

Second, Yarborough disputes that the July 28, 2017 attempted service was effective or sufficient to provide proper notice to Yarborough and/or to confer personal jurisdiction on the Circuit Court. *See* Roche, 318 S.C. at 209, 456 S.E.2d at 899 (the purposes of service of process are to confer "personal jurisdiction on the court and assure[] the defendant of reasonable notice of the action"). Instead of filing any opposition to Yarborough's Motion to Dismiss, Steele attempted to muddy the issue by attempting another service on Yarborough. Whether that service was sufficient to comply with Rule 4, SCRCP, has yet to be determined, was not properly before the Circuit Court, and is not before this Court.

Steele contends that the Circuit Court erred by not considering his attempt to serve Yarborough after Yarborough filed the Motion to Dismiss for insufficient service. In addition to the fact that the status of the Third-Party Complaint was pending before the Circuit Court due to Yarborough's Motion to Dismiss at the time Steele attempted to serve the very same Third-Party Complaint on July 28, 2017, Steele's argument is inapposite of the rules. Rule 4(i) states that the court "in its discretion and upon terms it deems just ... **may**, by written order, allow any process or proof of service thereof to be amended ..." Rule 4(i), SCRCP, (emphasis added). Thus, the Court was not required to

allow Steele to amend his proof of service. *See* Sunset Cay, LLC v. City of Folly Beach, 357 S.C. 414, 426, 593 S.E.2d 462, 468 (2004) (the use of the term "may" in a statute is permissive). In addition, even if the Court were inclined to allow him to amend his service of process, Steele never sought the Court's written permission to do so. Moreover, while Steele asserted repeatedly at the hearing that his amended service of process was proper, he did not seek to amend his proof of service at the motions hearing. Instead, Steele's sole requests were: 1) to deny the Motion to Dismiss, and 2) for permission to depose Yarborough and Pike concerning their Affidavits. Therefore, Steele's attempt to present evidence to the Circuit Court of an alleged second attempt to serve the Third-Party Complaint, while the Motion to Dismiss that very same Third-Party Complaint was pending, was improper. As a result, the Circuit Court did not err in not considering Steele's improper attempt to amend his proof of service or by dismissing Steele's Third-Party Complaint for insufficient service of process.

III. The Circuit Court did not issue an improper advisory opinion.

Finally, Steele argues that the Circuit Court's Order should be reversed because it was an impermissible "advisory opinion." This argument fails for a couple of reasons. First, it is unclear whether this issue is preserved for appellate review. Cole Vision, 394 S.C. at 149, 714 S.E.2d at 539-540 (issue not preserved for appellate review where, although appellant raised the issue during a hearing, the circuit court did not rule on it in its written order, which controls over any verbal rulings). Here, although Steele raised this argument at the motions hearing, the Circuit Court did not address it in its written Order. (Order, R. pp. 1-5). Furthermore, Steele did not raise this issue in his Motion for Reconsideration, (Motion for Reconsideration, R. pp. 84-85), and the Circuit Court did

not rule on it in its Order on Rehearing. (Order on Rehearing, R. p. 6). As a result this issue is not preserved and this Court should dismiss Steele's entire argument on this point.

Second, even assuming this issue is preserved, which Respondent disputes, the Circuit Court Order is not an advisory opinion. The actual controversy before the Circuit Court on Yarborough's Motion to Dismiss was whether the attempted service on April 21, 2017 by certified mail was effective pursuant to Rule 4(d)(8), SCRCP. As noted above, at the time of the hearing, Steele had not sought leave to amend his service of process pursuant to Rule 4(i), SCRCP, and the issue of whether the July 28, 2017 attempted service was effective was never conceded. In fact, an attempt to serve a complaint that is the subject of a pending motion to dismiss is inherently defective.

Furthermore, the cases on which Steele relies are distinguishable. First, Slezak v. State, Op. No. 2008-UP-005 (S.C. Ct. App. Order dated Jan. 2, 2008) (Shearouse Adv. Sh. No. 1), is an unpublished opinion of this Court which has no precedential value. Rule 268(d)(2), SCACR, provides that "unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." In any event, in Slezak, the "initial parole date ... ha[d] long since come and gone" and he had been denied parole on that date and at other times. "[C]onsequently, the question of whether [Slezak] should have received a parole hearing at an earlier date because of earned work credits to which he may have been entitled is of no moment." Here, in contrast, the question of whether Steele managed to effectively serve Yarborough on April 21, 2017 was the only issue properly pending before the Circuit Court at the August 2, 2017 motions hearing. Steele's attempt to serve Yarborough again did not moot the

issue before the Circuit Court because whether the attempt to serve Yarborough on July 28, 2017 was effective service was not properly before the Circuit Court and has never been decided or conceded.[2]

In Sloan v. Friends of the Hunley, Inc., 369 S.C. 20, 630 S.E.2d 474 (2006), the plaintiff sought documents from the Friends of the Hunley, Inc. ("Friends") pursuant to a FOIA request. Although it initially refused to provide the documents, Friends fully complied after the plaintiff brought suit asserting that Friends was a public body and/or the alter ego of the Hunley Commission. Friends moved for and was granted summary judgment on the basis that the remaining issue of whether Friends was a public entity was moot and the assertion that it was the alter ego of the Hunley Commission essentially would require an advisory opinion. The Supreme Court affirmed, explaining that, "[a] justiciable controversy exists where there is a real and substantial controversy which is appropriate for judicial determination, as distinguished from a dispute that is contingent, hypothetical, or abstract." In contrast, "[a] moot case exists where a judgment rendered by the court will have no practical legal effect upon an existing controversy because an intervening event renders any grant of effectual relief impossible for the reviewing court." 369 S.C. at 25-26, 630 S.E.2d at 477. As explained above, the issue the Circuit Court decided in this case was neither moot nor called for an advisory opinion.

Instead, the issue before the Circuit Court was whether to grant Yarborough's Motion to Dismiss based on the ineffective service of process by certified mail, restricted delivery on April 21, 2017. Because Steele never requested to amend his service of

[2] Just as the Affidavit of Service of Third-Party Summons, Defendant and Third-Party Plaintiff's Answer to Plaintiff's Complaint, Counterclaims and Third-Party Complaint, filed June 8, 2017, (R. pp. 75-77), was found to be insufficient, Steele's Affidavit of Service filed on August 2, 2017, may well be found to be insufficient as well.

process, that issue was not before the Circuit Court, was not conceded and has never been decided by the Circuit Court. Therefore, a justiciable controversy existed which the Circuit Court properly decided. If that were not the case; indeed, if as Steele argues, an "intervening event" (the alleged second attempt to personally serve Yarborough on July 28) rendered the Circuit Court Order moot or merely an advisory opinion, then "any grant of effectual relief [would be] impossible for the reviewing court." Sloan, 369 S.C. at 26, 630 S.E.2d at 477.

Steele argues that Yarborough's Motion to Dismiss was moot because Steele had not moved for a default judgment. This is a distinction without a difference. Yarborough's motion was a Motion to Dismiss the Third-Party Complaint for ineffective service of process, pursuant to Rule 12(b)(5), SCRCP, and not a motion for relief from an entry of default or a default judgment, pursuant to Rules 55(c) & 60(b), SCRCP. Yarborough was entitled, in fact, was required to raise the insufficiency of the service of process immediately or risk that that issue would be deemed waived. *See* Don Shevey & Spires, Inc. v. American Motors Realty Corp., 279 S.C. 58, 63, 301 S.E.2d 757, 760 (1983), Harwell, J., *dissenting* ("[g]enerally, formal defects and irregularities in the service of process must be taken advantage of at the first opportunity before any further step in the cause is taken; otherwise the defects will be waived"). Furthermore, because the Motion to Dismiss was granted, there was no pending Third-Party Complaint to be served, or to which any response needed or could be made.[3] Steele's Third-Party

[3] It is important to keep in mind that Judge McMahon took the matter under advisement for 30 days in order to allow Steele to depose Yarborough and/or Pike. Assuming for the sake of argument but without conceding, that the July 28, 2017 personal service would have been effective service but for the pending Motion to Dismiss, the time for Yarborough to answer would have run during that 30-day advisement period. Steele

Complaint has been dismissed and is no longer pending before the Circuit Court. As a result, Steele's remaining arguments and assertions that the Circuit Court was issuing an advisory opinion are misplaced and irrelevant.

CONCLUSION

For all of the reasons stated herein, this Court should affirm the Circuit Court's grant of Yarborough's Motion to Dismiss the Third-Party Complaint based on ineffective service of process pursuant to Rule 4(d)(8), SCRCP, on April 21, 2017 by certified mail restricted delivery. This Court should reject Steele's arguments that the attempted service on July 28, 2017 was properly before the Circuit Court and/or this Court. In the event this Court should reverse the Circuit Court, however, this Court should order that Yarborough is entitled to at least 15 days to respond to Steele's Complaint pursuant to Rule 12(a), SCRCP.

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effectively was attempting to "create" a mootness issue by attempting to serve Yarborough while the Motion to Dismiss was pending, which put Yarborough in a procedurally untenable position. Either he: 1) could continue to prosecute his Motion to Dismiss in good faith, or 2) could have proactively answered the Third-Party Complaint that Steele attempted to Serve on July 28. However, had Yarborough pursued the second option, he would have conceded the Circuit Court's jurisdiction over him, which also effectively would have mooted his Motion to Dismiss. Steele's attempt to create such a "Catch 22" situation and his attempt at gamesmanship in this case must be roundly rejected. *See* Tobias v. Rice, 386 S.C. 306, 311, 688 S.E.2d 552, 554 (2010) (reversing lower courts' decisions that placed the petitioner in an impossible "Catch-22" situation in which she could not seek redress); *cf.* Elam v. South Carolina Dept. of Transp., 361 S.C. 9, 25, 602 S.E.2d 772, 780-781 (2004) (civil procedural rules should not be interpreted in a manner that "create[s] a trap for the unwary lawyer or party," and which would "place a party between the proverbial rock and a hard place"). As a result, and for the reasons set forth herein, should this Court reverse the Circuit Court, Yarborough should be allowed a reasonable amount of time to file an Answer to the Third-Party Complaint, as is set forth in Rule 12(a), SCRCP, which provides that, "[t]he service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the Court: (1) if the Court denies the motion ... the responsive pleading shall be served within 15 days after notice of the Court's action."

Respectfully submitted,

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April 26, 2018

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas
R. Knox McMahon, Circuit Court Judge

Case No.: 2017-CP-32-00507

LM Insurance Corporation, Plaintiff,
v.

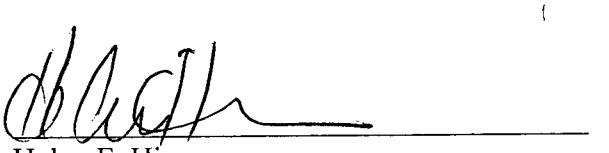
Josh Steele, Defendant, Third-Party Plaintiff, ... Appellant,
v.
Ernie Yarborough d/b/a Yarborough
Insurance Agency, Third-Party Defendant ..... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent Ernie Yarborough d/b/a Yarborough Insurance Agency complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of Respondent complies with the South Carolina Supreme Court's April 15, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

April 26, 2018

McANGUS GOUDELOCK & COURIE, LLC



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