**THE STATE OF SOUTH CAROLINA**
In the Court of Appeals

---

**APPEAL FROM GREENVILLE COUNTY**
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

---

C.A. NO.: 2010-CP-23-03597

---

Delta Apparel .. . . . . Respondent,

v.

Daniel G. Farina..... Appellant.

---

# BRIEF OF APPELLANT

---

Candy Kern-Fuller (S.C. Bar No. 11392)
**UPSTATE LAW GROUP, LLC**
200 East Main Street
Easley, South Carolina 29640
(864) 855-3114 (Ph)
(864) 855-3446 (Fax)
Candy@UpstateLawGroup.com

**ATTORNEY FOR APPELLANT**

## TABLE OF CONTENTS

## ISSUES ON APPEAL

I. DID THE TRIAL COURT ERR IN DETERMINING THAT DEFENDANT WAS "DULY SERVED WITH PROCESS" AND IN GRANTING PLAINTIFF'S MOTION FOR DEFAULT WITHOUT ADDRESSING DEFENDANT'S MERITORIOUS CHALLENGE TO PERSONAL JURISDICTION AND ACTUAL VALID SERVICE OF THE SUMMONS AND COMPLAINT?

A. DID SERVICE UPON ANOTHER RESIDENT OF A HOME WHERE A DEFENDANT NO LONGER RESIDED CONSTITUTE VALID SERVICE OF A SUMMONS AND COMPLAINT UNDER SCRCP 4?

B. DID THE MAILING OF A SUMMONS AND COMPLAINT BY SIMPLE CERTIFIED MAIL OR FEDERAL EXPRESS CONSTITUTE DUE AND PROPER SERVICE UNDER SCRCP 4?

C. DID PLAINTIFF ESTABLISH ITS BURDEN THAT PERSONAL JURISDICTION EXISTED UNDER SOUTH CAROLINA'S LONG ARM STATUTE SUCH AS TO PROCEED WITH A SUIT AND JUDGMENT AGAINST PLAINTIFF?

II. DOES SOUTH CAROLINA HAVE JURISDICTION TO RE-LITIGATE THE SAME ISSUES THAT WERE ALREADY TRIED BY THE SAME PARTIES IN A DIFFERENT FORUM, IN A DIFFERENT COUNTRY WHERE ALL THE ALLEGEDLY TORTIOUS ACTS OCCURRED AND JUDGMENT WAS PREVIOUSLY RENDERED?

## STATEMENT OF THE CASE

Appellant, Daniel Farina is not a resident of the State of South Carolina and has never been. In or about October 16, 2006, Appellant was interviewed in Maiden, **North** Carolina for the position of General Manager of Ceiba Textiles SRL in Quimistan, Honduras. Ceiba Textiles is a separately incorporated, Honduran subsidiary of Appellee. During Appellant's approximate two year employment with Ceiba, he received payments from M.J. Soffe Company and/or Delta Apparel, Inc. located in Duluth, Georgia; he received **no** payments emanating from South Carolina. **(R. pp. 14-24)**. On July 10, 2008, Defendant was terminated from his position with Ceiba. **(R. pp. 28, 34)** On October 14, 2008, Appellant

initiated a demand in the Honduran court of appropriate jurisdiction for payment over termination wages that were miscalculated by Ceiba. (**R. p. 34**). In May 2009, the Honduran Court ruled in Appellant's favor and Ceiba appealed the decision through the Honduran Court. (*Id.*) In September 2009, the Honduran appeals court upheld Appellant's ruling and awarded Appellant punitive salaries. (**R. p. 34**) Ceiba appealed again and in March 2011, the Supreme Court of Honduras awarded Appellant the missing portion of his miscalculated termination amount, but they relieved Ceiba of the punitive portion of the award. (*Id.*; **R. pp. 78-79**). Appellee admitted that they "waited until the award in Honduras was filed and [Ceiba] paid the Honduran judgment for Mr. Farina" before they pursued this action in South Carolina. (**R. p. 81**) Then, Delta Apparel "moved for a default judgment ... [and] came before [Judge Verdin] to get a default judgment and to set damages" arising from the transaction that was the subject of litigation that was solely litigated in the Honduran Court (*Id.*).

The lone basis for this suit against Appellant was Appellee's allegation that the Honduran court case "was a fraud in the Honduran court because Mr. Farina was never an employee of [Ceiba] Textiles, was an employee of Delta Apparel at all times. And he was not entitled to any award under Honduran law." (**R. pp. 66-67; R. p. 12**). Specifically, Appellee stated to Judge Verdin that "Delta Apparel filed a summons and complaint in May of 2010 against Mr. Farina alleging that he had perpetrated a fraud on [the] Honduran court and seeking damages for the award he received in Honduras." (**R. p. 67**) At the hearing on September 1, 2011, Appellee asserted that Delta "actually served Mr. Farina three different ways. We served him at his last known address, we served him by certified mail and that certified receipt was signed. And we sent a Fed Ex to his address and it was signed and

returned." (*Id.*) Appellee then asserted that Appellant *knew* of the lawsuit because he communicated with Brian Murphy, Esq. about potentially representing Appellant. (**R. pp. 67-68.**)

Appellee made no allegations in its complaint or supporting affidavits that Plaintiff actually ever communicated with or was present in Greenville, South Carolina. Rather, Appellee summarily asserted, with no further facts supporting the allegation, in the "Jurisdiction and Venue" portion of the Appellee's complaint that "the parties' employment relationship was partially performed in Greenville County", South Carolina. (**R. pp. 9-10**). Furthermore, Appellee specifically alleged in the "Parties" section of their May 4, 2010 complaint that "Daniel Farina is a citizen of the County of Los Angeles, State of California, has caused tortious injury to Delta Apparel, a resident of this State, by an act in Honduras, and has engaged in an ongoing business relationship with Delta Apparel." (**R. p. 9**).

In the supporting affidavits for Appellee's failed to attempt to get a temporary restraining order, Appellee put forth two affidavits from Deborah Merrill. In her May 4, 2010 affidavit, Ms. Merrill made no allegations to support personal jurisdiction over Appellant in Greenville, South Carolina. (**R. pp. 40-42**). In her second affidavit of Ms. Merrill on July 1, 2010, Ms. Merrill noted people with the Appellee and where their offices and officers were located. (**R. pp. 52-53**) However, notably (and importantly) absent from Ms. Merrill's allegations is that these communications or interactions ever actually occurred in Greenville, South Carolina or anywhere else within this state. Specifically, while ¶6 of Appellee's Complaint details who talked to Appellant, notably absent from said affidavit is *where* these discussions took place. (**R. p. 52**) The only evidence in the record is Appellant's account that he was interviewed in Maiden, **North** Carolina.

Finally, Appellee asserted that "Farina has been given the right to collect $230,039.78 from Delta Apparel." However, the Exhibit D, attached to their Complaint shows that Honduran Judgment was not against Delta Apparel, but its separate and distinct company, Ceiba Textiles S de RL, in Villaneuva, Honduras. (**R. p. 28**) Furthermore, and more importantly, Appellee admitted in ¶15 of their complaint that "[o]n September 1, 2009, the Honduran court ruled in Farina's favor, ordering **Ceiba Textiles** to pay Farina $57,984.14 in unpaid severance salaries prior to Farina's termination and $172,055.64 as damages and losses for unpaid salaries for a total of thirteen months and twenty days as a result of his wrongful termination." (**R. p. 11**) (emphasis added).

## ARGUMENTS

### I. THE TRIAL COURT ERRED IN DETERMINING THAT DEFENDANT WAS "DULY SERVED WITH PROCESS" AND IN GRANTING PLAINTIFF'S MOTION FOR DEFAULT BY FAILING TO ADDRESS DEFENDANT'S MERITORIOUS CHALLENGE TO PERSONAL JURISDICTION AND ACTUAL VALID SERVICE OF THE SUMMONS AND COMPLAINT

Appellant, *pro se,* filed a motion to dismiss the case against him, citing SCRCP 60. While citing Rule 60(b) in his motion, he styled his motion as a Motion to Dismiss. As the Court stated in *BB&T v. Taylor*, 369 S.C. 548, 551 (2006) "Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Our standard of review, therefore, is limited to determining whether there was an abuse of discretion. 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."

In the case at bar, Judge Verdin determined, without any evidentiary support, that "Defendant has been duly served with process." Appellee put forth NO evidence to support that Mr. Farina was a resident of California and all evidence presented to the Judge was that

Farina was a citizen and resident of Arizona on the date of purported service to the California address. In support of his motion, Appellant put into evidence a copy of his voter registration card for Arizona showing that he registered to vote in Arizona on 4/13/2010. **(R. pp. 60-63; 73-85)**. Plaintiff's process server, Gary Hansen, purported to have effected "substitute service" on a Pablo Farina by delivering the pleadings to 9341 Parrot Avenue, Downey, California 90240 on May 6, 2010. **(R. p. 59)**. However, at the time, Plaintiff did not reside with Pablo Farina in California in May 2010 and, conversely, had been residing in Arizona since April 2010. **(R. pp. 60-63; 73-85)**.

**a. SERVICE UPON ANOTHER RESIDENT OF A HOME WHERE A DEFENDANT NO LONGER RESIDES DOES NOT CONSTITUTE VALID SERVICE OF A SUMMONS AND COMPLAINT UNDER SCRCP 4.**

SCRCP 4(d)(1) provides that service of process may be had "by delivering a copy of the summons and complaint to him personally or by leaving copies thereof ***at his dwelling house or usual place of abode*** with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process." (emphasis added).

In the case at bar, in neither hearing did the Plaintiff/Appellee meet its threshold showing that Appellant actually lived at or was a resident of 9341 Parrot Avenue, Downey, California 90240, on May 6, 2010. Rather, all of the evidence before the Court indicated that Appellant had moved to Arizona the month before, in April 2010. **(R. pp. 60-63; 73-85)**.

While Plaintiff/Appellee produced an affidavit of service on the Downey, California address, they must also show that Appellant actually resided there to be able to claim "substitute service" on a resident of that household. **(R. p. 59)** "When the civil rules on service are followed, there is a presumption of proper service. Once the plaintiff has

demonstrated compliance with the rules, the defendant can rebut an inference that service was effected . . .." *Graham Law Firm, P.A. v. Makawi*, 721 S.E.2d 430, 433 (S.C. 2012). In this case, Appellee never made a prima facie showing that service complied with the rules and, even if they had, Appellant then clearly provided evidence sufficient to rebut any inference created by the affidavit of service put forth by Appellee. Accordingly, the Court abused its discretion in ruling in a manner wholly unsupported by the evidence before it when it found that Appellant was properly served with the pleadings in this matter and said ruling should be reversed and the default judgment determined to be void. *Roberson v. Southern Fin. of S.C., Inc.*, 365 S.C. 6, 12 (2005).

**b. THE MAILING OF A SUMMONS AND COMPLAINT BY SIMPLE CERTIFIED MAIL OR FEDERAL EXPRESS DOES NOT CONSTITUTE DUE AND PROPER SERVICE UNDER SCRCP 4.**

SCRCP 4(d)(8) provides as follows:

> *Service by Certified Mail.* Service of a summons and complaint upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule may be made by the plaintiff or by any person authorized to serve process pursuant to Rule 4(c), including a sheriff or his deputy, by registered or certified mail, return receipt requested and delivery restricted to the addressee. Service is effective upon the date of delivery as shown on the return receipt. Service pursuant to this paragraph shall not be the basis for the entry of a default or a judgment by default unless the record contains a return receipt showing the acceptance by the defendant. **Any such default or judgment by default shall be set aside pursuant to Rule 55(c) or Rule 60(b) if the defendant demonstrates to the court that the return receipt was signed by an unauthorized person.** If delivery of the process is refused or is returned undelivered, service shall be made as otherwise provided by these rules.

(Emphasis added)

Appellee asserted at the September 1, 2011, hearing that they "actually served Mr. Farina three different ways. We served him at his last known address, we served him by certified mail and that certified receipt was signed. And we sent a Fed Ex to his address and it was signed and returned." However, simple certified mail, return receipt when delivery

was NOT restricted to the Appellant and/or someone unauthorized signed for it, does not comport with Rule 4(d)(8).

When the Court's finding of proper service is "wholly unsupported by the evidence or controlled by an error of law ... [the] determination that service was proper should be reversed... ." *Roberson v. Southern Fin. of S.C., Inc.*, 365 S.C. 6, 12 (2005). If "service was improper, [the Court] need not address the remaining issues as the default judgment is void." *Id.*

### c. APPELLEE FAILED TO ESTABLISH ITS BURDEN THAT PERSONAL JURISDICTION EXISTED UNDER SOUTH CAROLINA'S LONG ARM STATUTE SUCH AS TO PROCEED WITH A SUIT AND JUDGMENT AGAINST APPELLANT.

Personal jurisdiction is exercised as "general jurisdiction" or "specific jurisdiction." General jurisdiction is the State's right to exercise personal jurisdiction over a defendant even though the suit does not arise out of or relate to the defendant's contacts with the forum, *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.15, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); general jurisdiction is determined under S.C. CODE ANN. §36-2-802. Specific jurisdiction is the State's right to exercise personal jurisdiction because the cause of action arises specifically from a defendant's contacts with the forum; specific jurisdiction is determined under S.C. CODE ANN. §36-2-803 (2003). *Cockrell v. Hillerich & Bradsby Co.*, 363 S.C. 485, 611 S.E.2d 505 (2005).

> **SECTION 36-2-803.** Personal jurisdiction based upon conduct.
>
> (A) A court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person's:
>
> (1) transacting any business in this State;
> (2) contracting to supply services or things in the State;
> (3) commission of a tortious act in whole or in part in this State;

(4) causing tortious injury or death in this State by an act or omission outside this State if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this State;
(5) having an interest in, using, or possessing real property in this State;
(6) contracting to insure any person, property, or risk located within this State at the time of contracting;
(7) entry into a contract to be performed in whole or in part by either party in this State; or
(8) production, manufacture, or distribution of goods with the reasonable expectation that those goods are to be used or consumed in this State and are so used or consumed.

(B) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

HISTORY: 1962 Code Section 10.2-803; 1966 (54) 2716; 2005 Act No. 27, Section 8, eff. July 1, 2005, applicable to causes of action arising after that date.

The exercise of personal jurisdiction under either statute must comport with due process requirements and must not offend traditional notions of fair play and substantial justice. *Cockrell v. Hillerich & Bradsby Co.,* 363 S.C. 485, 611 S.E.2d 505 (2005). Due process requires some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state. *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958).

In the case at bar, the record is totally devoid of any facts to support that the Appellant purposefully availed himself of the privilege to conduct activities within the forum state – i.e. South Carolina. While Appellee's affidavits show its own party's relationship to the forum state, they are absolutely devoid of showing any action that Appellant conducted activities within the forum state such as to bring him within the reach of the long-arm statute. Rather, the closest that Appellee can come to asserting that Defendant even conducted business anywhere close to South Carolina is that he was paid out of Georgia, while working in Honduras, and he initially interviewed for the position in North Carolina.

As the Court recently restated in the case of *Sullivan v. Hawker Beechcraft Corp. et al.*, 2011 S.C. App. LEXIS 270, *7-8 (Ct. App 2011), Appellant "relies solely on the language of *section 36-2-803(A)(4)* in arguing the trial court has personal jurisdiction without stating any general factual allegations to support his use of the long-arm statute. The repeating of the statute is insufficient to support a finding of personal jurisdiction, particularly based on the subsection of the long-arm statute."

Accordingly, even if the Court were to find that service was somehow properly effected on Appellant, Appellee has wholly failed to prove that Appellant's actions as alleged by Appellee were actions conducted within the forum state such as to provide South Carolina jurisdiction over him for those actions. Accordingly, the default judgment against Appellant should be declared void and unenforceable.

## II. SOUTH CAROLINA DOES NOT HAVE JURISDICTION TO RE-LITIGATE THE SAME ISSUES THAT WERE ALREADY TRIED BY THE SAME PARTIES IN A DIFFERENT FORUM, IN A DIFFERENT COUNTRY WHERE ALL THE ALLEGEDLY TORTIOUS ACTS OCCURRED AND JUDGMENT WAS PREVIOUSLY RENDERED.

In the case at bar, the matter between Ceiba and Farina was fully and vigorously litigated all the way up to the Supreme Court in Honduras. Appellee has asserted has no rights or obligations that arise separately from Ceiba's rights or obligations.

Appellee's subsidiary, Ceiba, had the right and obligation to raise and litigate any allegations regarding the merits of the underlying claim in the Honduran Court. After losing at the trial level in Honduras, then at the first appellate level, then gaining a slightly better decision from the Honduran Supreme Court (while still losing on the underlying merits of the validity of Appellant's claim), Appellee then brought this case in South Carolina – a forum state to which Appellant had no ties.

In addition to the due process notions of fair play for jurisdictional purposes, this action evinces a total disregard for the legal notions of collateral estoppel and *res judicata.*

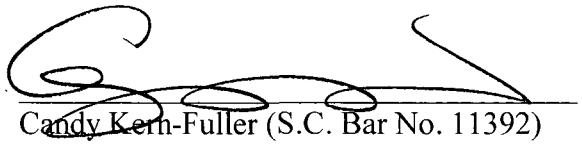
"Collateral estoppel, or issue preclusion, prohibits a court from adjudicating an issue that was actually litigated and determined by a valid and final judgment in a prior suit." *In re Crews,* 389 S.C. 322, 339 (2010). Appellee's subsidiary, Ceiba, litigated the matter all the way through the Honduran Court system and lost. Their attempt to re-litigate this matter in the South Carolina courts should be barred by collateral estoppel.

Additionally, the Appellee's action in the South Carolina court is also barred by the doctrine of *res judicata.* "*Res judicata* is a rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and, as to them, constitutes an absolute bar to a subsequent action. To establish *res judicata*, the following elements must be shown: (1) identities of the parties; (2) identity of the subject matter; and (3) adjudication of the issue in the former suit." *In re Crews,* 389 S.C. 322, 340 (2010). As applied to this case, Delta Apparel claims no distinction of itself from Ceiba. In fact, they assert they are one in the same as Ceiba and responsible for Ceiba's debt from Honduras. **(R. pp. 8-13).** The subject matter of this suit is the frivolity or fraud of the action in Honduras. Clearly, the Honduran Court in ruling that Ceiba was liable, determined the claim to be valid. Furthermore, Appellee puts forth no facts to support the alleged fraud other than to assert that Appellant really wasn't an "employee" of Ceiba, a fact which was conclusively determined against them in the Honduran Court. (***Id.***) Finally, upon the issuance of the Honduran Supreme Court's ruling, the adjudication of whether Appellant was an employee of Ceiba and validly entitled to a correct severance payment was conclusively

adjudicated. Accordingly, all the elements of *res judicata* apply and Appellee's action should be barred based upon the same.

## CONCLUSION

For these reasons, the Court erred in granting a default judgment to Appellee and the same should be overturned and found void by this Court.



Candy Kern-Fuller (S.C. Bar No. 11392)
**UPSTATE LAW GROUP, LLC**
200 East Main Street
Easley, South Carolina 29640
(864) 855-3114 (Ph)
(864) 855-3446 (Fax)
Candy@UpstateLawGroup.com

January 22, 2013

**ATTORNEY FOR APPELLANT**

Certificate of Counsel

Candy M. Kern-Fuller, Attorney for Appellant, does hereby certify, that the Final Brief complies with Rule 211(b) of the SCACR.

Candy Kern-Fuller, Esq. SC Bar No. 11392
**UPSTATE LAW GROUP, LLC**
200 E. Main Street
Easley, SC 29640
(864) 855-3114
(864) 855-3446 (facsimile)

**Attorney for Appellant**

**Dated:** January 22, 2013

**THE STATE OF SOUTH CAROLINA**
In the Court of Appeals

---

**APPEAL FROM GREENVILLE COUNTY**
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge



---

C.A. NO.: 2010-CP-23-03597

---

Delta Apparel ..... Respondent,

v.

Daniel G. Farina..... Appellant.

---

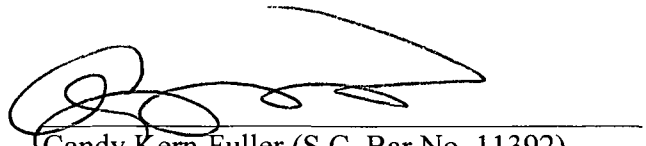
**CERTIFICATE OF SERVICE**

---

I hereby certify that on the 22nd of January, 2013 three copies of the Brief of Appellant was served upon Respondent by depositing a true and correct copy thereof in the United States Mail, proper postage affixed thereto, on the same day addressed to:

Mr. Samuel W. Outten, Esq., Attorney for Respondent
P.O. Box 10208
Greenville, SC 29603

And, further, that on the 23rd of January, 2013, by courier, fifteen bound copies and one unbound original of Appellant's brief and the Record on Appeal were hand delivered to the Court of Appeals.



Candy Kern-Fuller (S.C. Bar No. 11392)
**UPSTATE LAW GROUP, LLC**
200 East Main Street
Easley, South Carolina 29640
(864) 855-3114 (Ph)
(864) 855-3446 (Fax)
Candy@UpstateLawGroup.com

January 22, 2013

**ATTORNEY FOR APPELLANT**