THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
L. Casey Manning, Circuit Court Judge

Case No. 2015-CP-40-05106
Appellate Case No. 2016-002043

Pearline Williams.....Respondent

v.

Larita Hipp and Michelle Masaryk..... Defendants,

Of Whom Michelle Masaryk is the.....Appellant.

FINAL REPLY BRIEF OF APPELLANT

William H. Bowman, III (SC Bar No. 810)
Robert P. Wood (SC Bar No. 6206)
ROGERS TOWNSEND & THOMAS, PC
1221 Main Street, 14th Floor (29201)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803) 771-7900
robert.wood@rtt-law.com

Attorneys for Defendant/Appellant
Michelle Masaryk

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REPLY ARGUMENT

I. THE AFFIDAVIT IS FACIALLY DEFECTIVE, AND THE DEFAULT JUDGMENT SHOULD HAVE BEEN SET ASIDE.

Despite Respondent's argument to the contrary, a defect in fact appears on the face of the record. The defect is that the affidavit relied upon by the Clerk of Court for ordering service by publication merely recites that "after due diligence, the Defendant cannot be found...." Aff. of Jerry Reardon.[1] Both the Clerk and the Lower Court overlooked the fact that there is no evidentiary support for the statement that due diligence was exercised, and an affidavit in support of an order for service by publication where the defendant is a resident of South Carolina and cannot be found after a diligent search "must include 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." *Caldwell v. Wiquist*, 402 S.C. 565, 574, 741 S.E.2d 583 (2013).

"An abuse of discretion arises when the court issuing the order was controlled by an error of law or when the order, based upon factual conclusions, is without evidentiary support." *Caldwell*, at 569, 585. That is exactly what we have here.

Wachovia Bank of S.C., N.A. v. Player, 341 S.C. 424, 535 S.E.2d 128 (2000), is distinguishable because there the Supreme Court reported that the process server's affidavit reflected due diligence. *Wachovia* at 428, 130. Here, all the attorney's affidavit does is recite that due diligence was exercised.

Montgomery v. Mullins, 325 S.C. 500, 480 S.E.2d 467 (Ct. App. 1997), is easily distinguished because the affidavit there lists specific efforts to locate the defendant. Those

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[1] Note that the Clerk of Court properly declined to rely on the Affidavit of Mark Weaghington (the process server) and instead merely referred to the attorney's affidavit. Order for Service by Publication. (R.p. 3.) This would make sense because Weaghington's affidavit did not demonstrate the actual exercise of due diligence.

efforts included contacting the defendant's insurance carrier, calling a particular telephone number, contacting power and telephone utilities, contacting the Navy, and calling a telephone number found on the accident report. No such efforts are alleged here.

Ingle v. Whitlock, 282 S.C. 391, 318 S.E.2d 367 (1984), is likewise distinguishable. There, the Supreme Court noted that the process server averred that he attempted to locate the defendant at his last known address and another address, contacted appropriate mail carriers, contacted the defendant's stepmother, made several neighborhood inquiries, contacted a power company and water works, and contacted a correctional release center. These are just the sort of facts a court clothed with discretion must consider.

Respondent raises *Yarbrough v. Collins*, 293 S.C. 290, 360 S.E.2d 300 (1987), for the first time. Unlike the case at bar, *Yarbrough* is a quiet title case involving land in South Carolina. Pursuant to *Yarbrough* and what is now S.C. Code Ann. § 15-9-710(4), if a plaintiff wants permission to serve a summons and complaint by publication in a case involving property in South Carolina, the plaintiff must show that: a) the defendant owns property in South Carolina but does not reside here, b) the court has subject matter jurisdiction, c) the defendant cannot be located within the state, and (d) the plaintiff has a cause of action against the defendant involving that property. *Yarbrough* allows a plaintiff to make this four-part showing using only a conclusory statement of the exercise of due diligence, but only because the case involves title to property in South Carolina. *Yates v. Gridley*, 16 S.C. 496 (1882), cited by the *Yarbrough* court, is similarly a partition case involving title to real property in South Carolina.

Here, Respondent's attorney submitted his affidavit under S.C. Code Ann. § 15-9-710(3) (assuming Appellant still lived in South Carolina). Under § 710(c), the important state interest of maintaining good titles to real property is not involved. What is involved is a defendant who

lives in South Carolina but who cannot be found after a diligent search. In those cases (per *Caldwell*), a plaintiff cannot slide by with a conclusory statement of due diligence.[2]

Because the defect appears on the face of the attorney's affidavit, Appellant did not have to prove fraud or collusion to have service by publication found to be void.

II. THE LOWER COURT SHOULD NOT HAVE CONSIDERED THE PROCESS SERVER'S AFTER-THE-FACT AFFIDAVIT.

The question is whether the Clerk of Court abused her discretion in entering the order of service by publication. The Clerk of Court never saw the process server's second affidavit. An abuse of discretion is determined by whether there was some factual basis upon which the court issuing the order of service by publication (here, the Clerk) could have found that the defendant could not, after due diligence, have been found within the state. *Caldwell*, 402 S.C. 565, 741 S.E.2d 583. Because the Clerk never read the process server's second affidavit (it being signed and filed months after the order of service by publication case was entered), then what the affidavit said was irrelevant.

III. THE LOWER COURT SHOULD NOT HAVE SIGNED A NEW ORDER.

The orders entered by the Lower Court are, to put it bluntly, a mess.

On March 16, Respondent sent Appellant notice of a damages hearing scheduled for March 22.

On March 21 (before the hearing was even held), the Lower Court signed and entered an order setting damages at $25,000. To this day Respondent has never filed a Rule 59(e) motion as to that order, and the Lower Court has never vacated it.

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[2] We are not raising this issue for the first time on appeal. Respondent raised it by citing a case (*Yarbrough*) that deals with S.C. Code Ann. § 15-9-710(4), when the case at bar deals with S.C. Code Ann. § 15-9-710(3).

During the hearing on March 22, the Lower Court signed a second order setting damages at $25,000. The Lower Court never vacated that order, and Respondent never filed a Rule 59(e) motion with respect to it.

The same day as the hearing, the Lower Court inexplicably signed a new order setting damages at $45,000, and it did so without receiving any new evidence after having signed the two orders setting damages at $25,000.

The next day (March 23) the Lower Court entered its $45,000 order.

And finally, on March 28, the Lower Court entered its Form 4 Order for $45,000.

The Supreme Court has defined "arbitrary," as meaning, "based alone upon one's will, and not upon any course of reasoning and exercise of judgment; bound by no law; done capriciously or at pleasure, without adequate determining principle, nonrational; not governed by any fixed rules or standard." *Turbeville v. Morris*, 203 S.C. 287, 315, 26 S.E.2d 821, 832 (1943).

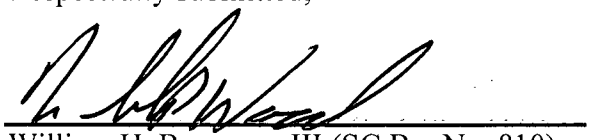
Respondent has not shown that this series of orders was anything other than arbitrary. Nothing in the record shows that the Lower Court in fact engaged in a "course of reasoning," exercised any judgment, or applied any fixed rules or standards when signing and entering the $45,000 order.

Furthermore, Rule 59(e) says nothing about the power of a court to modify an order *sua sponte* within ten days of its entry. Language to that effect in *Leviner v. Sonoco Prods. Co.*, 339 S.C. 492, 494, 530 S.E.2d 127, 128 (2000), is simply nothing more than *dicta* and was written without the benefit of arguments regarding the right (Constitutional or otherwise) to brief and argue whether changes to an order might be appropriate or based on law.

CONCLUSION

For the foregoing reasons, the Lower Court's orders should be vacated as void under S.C. Code Ann. § 15-9-710(3), Rule 60(b) of the South Carolina Rules of Civil Procedure, and the Due Process Clauses of the South Carolina and United States Constitutions. Failing that, the $45,000 orders should be disregarded as inappropriately entered and replaced with the $25,000 order.

Respectfully submitted,



William H. Bowman, III (SC Bar No. 810)
Robert P. Wood (SC Bar No. 6206)
ROGERS TOWNSEND & THOMAS, PC
1221 Main Street, 14th Floor (29201)
Post Office Box 100200
Columbia, South Carolina 29202-3200
(803) 771-7900
Bo.Bowman@rtt-law.com
Robert.Wood@rtt-law.com

Attorneys for Defendant/Appellant
Michelle Masaryk

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