THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2018-001497
Civil Action No. 2015-CP-26-05633

Bobby Foster,

Appellant,

v.

Julian Neil Armstrong,

Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF JURISDICTION

This appeal arises out of the October 26, 2016, Order of the Honorable Benjamin H. Culbertson, granting Respondent's Motion Setting Aside Order for Publication and Setting Aside Order for Entry of Default and for Referral on Damages; and the July 12, 2018, Order of the Honorable Larry B. Hyman, granting Summary Judgment and Dismissing Action with Prejudice.

The Trial Court's final judgment was entered on July 12, 2018. Appellant received notice of Judge Hyman's Order Granting Summary Judgment on July 12, 2018. Appellant timely filed and Served a Notice of Appeal on August 13, 2018 (the 30-day deadline having fallen on the preceding Saturday). This Court has jurisdiction to entertain the appeal and correct errors of law pursuant to S.C. Code Ann. § 14-3-330.

STATEMENT OF ISSUES ON APPEAL

I. Did the Circuit Court err in holding that service by publication was ineffective on the basis that the "publication of the Summons in this case does not state the date of the filing of the Summons [in violation of] S.C. Code Ann. § 15-9-740?"

II. Did the Circuit Court err in holding that the Summons in this action was ineffective on the basis that it "does not notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him?"

III. Did the Circuit Court err in holding that service by publication was ineffective on the basis that the North Myrtle Beach Times is not a "daily newspaper of the defendant's last known address, 186 Williamsburg Road, Little River, South Carolina" and is "not a newspaper of general circulation in Horry County?"

IV. Did the Circuit Court err in holding that service by publication was ineffective on the basis that the Plaintiff failed "to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. § 15-9-740?"

V. Did the Circuit Court err in granting summary judgment insofar as the sole basis for doing so was the Court's prior erroneous invalidation of Appellant's service by publication?

STATEMENT OF THE CASE

On April 8, 2013, Respondent rear-ended Appellant. Appellant suffered significant personal injury and property damage as a result. On July 27, 2015, Appellant filed a Summons and Complaint in Horry County. Appellant attempted to serve Respondent personally without success. Appellant then secured an Order for Publication. (*See* Nov. 24, 2015, Order for Pub.).

The publication ran during the weeks of December 24 and 31, 2015, and January 7, 2016. On March 2, 2016, Appellant moved for entry default against Respondent (*See* Appellant's Motion for Default.), which was entered on March 8, 2016. (*See* Mar. 8, 2016, Order for Entry of Default.)

In July 2016, Respondent's counsel appeared in this matter. (*See* Notice of Appearance.) In September 2016, Respondent filed a Motion to Set Aside Order for Entry of Default and

Order for Publication. (*See* Def. Mot. to Set Aside). Respondent's motion was granted on October 21, 2016. (*See* Oct. 21, 2016, Order).

On November 10, 2016, Appellant filed a Motion to Reconsider pursuant to Rule 59, SCRCP, (*See* Nov. 10, 2016, Motion to Reconsider). The Court denied Appellant's motion by order dated March 16, 2017. (*See* Mar. 16, 2017, Order.) Respondent filed a Motion for Summary Judgment on March 31, 2017 (*See* Motion for Summ. J.).

Form 4 granting Respondent's Motion for Summary Judgment was signed by the Court on April 24, 2017. It stated that a formal order would follow. On July 7, 2017 Appellant filed a Motion to Alter or Amend. The Motion was denied. On July 12, 2018, the final order was entered. Appellant timely filed and served a Notice of Appeal on August 13, 2018.

STANDARD OF REVIEW

As to Issues on Appeal I through IV: "Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge." *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502–03 (2006). Accordingly, this Court's review is limited to determining whether there was an abuse of discretion. *Id.* "An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions that are without evidentiary support." *Id.*

As to Issue on Appeal V: Summary judgment is "an extreme remedy to be cautiously invoked." *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E.2d 728, 729 (1986). Summary judgment should only be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56,

SCRCP. When reviewing the grant of summary judgment, the Appellate Court applies the same standard that governs the trial court. *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C 334, 340, 611 S.E.2d 485, 488 (2005). An appellate court may decide questions of law with no particular deference to the trial court. *Verenes v. Alvanos*, 387 S.C. 11, 690 S.E.2d 771 (2010). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001). This Court therefore may review this question presented *de novo*.

ARGUMENT

I. The trial court erred in holding that service by publication was ineffective on the basis that the "publication of the Summons in this case does not state the date of the filing of the Summons [in violation of] S.C. Code Ann. § 15-9-740." (October 2016 ORDER, p. 2).

The trial Court erred because (a) our courts have never required strict compliance with this portion of the statute, and (b) even if they had, the reason for doing so has long since passed.

This issue highlights the tension between two long-standing and well-known precedents. One precedent is our courts' historical insistence on "strict compliance with publication statutes." *Caldwell v. Wiquist,* 402 S.C. 565, 572, 741 S.E.2d 583, 587 (Ct. App. 2013). The other is that historically, "courts of this State have refused to elevate form over substance," *(Paschal v. Price,* 380 S.C. 419, 442, 670 S.E.2d 374, 387 (Ct. App. 2008), and have not required litigants to do useless things. *Newton v. Progressive Nw. Ins. Co.*, 347 S.C. 271, 274, 554 S.E.2d 437, 439 (Ct. App. 2001) (Goolsby, J.) ("The law requires a lot of things, but doing a useless act is not one of them."). Here, requiring truly strict compliance would elevate form over substance.

Therefore, one or the other precedent must yield. It should be the former. Here's why.

The statute that provides for service by publication is old. It was first enacted in 1870, which means that it predates not only e-filing, the online public index, and the Internet, but also the cellphone, fax machine, computer, photocopier, land-line telephone,[1] and mechanical Bates numbering machine.[2] It even predates the light bulb. Odds are that the statute was first written by hand, as the typewriter had been invented just two years prior.[3] It's an old statute.

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[1] Technology Timeline, available at https://www.explainthatstuff.com/timeline.html . Last visited January 1, 2019.
[2] The Thomas Edison Papers, available at http://edison.rutgers.edu/NamesSearch/glocpage.php?gloc=CK300& Last visited January 1, 2019.
[3] By Christopher Latham Sholes. Encyclopedia Brittannica, available at https://www.britannica.com/biography/Christopher-Latham-Sholes

Accordingly, it is not surprising that some of the items found in the statute were necessary back then, but are no longer necessary now. If they are no longer necessary, then they are no longer necessary. *See Rhett v. Gray*, 401 S.C. 478, 496, 736 S.E.2d 873, 883 (Ct. App. 2012) ("[w]hen the reason does not exist, the rule does not apply."); *Amerson v. F. C. X. Co-op. Serv.*, 227 S.C. 520, 525, 88 S.E.2d 605, 608 (1955) ("It is well settled that when the reason of the rule fails the rule does not apply."); *Richardson v. Blalock*, 118 S.C. 438, 110 S.E. 678, 678 (1922) ("When the reason of the rule is not applicable, the rule does not apply.").

Which brings us to the alleged deficiency at issue here – the trial Court held that the publication in this case violates S.C. Code Ann. § 15-9-740 because it "does not state the ***date*** of the filing of the summons." (October 2016 ORDER, p. 2) (emphasis added).

As an initial matter, the statute does not require the date. What the statute actually says is that "the summons, as published, must state the ***time*** and place of such filing." S.C. Code Ann. § 15-9-740 (emphasis added). Obviously, our courts have never insisted on strict compliance with this section of the statute, as rare indeed is the published summons that states the ***time*** at which it was filed. Thus, while strict compliance may be the general rule, historically it has not been the rule for this specific part of the statute. Moreover, it has long been recognized that the "rule that the statutory requirements as to constructive service by publication must be strictly carried out does not mean that any irregularity, however slight, is fatal." *Du Bose v. Du Bose*, 90 S.C. 87, 72 S.E. 645, 646 (1911).

Even if the date of filing had been required in the past, it is no longer required. The reason for the date back before the online public index is fairly obvious – i.e., if one saw his name in a summons in the newspaper, he had to trek over to the county seat to look up the Complaint in order to learn what he had been sued for. With the records being kept in

chronological order, knowing the date of filing was essential unless one had the time to look one-by-one at every single file in the courthouse. So, knowing when the action was filed was necessary back before the online public index came into being. It's not necessary now.

Now, if one sees his name in a summons in the newspaper he need only visit www.sccourts.org and follow the links to look up his case by his name or by the civil action number. Accordingly, the reason for the rule – which was never strictly followed to begin with – no longer applies. As a result, the rule no longer applies. *Rhett v. Gray*, 401 S.C. 478, 496, 736 S.E.2d 873, 883 (Ct. App. 2012).

To invalidate Plaintiff's service of process because Plaintiff failed to do something that no longer serves any useful purpose impermissibly elevates form over substance.

II. The trial court erred in holding that the Summons in this action was ineffective on the basis that it "does not notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him." (October 2016 ORDER, p. 2).

The trial Court's holding is in direct conflict with binding precedent, as the language used in the Summons in this case is substantively identical to the language approved by the Court of Appeals almost thirty years ago in *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 463, 381 S.E.2d 499, 500–01 (Ct. App. 1989).

The Summons in *Wham* said:

> **"[I]f you fail to answer the complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint."**

The Summons here said:

> **"[I]f you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the court for the relief demanded in the Complaint."**

But for four superfluous words, the language is identical.[4]

[4] Here, the summons said ". . . plaintiff will apply . . ." whereas in Wham the summons said ". . . ***the*** plaintiff ***in this action*** will apply . . ." (emphasis added to superfluous words).

The *Wham* Court began by observing that this language "is almost the same as that suggested by Dean Lightsey and Professor Flanagan in their 'summons' form," and went on to "deem the summons sufficiently accurate to provide proper notice to [defendant]. It tells [defendant] that its failure to respond within the prescribed period will result in [plaintiff's] demanding from the court the relief sought in his complaint, which is another way of saying that judgment by default will be taken against [defendant] should it fail to appear and defend the action." *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 464, 381 S.E.2d 499, 501 (Ct. App. 1989).[5]

In the thirty years since *Wham*, its holding has not been overturned. It has not even been called into question. And this is consistent with South Carolina's general body of case law concerning service of process, as magic words are not required to effect service of process. *See Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 209–10, 456 S.E.2d 897, 899 (1995) (South Carolina has "never required exacting compliance with the rules to effect service of process."). Rather, the proper inquiry is "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 *Wham*, the language in the Summons at issue is sufficient. The trial Court holding to the contrary is an error or law which this Court can and should correct.

[5] Moreover, the omission of the word "default" is harmless in any event, as Defendant claims that he "never received notice of this lawsuit until August of 2016" – ***five months after*** he was held in default. (Defendant's Motion to Set Aside Order for Entry of Default and Order for Publication, p.2). Accordingly, the absence of the word "default" could not have caused Defendant's failure to appear and defend the action. *See Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 464, 381 S.E.2d 499, 501 (Ct. App. 1989) ("In any case, the omission of the language from the summons was harmless. The omission had nothing whatever to do with Shearson Lehman's failure to appear and defend the action and it neither confused nor misled Shearson Lehman."); *see also McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (Sanders, C.J.) ("[W]hatever doesn't make any difference, doesn't matter.")

III. The trial court erred in holding that service by publication was ineffective on the basis that the North Myrtle Beach Times is not a "daily newspaper of the defendant's last known address, 186 Williamsburg Road, Little River, South Carolina" and is "not a newspaper of general circulation in Horry County." (October 2016 ORDER, p. 2).

"An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007). Here, there is no evidentiary support for the trial Court's holding that the North Myrtle Beach Times is not a "daily newspaper of the defendant's last known address, 186 Williamsburg Road, Little River, South Carolina" and is "not a newspaper of general circulation in Horry County" (October 2016 ORDER, p. 2).[6]

The record does not contain any affidavits, deposition transcripts, authenticated documents, discovery responses, business records, or any other type of evidence with respect to circulation or frequency of publication of the North Myrtle Beach Times. Nor did the trial Court purport to take judicial notice of the same.

Instead, all that supports the trial Court's holding are Defendant's memorandum and arguments of counsel, neither of which are evidence. *State v. Manning*, 418 S.C. 38, 47, 791 S.E.2d 148, 152 (2016) (Pleicones, C.J., dissenting) ("It is axiomatic that arguments of counsel are not evidence."); *Harris Teeter, Inc. v. Moore & Van Allen, PLLC,* 390 S.C. 275, 701 S.E.2d 742 (2010) (Hearn, J., dissenting) (Memorandum in support of a motion is not evidence).

The trial Court's holding with respect to the North Myrtle Beach Times is an abuse of discretion, as it is wholly without evidentiary support.

[6] Although it is the lack of evidentiary support for the trial Court's holding – rather than its inaccuracy – that is at issue here, it is worth noting that the trial Court's holding is both unsupported ***and*** inaccurate. Contrary to the trial Court's unsupported holding, the North Myrtle Beach Times does indeed serve Little River and the rest of Horry County according to its Circulation Report available at http://nmbtimes.com/wp-content/uploads/2018/12/NMB_circulation_report.pdf.

IV. The trial court erred in holding that service by publication was ineffective on the basis that the Plaintiff failed "to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. § 15-9-740." (October 2016 ORDER, p. 3).

The trial Court erred because whether or not Plaintiff actually used due diligence is not a decision that the trial Court is empowered to make under these circumstances. Rather, where, as here, "a party contests the validity of an order of publication based on a lack of diligence in attempting to locate the party . . . the trial court is without authority to overrule the finding of the clerk of court." *Caldwell v. Wiquist*, 402 S.C. 565, 569, 741 S.E.2d 583, 585–86 (Ct. App. 2013) (internal quotations and citations omitted).

"An order for service by publication may be issued pursuant to S.C. Code Ann. § 15–9–710 (Supp.1999) when an affidavit, ***satisfactory to the issuing officer***, is made stating that the defendant, a resident of the state, cannot, after the exercise of due diligence, be found, and that a cause of action exists against him." *Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 428–29, 535 S.E.2d 128, 130 (2000) (emphasis added). "When the issuing officer is satisfied by the affidavit, ***his decision to order service by publication is final*** absent fraud or collusion." *Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 428–29, 535 S.E.2d 128, 130 (2000) (emphasis added) (citing *Yarbrough v. Collins,* 293 S.C. 290, 360 S.E.2d 300 (1987); *Ingle v. Whitlock,* 282 S.C. 391, 318 S.E.2d 367 (1984); *Gibson v. Everett,* 41 S.C. 22, 19 S.E. 286 (1894); *Yates v. Gridley,* 16 S.C. 496 (1882)).

Here, the record does not contain any allegations of fraud or collusion.[7] "Since there were neither allegations nor proof of fraud or collusion before the [trial court]," the trial Court committed reversible error by second-guessing the issuing officer. *See Wachovia Bank of S.C.,*

[7] Nor any allegation that the affidavit was facially defective. Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray, 419 S.C. 605, 616, 799 S.E.2d 310, 315 (Ct. App. 2017), reh'g denied (May 26, 2017), cert. denied (Mar. 7, 2018)

N.A. v. Player, 341 S.C. 424, 428–29, 535 S.E.2d 128, 130 (2000) ("Since there were neither allegations nor proof of fraud or collusion before the master, he correctly refused to set aside service.").

V. The trial Court erred in granting summary judgment insofar as the sole basis for doing so was the Court's prior erroneous invalidation of Appellant's service by publication.

Appellant raises this issue only out of an abundance of caution. The grant of summary judgement was error insofar as its sole basis was the trial Court's prior error in invalidating Appellant's service by publication. By the time the trial Court invalidated service, the statute of limitations had already run. All Responded needed to do at that point (and immediately did) was move for summary judgment on his statute of limitations defense. As a result, invalidation of service of process functioned as a *de facto* dismissal with prejudice.

CONCLUSION

The trial Court's errors described in Section I, II, and IV above each result from errors of law. Accordingly, each represents an abuse of discretion that this Court can and should correct. *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502–03 (2006). The trial Court's error described in Section III resulted from the trial Court having issued an order "based on factual conclusions that are without evidentiary support," and therefore it also constitutes an abuse of discretion that this Court can and should correct. *Id.*

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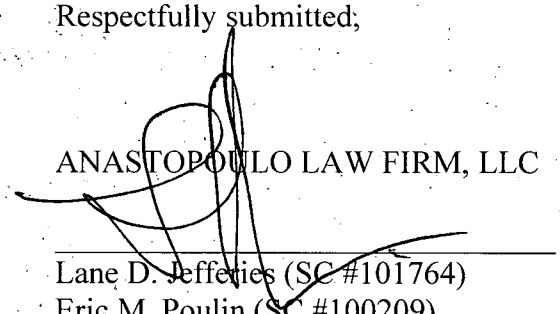
Respectfully submitted,



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This 2nd day of January, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
Larry B. Hyman, Jr., Circuit Court Judge

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Bobby Foster,

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v.

Julian Neil Armstrong,

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PROOF OF SERVICE

I certify that I have served Appellant's Initial Brief and Appellants Designation of Matter to be Included in Record on Appeal on Respondent by depositing a copy of it in the United States Mail, postage prepaid, on January 2, 2019, addressed to his attorney of record, Linda Weeks Gangi, Post Office Box 1740, Conway, SC, 29528.

January 2, 2019

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January 2, 2019

SENT VIA U.S. MAIL

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The Honorable Jenny Abbott Kitchings
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Post Office Box 11629
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RE: *Bobby Foster v. Julian Neil Armstrong*
Appellate Case No.: 2018-001497

Dear Ms. Kitchings:

Please find enclosed for filing:

1. Appellant's Initial Brief;
2. Appellant's Designation of Matter to be included in the Record on Appeal; and
3. Proof of Service.

If you should have any questions, please do not hesitate to contact us.

Sincerely,

Lane D. Jefferies

Enclosures as stated

cc: Linda Weeks Gangi

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