

THE STATE OF SOUTH CAROLINA
In the Court of Appeals
Case No. 2013-001295

APPEAL FROM OCONEE COUNTY
Hon. R. Lawton McIntosh, Circuit Court Judge

Randolph M. James, P.C., Appellant
a North Carolina Professional Corporation

v.

Oconee County, South Carolina, a political Respondent
Subdivision of the State of South Carolina,
d/b/a Oconee County Regional Airport (KCEU)

RECORD ON APPEAL

Tracy L. Eggleston (SC Bar 1856)
Cozen O'Connor
One Wells Fargo Center, Suite 2100
301 South College Street
Charlotte, North Carolina 28202
Tel: (704) 376-3400
Attorney for Appellant

Michael B.T. Wilkes (SC Bar 6107)
C. Daniel Atkinson (SC Bar 72721)
Wilkes Law Firm, P.A.
127 Dunbar Street, Suite 200
Spartanburg, South Carolina 29306
Tel: (864) 591-1113
Attorneys for Respondent

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SC Court of Appeals

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF OCONEE)
)
 RANDOLPH M. JAMES, P.C., a North)
 Carolina Professional Corporation,)
)
 Plaintiff,)
 vs)
)
 OCONEE COUNTY, d/b/a Oconee)
 County Aeronautics Commission)
 and d/b/a Oconee County Regional)
 Airport (KCEU))
)
 Defendant.)

IN THE COURT OF COMMON PLEAS
 TENTH JUDICIAL CIRCUIT

FILED OCONEE, SC
 BEVERLY H. WHITFIELD
 CLERK OF COURT
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**ORDER CONSOLIDATING DEFENDANT'S
 MOTIONS TO DISMISS**

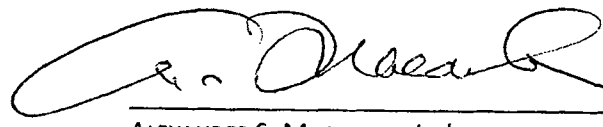
CIVIL ACTION NO. 2012-CP-37-0319

This matter was heard on September 4, 2012, on Defendant's Motion to Dismiss the Complaint of the Plaintiff for failure to comply with Rule 4(d)(6), SCRPC. The Defendant was represented by its attorney, C. Daniel Atkinson, Esquire, and the Plaintiff by its attorney, Peter F. Asmer, Jr., Esquire.

Prior to the court entering its formal order, the Plaintiff filed and served an Amended Complaint on September 7, 2012. Thereafter, Defendant served its Motion to Dismiss, With Prejudice, Pursuant to Rule 12(b)(6), SCRPC, which is scheduled for hearing on November 5, 2012, at 10:00 a.m., at the Common Pleas Non Jury Term of Court.

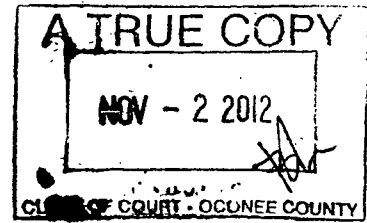
It is deemed that, in the interest of judicial economy, both of the present motions to dismiss should be considered together for final disposition at the scheduled November 5, 2012, hearing during the Common Pleas Non Jury Term of Court.

AND, IT IS SO ORDERED.



ALEXANDER S. MACAULAY, Judge

November 2, 2012
 Walhalla, South Carolina



STATE OF SOUTH CAROLINA)
COUNTY OF OCONEE)
Randolph M. James, P.C., a North Carolina)
Professional Corporation,)
Plaintiff,)
v.)
Oconee County, South Carolina, a political)
subdivision of the State of South Carolina,)
d/b/a Oconee County Regional Airport)
(KCEU),)
Defendant.)

IN THE COURT OF COMMON PLEAS

C.A. No. 2012-CP-37-319

ORDER

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 APR 5 PM 3 38

This matter is before the Court on the consolidated Motions of Defendant Oconee County, a body politic and corporate, and a political subdivision of the State of South Carolina, incorrectly identified by Plaintiff as "Oconee County, South Carolina, a political subdivision of the State of South Carolina," (hereinafter "Oconee") to Dismiss the Complaint of Plaintiff Randolph M. James, a North Carolina Professional Corporation (hereinafter "Plaintiff"), due to improper service, pursuant to Rule 12(b)(5), SCRCF, and to Dismiss the Amended Complaint of Plaintiff with Prejudice, pursuant to Rule 12(b)(6), SCRCF. In its Rule 12(b)(5) Motion, Oconee contends that Plaintiff failed to properly serve Oconee with the Summons and Complaint in this matter, with the first proper service on Oconee being service of the Amended Summons and Amended Complaint on September 7, 2012. In its Rule 12(b)(6) Motion, Oconee contends that Plaintiff failed to commence its action within the period allowed under S.C. Code Ann. §15-78-110.

The Court conducted a hearing on this Motion on December 11, 2012. Attorney C. Daniel Atkinson appeared for Oconee, while Attorney Peter Asmer appeared for Plaintiff. At the December 11, 2012, hearing, the Court considered briefs submitted by both Oconee and Plaintiff, Affidavits of Service filed April 16, 2012 reflecting attempted service via certified mail upon Elizabeth Hulse, T. Scott Moulder, and Reginald Dexter as well as three affidavits, related to purported service, executed by process server Tony Finley. The Court also considered a transcript from a previous hearing on September 4, 2012, where Judge Alexander Macaulay received live testimony from Oconee County Administrator Scott Moulder, and Oconee County Deputy Administrator Glenn Breed.

For the reasons set forth below, the Court finds that Oconee was first properly served with process on September 7, 2012. Accordingly, Oconee's Motion to Dismiss with Prejudice, pursuant to Rule 12(b)(6), SCRPC, is hereby GRANTED.

STANDARD OF REVIEW

In a civil action,

[t]he plaintiff has the burden to establish that the court has personal jurisdiction over the defendant. The plaintiff need only show compliance with the rules. When the civil rules on service are followed, there is a presumption of proper service. Rule 4, SCRPC, [which sets for the rules for service of process upon defendants] serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action.

Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996). Without following the rules of service set forth in Rule 4, SCRPC, the Court of Common Pleas does not obtain personal jurisdiction over a defendant.

A defendant is allowed to challenge the sufficiency of service of process through Rule 12(b)(5), SCRPC. *Unisun Ins. v. Hawkins*, 342 S.C. 537, 541, 537 S.E.2d 559, 561 (Ct. App.

2000). Any motion must assert the defects in the purported service. A party must challenge the sufficiency of service of process at the outset of litigation, either by Motion to Dismiss or by challenging the sufficiency of service of process in its responsive pleading. Rule 12(h), SCRPC.

“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 [rather than by a jury]. 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.” *Brown v. Carolina Emergency Physicians, P.A.*, 348 S.C. 569, 583, 560 S.E.2d 624, 631 (Ct. App. 2001) (internal citations omitted).

“[Rule 12(b)(6)] permits a defendant to move for a judgment on the pleadings when the defendant contends the complaint fails to state facts sufficient to constitute a cause of action.” *Bradshaw v. Anderson County*, 388 S.C. 257, 262, 695 S.E.2d 842, 844 (2010) (internal citations omitted). “The reviewing Court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deductible from the pleadings would entitle the plaintiff to relief on any theory of the case.” *Id.* (internal citations omitted). A defendant may move for a dismissal pursuant to Rule 12(b)(6), SCRPC, where claims brought are barred under an applicable Statute of Limitations. *See Spell v. South Carolina Dep’t of Highways and Pub. Transp.*, 292 S.C. 228, 355 S.E.2d 860 (1987) (affirming Rule 12(b)(6) dismissal of claims against Highway Department where claims were not brought within statutory claims period).

In this case, the Court is allowed to resolve all questions of fact related to service of process, with no preference given to the non-moving party. Once the Court makes its

determination on service, it must view all remaining facts in the light most favorable to the non-moving party.

FINDINGS OF RELEVANT FACT

Plaintiff Randolph M. James, P.C. ("Plaintiff"), is a North Carolina professional corporation acting as a law firm, with its principal place of business in Winston-Salem, North Carolina. (Amended Complaint, ¶ 1.) Plaintiff owned a Piper aircraft, which allegedly struck a deer while attempting to take off from Oconee County Regional Airport, on April 23, 2010. (Amended Complaint, ¶ 23 and ¶ 27.) In its Amended Complaint, Plaintiff alleges that Oconee acted negligently in failing to prevent deer from gaining access to the Oconee County Regional Airport Runway.

Oconee is a governmental subdivision of the State of South Carolina. (Amended Complaint, ¶ 2.) Oconee owns and operates the Oconee Regional Airport. Oconee operates under a Council-Administrator form of government, and the Chief Administrative Officer of Oconee is the County Administrator. *See* Oconee County Code §2-2. Scott Moulder is the present Oconee County Administrator. Glenn Breed serves as Deputy Administrator.

Oconee also has a Clerk of the County Council. *See* Oconee County Code §2-271. Elizabeth Hulse presently serves as Oconee's Clerk of County Council. The current chair of the County Council is Joel Thrift.

As reflected in the Affidavits of Service filed on April 16, 2012, Plaintiff attempted to serve Oconee by delivering suit papers via Certified Mail to Elizabeth Hulse, Scott Moulder and Reginald Dexter. On or around May 2, 2012, Oconee filed its Rule 12(b)(5), SCRPC, Motion to Dismiss, based on improper service of process. In that Motion, Oconee explicitly stated that "service of process [against Oconee] must have been made by personal service of a copy of the

complaint to the chief executive officer or clerk of Oconee County.” (See Oconee’s Motion to Dismiss, p. 2.) After receipt of Oconee’s Motion to Dismiss, on or around May 11, 2012, Process Server Tony Finley, acting on Plaintiff’s behalf, personally delivered copies of the Summons and Complaint to Reginald Dexter, a member of the Oconee County Council. (See Finley’s Affidavit of Service of Reginald Dexter, filed May 18, 2012). Mr. Finley also attempted to personally serve Elizabeth Hulse, but instead delivered the papers to Glenn Breed, Deputy Administrator of Oconee. (See Finley’s Affidavit of Service of Elizabeth Hulse, filed May 25, 2012). Finley never delivered the Summons and Complaint to Council Chair Joel Thrift. Plaintiff never personally delivered copies of the Summons and Complaint to either County Administrator Scott Moulder or to County Council Clerk Elizabeth Hulse. There is a clear error in the August 28, 2012, affidavit executed by Finley, in that it states that Finley delivered suit papers to the Oconee County Government offices on Confederate Memorial Day, a date on which the offices were not open for business.

Mr. Finley avers that he attempted to personally serve the Summons and Complaint upon Elizabeth Hulse at the Oconee County administrative offices, but upon arrival learned that she was not present. (See, August 28, 2012, Affidavit of Tony Finley, ¶¶ 7-8.) Mr. Finley claims that Mr. Breed advised that he could accept service of the Summons and Complaint on Ms. Hulse’s behalf. (*Id.*) On September 4, 2012 during his live testimony, Mr. Breed acknowledged that he told Mr. Finley that he could accept the papers for Ms. Hulse, and that he did accept them; however, he denied that Finley advised he was delivering suit papers, and Breed further denied stating he could accept service of suit papers upon her behalf. Mr. Breed testified that he had no authority to accept process on Oconee’s behalf. Mr. Breed testified that he later handed the papers to Elizabeth Hulse upon her return and that he is over the age of eighteen (18) years.

On September 4, 2012, Circuit Judge Alexander Macaulay conducted a hearing on Oconee's Rule 12(b)(5), SCRCP, Motion to Dismiss. After that hearing but prior to Judge Macaulay's ruling on that Motion, Plaintiff filed an Amended Summons and Amended Complaint with the Clerk of Court for Oconee County on September 7, 2012. Plaintiff had the Amended Summons and Amended Complaint personally delivered to Elizabeth Hulse on September 7, 2012. On September 21, 2012, Oconee filed its Motion to Dismiss with Prejudice, pursuant to Rule 12(b)(6), SCRCP, based on application of S.C. Code Ann. §15-78-110. On November 2, 2012, Judge Macaulay issued an Order Consolidating Oconee's pending Motions to Dismiss, for hearing at the next non-jury term. From that Order, the Court conducted a hearing on the consolidated motions on December 11, 2012.

CONCLUSIONS OF LAW

Prior to September 7, 2012, Plaintiff has failed to comply with the rules governing service upon a county in its efforts to effect service upon Oconee. The first proper service upon Oconee occurred on September 7, 2012, 157 days after Plaintiff first filed a Summons and Complaint in this action on April 4, 2012. The final date for commencement of this civil action was April 23, 2012, based on application of the two-year limitations period set forth in the South Carolina Tort Claims Act. Based on the date of the first proper service in this case, Plaintiff failed to commence this action within the applicable limitations period; therefore, the action is subject to dismissal pursuant to Rule 12(b)(6), SCRCP, for failure to state a claim upon which relief can be granted.

1. Pursuant to S.C. Law, Oconee Is Not Subject to Service Via Certified Mail.

Based on the language of Plaintiff's Amended Complaint, Oconee is a political or governmental subdivision of the State of South Carolina. (Amended Complaint, ¶ 2.)

Accordingly, service on Oconee is governed by Rule 4(d)(6), SCRCPP, which states service can be effected upon a county "by delivering a copy of the summons and complaint to the chief executive officer or clerk thereof, or by serving the summons and complaint in the manner prescribed by statute for the service of summons and complaint or any like process upon any such defendant." *Id.* (emphasis added). Oconee notified Plaintiff of the requirements for service upon a county in its May 2, 2012, Motion to Dismiss. Neither Plaintiff nor Oconee have identified any statutes which expand Oconee's agents for service of process beyond those identified in Rule 4(d)(6), SCRCPP.

According to Rule 4(d)(8), SCRCPP, service by certified mail is only available for use against defendants within the categories of "individuals," "minors, incompetents, and persons confined," and "corporations and partnerships." *Id.* There is no provision for service upon a county or governmental subdivision by certified mail. Accordingly, Plaintiff's efforts to serve Oconee through certified mail constitute insufficient service of process, and they also constitute a failure to comply with the South Carolina Rules of Civil Procedure governing service of process on political subdivisions.

2. Prior to September 7, 2012, Plaintiff Failed to Effect Service Upon Any Person Authorized to Receive Service On Behalf of Oconee.

After Oconee objected to service upon Oconee via certified mail, Plaintiff attempted personal service upon agents authorized to receive service on Oconee's behalf; however, Plaintiff did not properly serve any person authorized by law to receive service on Oconee's behalf prior to September 7, 2012. As stated by the plain language of Rule 4(d)(6), SCRCPP, Plaintiff could have served one of two people to effect service on Oconee: (1) the Clerk of the Council, Elizabeth Hulse; or (2) Oconee's chief executive officer. At the December 11, 2012,

hearing, counsel for Plaintiff conceded that Plaintiff never effected service on Oconee's chief executive officer. Accordingly, the only remaining question is whether Plaintiff served Council Clerk Elizabeth Hulse prior to September 7, 2012.

Plaintiff did not effect service on Elizabeth Hulse by delivering papers to Oconee's Deputy Administrator Glenn Breed. It is undisputed that Elizabeth Hulse is the Clerk of Oconee's County Council. Further, it is undisputed that Plaintiff failed to effect service directly and personally upon Elizabeth Hulse, prior to September 7, 2012.

At the December 11, 2012, hearing, Plaintiff contended that it served Elizabeth Hulse by delivering a Summons and Complaint to Glenn Breed, a man who serves as Deputy County Administrator and works in the same office building as Ms. Hulse.¹

Rule 4(d)(6), SCRPC, which governs service on counties and political subdivisions, contains no provisions provision allowing for substitute service on a county employee working in the same office building as the council clerk or the chief executive officer. Rule 4(d)(1) is the provision of the Rules of Civil Procedure allowing service by delivery to someone else, and that rule, which governs service on individuals, requires delivery at the individual being served's "dwelling house or usual place of abode." There is no provision for substitute service upon a County, by delivery to someone other than the Clerk of the Council or the County's Chief Executive Officer. The only persons who can receive service for a County are the Chief Executive Officer and the Clerk of the County Council. *See* Rule 4(d)(6), SCRPC.

Plaintiff contends, through its affidavit of service, that Glenn Breed was authorized to accept service on Hulse's behalf; however, this contention is not supported by South Carolina law. In *Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 615 S.E.2d 112 (2005), the Supreme Court of South Carolina addressed the authority of a non-registered, non-

¹ Breed is a Deputy Administrator; therefore, it is clear he is not the chief executive officer of Oconee.

designated agent to receive service on behalf of a corporation. In *Roberson*, the Court considered the trial court's denial of Southern's motion to set aside default. Southern's Motion to Set Aside Default was premised upon the argument that Southern was not properly served with the Summons and Complaint in the matter. The trial court ruled that Plaintiff properly served Southern by certified mail, when the letter was accepted by Amy Jones Bair, a clerical employee of Southern's registered agent, Charles Brooks. Although Southern unarguably authorized Brooks to accept process on its behalf, by listing him as the company's registered agent, Southern argued that Bair was not so authorized. *Id.* at 9. The plaintiff argued that Bair was authorized to accept service on behalf of Southern because Bair had accepted service on behalf of Southern in other cases. *Id.* Essentially, the plaintiff argued that prior dealing cloaked Bair with apparent authority to accept service on Southern's behalf.

In evaluating Bair's authority, the court noted "[a]n agent's authority is composed of his or her actual authority, whether express or implied, together with the apparent authority which the principal by his or her conduct is precluded from denying." *Id.* at 10. The Supreme Court noted that Southern Finance never authorized Bair to accept service on its behalf. *Id.* at 11. As a result Bair had no express authority. Furthermore, there was no evidence that the plaintiff knew that Bair had accepted service in the past. Therefore, the plaintiff could not claim that Bair was impliedly authorized to accept service on Southern's behalf. Accordingly, the Court found Bair unauthorized to accept service on behalf of Southern pursuant to Rule 4(d)(8), SCRCP, and held the default judgment void. *Id.* at 11-12.

At the September 4, 2012, hearing on Oconee's Rule 12(b)(5) Motion, Breed testified that he has never knowingly accepted service on behalf of Oconee. Breed further testified that the process server never identified himself as a process server, and the process served never

stated that he was attempting to serve Oconee with a Summons and Complaint. Both Moulder and Breed testified that Breed was never authorized by Oconee to receive service of process for Oconee. Further, there is also no evidence that Oconee, the principal, ever made any representation to any person or entity that Breed was authorized to accept service on Oconee's behalf. As a result, the *Roberson* precedent is directly applicable.

The Court of Appeals also refused to allow for substitute service upon a corporate entity in *Moore v. Simpson, supra*. In *Moore*, the Court of Appeals reviewed a trial court's order quashing service upon a law firm, based on a finding that delivery to a secretary within the firm did not constitute valid service upon the law firm. In that case, there was no Motion to Set Aside Default. The Motion considered was simply to dismiss for improper service of process, largely because dismissal would render the plaintiffs' claims barred under the applicable Statute of Limitations. In *Moore*, the Court of Appeals determined that "SCRCP 4(d)(1), like its federal counterpart, Rule 4(d)(1) of the Federal Rules of Civil Procedure, provides for service upon an agent only if authorized by appointment or by law." *Moore, supra*, 322 S.C. at 523, 473 S.E.2d at 66. Further, for a person to be deemed an entity's agent for the purpose of receiving service of process, "[a]ctual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process." *Id.* As with any issue of agency, a person's status as an agent must be determined through manifestations of the principal, rather than those of the purported agent. Accordingly, "[c]laims by one to possess authority to receive process or actual acceptance of process [, where such claims are made,] by an alleged agent will not necessarily bind the defendant. Rather there must be evidence the defendant intended to confer such authority." *Id.* at 523, 473 S.E.2d at 67. "Without specific authorization

to receive process, service is not effective when made upon an employee of the defendant, such as a secretary." *Id.* at 523-24, 473 S.E. at 67. In *Moore*, the Court of Appeals affirmed the trial court's ruling quashing service, where the process server delivered suit papers to a law firm secretary, rather than to a member of the firm.

The *Moore* precedent is directly applicable to the present case. At the hearing, Glenn Breed denied that he ever stated to the process server that he had authority to accept process on Oconee's behalf. Further, Breed denied that the process server made any representations that he was attempting to effect service on Oconee. Even if the allegations of the process server's affidavit are all deemed true, there still is no basis for legal service. Plaintiff has provided no evidence indicating that Oconee ever represented that Glenn Breed was authorized to receive service of process on behalf of Oconee. As in *Moore*, even if Breed had previously received deliveries for Ms. Hulse, such previous course of action is insufficient to make Breed a legal agent for receipt of process for Oconee.

Plaintiff has failed to provide any evidence, by affidavit, brief or any citation of law, to demonstrate that Mr. Breed was authorized to accept service on Oconee's behalf. Accordingly, Plaintiff has failed to demonstrate that it complied with the service requirements for counties under Rule 4, SCRCP, prior to the delivery of the Amended Summons and Amended Complaint to Elizabeth Hulse on September 7, 2012.

At both the September 4 and December 11, 2012 hearings, Plaintiff argued alternatively that when Mr. Breed agreed to accept the papers from Mr. Finley and give them to Ms. Hulse, Mr. Breed, who testified that he is over the age of eighteen (18), became the agent for service of process. Plaintiff argued that South Carolina does not require any specific words to be stated when suit papers are delivered and further argued that Rule 4(c), SCRCP, allows service of

process to be made by any person over the age of 18 who is not an attorney in or party to the action. By agreeing to give the papers to Ms. Hulse, Plaintiff argues that Mr. Breed who is neither an attorney in the action nor a party to it and who admitted he gave Ms. Hulse the papers that same day, accomplished service of process within the statutory period.

Essentially, Plaintiff argues that it is not required to comply with Rule 4's service requirements regarding service upon a County, provided that a wrongly-served County employee delivers papers to one of the County's legal agents for service of process. It is clear that Plaintiff failed to comply with the rules of service for a county; therefore, Plaintiff does not receive any presumption of proper service. Were Plaintiff's position vis-à-vis Breed the actual law of South Carolina, the *Roberson* and *Moore* cases would not remain good law, because delivery to a secretary would constitute good service, provided the secretary delivered papers to the principal. The Rules of Civil Procedure clearly establish who can receive service for a County, and Mr. Breed is not within any category that can receive service. Plaintiff's contention that subsequent delivery constitutes service would render our service rules, which allow for substitute service only when delivered to an individual defendant's dwelling place, meaningless; therefore, Plaintiff's contention that Breed's delivery of papers to Hulse constitutes service does not reflect current South Carolina law on service of process.

Plaintiff's reliance on *Mull v. Ridgeland Realty, LLC*, 387 S.C. 489, 693 S.E.2d 27 (Ct. App. 2010), as well as *Roche v. Young Brothers, Inc.*, 318 S.C. 207, 456 S.E.2d 897 (1995), is misplaced. Both cases dealt with service of process upon corporate entities by certified mail, as allowed by Rule 4(d)(8), SCRCP. Both found service acceptable where the certified mailing was mailed to the registered agent. In *Mull*, the pleadings were mailed to a registered agent at an address other than that listed for the registered agent. In *Roche*, the documents were received by

another company executive than the registered agent.² The key difference between *Mull/Roche* and the case at bar is that in those cases, the plaintiffs complied with applicable rules for service of process – the divergence from the rules related to who received the mail or where the agent received the mail. By contrast, in this case, Plaintiff failed to comply with the rules by failing to effect service upon Oconee with the method specified in Rule 4(d)(6), SCRCF. As noted above, Rule 4(d)(8), SCRCF, does not allow for service upon a county or governmental subdivision via certified mail; therefore, the *Mull/Roche* precedents are not applicable to this case.

Plaintiff contends the errors in service are insignificant and insufficient to constitute grounds for granting a Rule 12(b)(5) Motion, because Oconee received notice of suit within time to answer the Complaint. This ignores the precedent of *Moore v. Simpson, supra*. In *Moore*, the defendant lawyer and firm received the pleadings, but not via proper service. The Court found service inappropriate and quashed service. Plaintiff has failed to introduce any evidence demonstrating that Oconee intended to grant Glenn Breed authority to accept service on Oconee's behalf. As a result, Plaintiff's service on Mr. Breed fails to meet the requirements of Rule 4(d)(6), SCRCF.

Through *Roche, supra*, and *Moore, supra*, South Carolina's courts have clearly stated that a plaintiff only receives a presumption of proper process, where that plaintiff complies with the rules for service of process upon a defendant. In this case, Plaintiff has failed to demonstrate that it complied with the rules of service for a county – Plaintiff never served the chief executive office or Council Clerk of Oconee personally with process. Plaintiff has failed to prove that the persons served were authorized to receive process on Oconee's behalf; therefore, Plaintiff has

² Had that officer received who received the certified mail received process through personal service, the corporation would have been properly served, under Rule 4(d)(3)'s provision that a corporation or partnership can be served by delivering a copy of the summons and complaint to an officer of the corporation.

failed to meet its burden of proving it properly served Oconee, sufficient to subject Oconee to the personal jurisdiction of this Court.

Oconee concedes that Elizabeth Hulse was served with the Amended Summons and Amended Complaint on September 7, 2012; however, this Court finds that there was no proper service upon Oconee prior to that date.

3. Plaintiff Failed to Commence This Action Within the Applicable Statute of Limitations; Therefore, Plaintiffs Claims Are Subject to Dismissal for Failure to State a Claim Upon Which Relief Can Be Granted.

At the December 11, 2012, hearing on the pending motions, Plaintiff conceded that its claims against Oconee were governed by the two-year limitations period set forth in S.C. Code Ann. §15-78-110. Based on application of the two-year limitations period, Plaintiff must have commenced its action, as defined in Rule 3, SCRCP, and S.C. Code Ann. §15-3-20(A) by April 23, 2012, to comply with the applicable limitations period. Although Plaintiff first filed a Summons and Complaint within the applicable limitations period, Plaintiff failed to commence the action within the applicable limitations period, because Plaintiff first properly served Oconee with process 157 days after filing its Summons and Complaint.

Pursuant to S.C. Code Ann. §15-3-20(A), “[c]ivil actions may only be commenced within the time periods prescribed [within Title 15 of the S.C. Code] after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.” S.C. Code Ann. §15-3-20(A). Further, “a civil action is commenced when the summons and complaint are file with the clerk of court if actual service is accomplished within one hundred twenty days after filing.” S.C. Code Ann. §15-3-20(B) (emphasis added). As noted above, Plaintiff failed to properly serve Oconee with a Summons and Complaint within 120 days of filing.

Based on the plain language of the Amended Complaint, Oconee is a governmental entity, and a political subdivision of the state of South Carolina. (Amended Complaint, ¶ 2.) In the Amended Complaint, Plaintiff asserts two causes of action: (1) negligence, and (2) negligence *per se*. Both causes of action constitute claims based in tort. Pursuant to S.C. Code Ann. §15-78-20, political subdivisions of South Carolina “are only liable for torts within the limitations of [the Tort Claims Act] and in accordance with the principles established [therein].” *See* S.C. Code Ann. §15-78-20. As Plaintiff conceded at the December 11, 2012, hearing, the Tort Claims Act sets a two-year limitations period for claims. *See* S.C. Code Ann. §15-78-110. Accordingly, Plaintiff must have commenced its action within two years of the Incident, which occurred on April 23, 2010, to possess a claim upon which relief can be granted. The last day to commence an action under the applicable limitations period was April 23, 2012.

South Carolina’s Supreme Court has recently determined, by jointly interpreting Rule 3(a), SCRPC, and S.C. Code Ann. §15-3-20, that:

- (1) an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, and
- (2) if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days of *filing*.

Mims v. Babcock Center, Inc., 732 S.E.2d 395, 397-98 (2012). In *Mims*, a defendant challenged the propriety of commencement of an action, where that defendant was first served with an Amended Complaint one year after the plaintiff filed the original complaint. As in the case at bar, the plaintiff never properly served the defendant with the original Complaint. The Supreme Court found commencement to be acceptable, because service of the Amended Complaint came within the applicable limitations period. In the present case, unlike *Mims*, it is undeniable that Plaintiff’s service of the Amended Complaint occurred outside the two-year limitations period.

Further, the evidence (and the time stamp) on the Amended Complaint clearly demonstrate that the Amended Complaint was served 157 days after the April 4, 2012, date of original filing of Plaintiff's Complaint. Accordingly, the action was commenced on September 7, 2012.

At the December 11, 2012, hearing, Plaintiff argued that, based on Rule 15, SCRPC, it had 120 days to serve Oconee from the date of filing the Amended Complaint. This contention is clearly erroneous. Rule 15(c), SCRPC, states that an amended pleading relates back to the date of the original pleading. Accordingly, the date of filing for the Amended Complaint is treated as April 4, 2012. As noted above, Plaintiff first properly served Oconee with process in this case on September 7, 2012, which is 157 days after original filing, and outside the applicable limitations period. The action was therefore not commenced within the applicable limitations period. Plaintiff did not obtain an additional 120 days to serve Oconee, based on the amendment of a pleading outside the applicable limitations period.

By failing to properly serve Oconee within the applicable limitations period or within 120 days of original filing, Plaintiff has failed to commence its civil action within the time set forth in S.C. Code Ann. §15-78-110. Accordingly, Plaintiff cannot state a claim on which relief can be granted, and Oconee is entitled to dismissal of Plaintiff's claims pursuant to Rule 12(b)(6), SCRPC.

CONCLUSION

Under Rule 4(d)(6), SCRPC, only two people are authorized by law to receive service of process on behalf of Oconee: (1) Oconee's Chief Executive Officer; and (2) the Clerk of the Oconee County Council. Plaintiff has failed to serve either the Chief Executive Officer or the Clerk of the County Council prior to September 7, 2012. Accordingly, Plaintiff failed to

properly commence this action within the time period set forth in S.C. Code Ann. §15-78-110, and Plaintiff's claims against Oconee are therefore time-barred.

Oconee's Motion to Dismiss with Prejudice, pursuant to Rule 12(b)(6), SCRPC, is hereby GRANTED. This order constitutes a final judgment in this matter.

IT IS SO ORDERED.

Mad
January 15, 2013
Walhalla, South Carolina
Anders

[Signature]

Judge R. Lawton McIntosh
Resident Judge
Tenth Judicial Circuit

A TRUE COPY
APR 5 2013
BB
CLERK OF COURT - OCONEE COUNTY

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 APR 5 PM 3 38

FORM 4

STATE OF SOUTH CAROLINA
 COUNTY OF OCONEE
 IN THE COURT OF COMMON PLEAS
 FILED OCONEE, SC
 BEVERLY H. WHITFIELD
 CLERK OF COURT

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2012CP37319

Randolph M. James, P.C. <div style="text-align: right; font-weight: bold; font-size: 1.2em;">2012 DEC 13 PM 12 17</div>	Oconee County dba Oconee County Aeronautics, et al.
PLAINTIFF(S)	DEFENDANT(S)

Submitted by:	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant
---------------	---

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):**
 - Rule 12(b), SCRCP; Rule 41(a), SCRCP (Vol. Nonsuit);
 - Rule 43(k), SCRCP (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON):**
 - Rule 40(j) SCRCP; Bankruptcy;
 - Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 - Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

Plaintiff's attempted service on the deputy administrator Breeden was not in compliance with Rule 4(d)(6) SCRCP and there is no evidence Mr. Breeden had been authorized to accept service by Oconee County. Mr. Breeden's transmittal to Ms. Hulse does not constitute service of process. Thereafter, personal service on Ms. Hulse on September 7, 2012 was beyond the Statute of Limitations, being beyond the 120-day allowed by Rule 13, SCRCP. (Mr. Atkinson to draft a proposed order and provide a copy to opposing counsel before sending to me.)

ORDER INFORMATION

This order ends does not end the case. Additional Information for the Clerk:

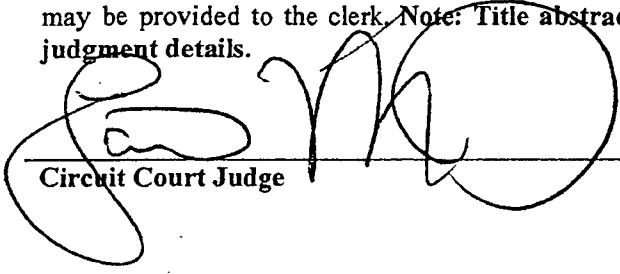
INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**



 Circuit Court Judge

2155
 Judge Code

12-11-12
 Date

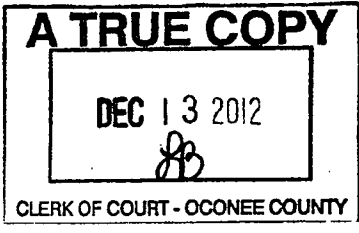
FILED O'CONNOR, SC
 BEVERLY H. WHITFIELD
 CLERK OF COURT
 2012 DEC 13 PM 12 17

For Clerk of Court Office Use Only

This judgment was entered on Dec 13, 2012, and a copy mailed first class or placed in the appropriate attorney's box on Dec 13, 2012 to attorneys of record or to parties (when appearing pro se) as follows:

Peter Frederick Asmer, Jr.
 ATTORNEY(S) FOR THE PLAINTIFF(S)

Charles Daniel Atkinson
 ATTORNEY(S) FOR THE DEFENDANT(S)



Beverly H. Whitfield
 Beverly H. Whitfield - Clerk of Court

Court Reporter Jo Rice

STATE OF SOUTH CAROLINA
 COUNTY OF Oconee
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2012 CP-37-319

Randolph M. James, P.C., a North Carolina
 Professional Corporation

Oconee County, South Carolina, a political
 subdivision of the State of South Carolina

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: C. Daniel Atkinson	Attorney for : <input type="checkbox"/> Plaintiff	<input checked="" type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant	

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

FILED OCONEE, SC
 BEVERLY H. WHITFIELD
 CLERK OF COURT
 APR 5 PM 3 30

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Defendant's Motion to Dismiss with Prejudice is GRANTED.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : _____

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

[Signature]
 Circuit Court Judge

A TRUE COPY
 APR 5 2013
[Signature]
 CLERK OF COURT - OCONEE COUNTY

2155
 Judge Code

3-25-13
 Date

For Clerk of Court Office Use Only

This judgment was entered on the 5th day of Apr, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this 5th day of Apr, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Peter Fredrick Asmer, Jr.

ATTORNEY(S) FOR THE PLAINTIFF(S)

Charles Daniel Atkinson

ATTORNEY(S) FOR THE DEFENDANT(S)

Beverly H. Whitfield
CLERK OF COURT

Court Reporter: Jo Rice

STATE OF SOUTH CAROLINA
COUNTY OF OCONEE
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2012- CP-37-00319

Randolph James, PC, a North Carolina

Oconee County, d/b/a Oconee County
Aeronautics Commission & d/b/a Oconee
County Regional Airport (KCEU)

Professional Corporation,
PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON): Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): Affirmed; Reversed; Remanded; Other

FILED OCONEE, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 MAY 13 PM 2:10

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court: Plaintiff's Motion for Reconsideration is denied without the necessity of oral arguments. No formal order to follow.

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

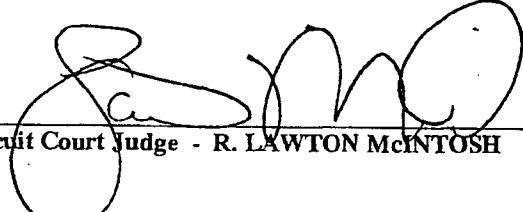
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

A TRUE COPY
MAY 13 2013
CLERK OF COURT, OCONEE COUNTY

If applicable, describe the property, including tax map information and address, referenced in the order.

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge - R. LAWTON McINTOSH

2155
Judge Code

5-7-13
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of May, 2013 and a copy mailed first class or placed in the appropriate attorney's box on this _____ day of May, 2013 to attorneys of record or to parties (when appearing pro se) as follows:

Tracy L. Eggleston
301 S. College Street, Suite 2100
Charlotte, NC 28202
ATTORNEY(S) FOR THE PLAINTIFF(S)

C. Daniel Atkinson
127 Dunbar Street, Suite 200
Spartanburg, SC 29303
ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT RICHARD SHIRLEY

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FILED O'CONNOR, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 MAY 13 PM 2 10

STATE OF SOUTH CAROLINA)
)
COUNTY OF OCONEE)

COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

Randolph M. James, P.C., a North)
Carolina Professional Corporation,)
)
Plaintiff,)

Civil Action File Number

vs.)

2011-CP-37-319

Oconee County, d/b/a Oconee County)
Aeronautics Commission and d/b/a)
Oconee County Regional Airport)
(KCEU),)
)
Defendant.)

2012 APR - 3 PM 2:46

FILED
CLERK OF COURT
TENTH JUDICIAL CIRCUIT
SOUTH CAROLINA

COMPLAINT FOR DAMAGES — JURY TRIAL REQUESTED

Plaintiff Randolph M. James, P.C. (“James”) herewith makes its complaint of the defendant Oconee County, South Carolina, d/b/a Oconee County Aeronautics Commission and d/b/a Oconee County Regional Airport (“OCRA” or “KCEU”) as follows, respectfully showing the Court:

Jurisdiction and Venue

1.

Plaintiff is a professional corporation organized and existing under the laws of the State of North Carolina with its principal place of business located at 116 North Spruce Street, Winston-Salem, North Carolina 27101.

2.

Defendant Oconee County is a political subdivision of the State of South Carolina which, among other things, operates as a business the Oconee County Regional Airport. Defendant Oconee County may be served by service of process upon its chief executive, the Hon. Joel Thrift, Chairman of the County Council, at 629 Seed Farm Road, Westminster, South Carolina 29693 or upon the County Council's Clerk, the Hon. Elizabeth G. Hulse, Oconee County Administrative Offices, 415 South Pine Street, Walhalla, South Carolina 29691.

3.

Oconee County Aeronautics Commission is a commission elected by the Board of Commissioners of Oconee County, South Carolina pursuant to Oconee County, South Carolina Code of Ordinances Chapter 2, § 2-261 *et. seq.*, for the purpose of operating, as a business and as a proprietary commercial function, the Oconee County Regional Airport ("OCRA").

4.

This Court has jurisdiction over this civil action as this matter involves an amount in controversy in excess of the sum of \$7,500.00.

5.

Venue is proper for this action pursuant to S.C. Code Ann. § 15-78-100(b) in that the tortious acts giving rise to plaintiff's complaint occurred in Oconee

County, South Carolina.

Predicate Facts

6.

At all times relevant to this civil action, plaintiff James was the registered owner of an airplane manufactured by Piper Corporation, model PA-46-350P, serial number 4636364, Federal Aviation Administration (FAA) Registration Number N-364ST.

7.

At all times relevant to this civil action, defendant Oconee County, through the Oconee County Aeronautics Commission (“OCAC”) operated the OCRA, FAA identifier KCEU, as a public regional general aviation facility, selling airplane and jet fuel, constructing hangars for the storage of air craft and generally providing the types of services normally provided by a fixed base operator (“FBO”), including construction and maintenance of facilities for the take-off and landing of aircraft, such as runways. At all times relevant to this civil action, planes could and did land and take off, take on fuel, be serviced and otherwise use Oconee County’s KCEU airport for general aviation purposes.

8.

At all times relevant to this civil action, defendant Oconee County’s KCEU was a general aviation facility included as part of the National Plan of Integrated

Airport Systems (NPIAS) of the Federal Aviation Administration (FAA) of the United States government.

9.

At all times relevant to this civil action, Oconee County's KCEU airport engaged in proprietary functions associated with the airport operation, including the sale of fuel to aircraft, thus waiving any governmental immunity as to its operation.

10.

At all times relevant to this civil action and continuously since 1997, defendant OCAC's KCEU airport has been a recipient of grants from the FAA's Airport Improvement Project (AIP).

11.

At all times relevant to this civil action, defendant Oconee County's KCEU airport, as a recipient of FAA AIP (Airport Improvement Project) grants, was contractually obligated, pursuant to assurances imposed upon KCEU by 49 U.S.C. § 47107, to maintain its terminal airspace so as to protect against airport hazards, which term is defined by 49 U.S.C. § 47107 to include "a use of land near the airport, that obstructs or otherwise is hazardous to the landing or taking off of aircraft at or from the airport."

12.

Fulfillment of the assurances made by defendant Oconee County's KCEU airport in consideration of receipt of funds from AIP grants would require the KCEU airport to assess and mitigate the hazard presented to aircraft using the airport runways by deer coming on to the airport's runways, including runway 7, from adjacent land known to be habitat for deer and for which there was no fencing or other barrier to keep the deer off the runways.

13.

At all times relevant to this civil action, Randolph M. James, the pilot of the Piper Mirage aircraft described in paragraph 5, above, was duly licensed, trained and certified for the operation of the aircraft and for landings and take-offs from general aviation facilities such as the KCEU.

14.

As of April 23, 2010, Oconee County's KCEU airport had not conducted any wildlife assessment of its facility, did not have any wildlife management plan in force and effect for its runway or other facilities and had taken no action to erect any barrier or fence to keep deer off the airport's runways.

15.

As of April 23, 2010, the runway of defendant Oconee County's KCEU airport adjoined a portion of Clemson University's protected forest, which forest was

known by KCEU personnel to be inhabited by various types of wildlife, including deer.

16.

As of April 23, 2010, there was no perimeter fence or other barrier to protect the runways of defendant Oconee County's KCEU airport from incursion of deer or other wildlife from the immediately adjoining forest lands of Clemson University.

17.

Prior to April 23, 2010, in April of 2009, a collision occurred between a landing aircraft carrying former Clemson head football coach Tommy Bowden and a deer on the runway, resulting in more than \$70,000.00 damage to the aircraft.

18.

This aircraft / wildlife collision was not reported to the U.S. Department of Transportation's Federal Aviation Administration.

19.

Defendant Oconee County's KCEU airport did not amend or enhance its published warnings to users of its facilities regarding hazards presented by wildlife on or in the vicinity of its runways, despite this significant aircraft / wildlife collision at its facility in 2009.

20.

Defendant Oconee County's KCEU airport did not perform any wildlife hazard assessment, implement any wildlife management plan or otherwise take any steps to address or mitigate the wildlife hazard at its facility, despite this significant aircraft / wildlife collision at its facility.

21.

On or about the 28th day of March, 2010, Kevin Short, the director/manager of Oconee County's KCEU airport acknowledged the need for perimeter fencing for the KCEU's runway in an interview with a reporter for the Anderson, South Carolina *Independent Mail*.

22.

On or about the 23rd day of April, 2010, Randolph M. James, pilot of plaintiff's aircraft, purchased fuel from the Oconee County's KCEU fuel facility, which is operated as a proprietary function by the KCEU airport.

23.

Thereafter, on or about the 23rd day of April 2010 at approximately 10:40 p.m., plaintiff's aircraft, piloted by Randolph M. James, attempted to take off from Oconee County's KCEU airport.

24.

Prior to take off at the KCEU airport, pilot James had investigated the warnings

for wildlife published by Oconee County's KCEU airport for this airport, which warnings made only general reference to the possibility of wildlife in the area of the runway and did not disclose either the free access to the runway by deer and other wildlife from the Clemson University forest or the occurrence of any prior collision between aircraft and wildlife at Oconee County's KCEU airport.

25.

Had defendant Oconee County's, in operation of its KCEU airport, properly reported prior aircraft / deer collisions and provided full and appropriate warnings concerning the potential for wildlife on the defendant's KCEU runway, pilot James could have taken additional precautions in making his departure at night from KCEU, could have taken off at a different and earlier time while lighting conditions were better and otherwise have taken steps to avoid colliding with a herd of deer on the KCEU runway.

26.

After making his preparations for takeoff and committing the aircraft to takeoff, pilot James felt a collision with an object, later determined to be deer. The split second prior to impact, pilot James observed one deer on KCEU's runway 7, immediately in front of N364ST's spinning prop that made collision inevitable and unavoidable by pilot James.

27.

Plaintiff's aircraft collided with the deer, killing them and sustaining significant damage to the aircraft resulting from the nose gear collapse caused by striking one or more of the deer.

28.

The total damages sustained by plaintiff, including the cost of returning the aircraft to an airworthy condition, plus other damages sustained as a result of the collision was in excess of \$311,000.00.

29.

Oconee County's KCEU airport did not report the deer / aircraft collision that occurred on April 23, 2010 to the FAA.

30.

On January 30, 2011, an aircraft carrying a returning Clemson soccer coach collided with a deer upon landing at Oconee County's KCEU airport.

31.

This collision required repairs to the aircraft involved of approximately \$178,000.00.

32.

This aircraft / wildlife collision was not reported to the U.S. Department of Transportation's Federal Aviation Administration.

First Claim for Relief — Negligence

33.

Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 32, above.

34.

Defendant Oconee County, by its operation of KCEU, owed duties to the general aviation public, including plaintiff, which duties included:

- a. the duty to use due care in the operation of KCEU to avoid creation or maintenance of conditions that presented risks or hazards to persons and aircraft using the KCEU facilities;
- b. the duty to keep the KCEU runways clear and free of obstructions so that landing or departing planes would not collide with objects, obstructions or animals;
- c. the duty to erect perimeter fences or other barriers to protect its runways from the free and unhindered access of wildlife from adjacent forest lands;
- d. the duty to monitor runway conditions for departing and landing aircraft once KCEU learned of and experienced an aircraft / wildlife collision resulting from the incursion of deer from adjacent forest lands onto the KCEU runway;

- e. the general duty to use due care and reasonable diligence to avoid causing or permitting harm to business invitees using the KCEU facilities; and
- f. the duty to warn business invitees and users of the KCEU facility of known risks and hazards that would not otherwise be known or apparent to operators of aircraft landing at or taking off from the KCEU facilities.

35.

Defendant Oconee County, in its operation of the KCEU, breached these duties, in that:

- a. it failed to use due care in the operation of the KCEU to avoid creation or maintenance of conditions that presented risks or hazards to persons and aircraft using the KCEU facilities;
- b. it failed to keep the KCEU runways clear and free of obstructions so that landing or departing planes would not collide with objects, obstructions or animals;
- c. it failed to erect perimeter fences or other barriers to protect its runways from the free and unhindered access of wildlife from adjacent forest lands;

- d. it failed to monitor runway conditions for landing aircraft once KCEU learned of and experienced an aircraft / wildlife collision resulting from the encroachment of deer from adjacent forest lands onto the KCEU runway;
- e. it failed to use due care and reasonable diligence to avoid causing or permitting harm to business invitees using the KCEU facilities;
- f. it failed to warn business invitees and users of the KCEU facility of known risks and hazards that would not otherwise be known or apparent to operators of aircraft landing at or taking off from the KCEU facilities;
- g. it failed to report prior collisions between aircraft and wildlife to the Federal Aviation Administration of the U.S. Department of Transportation; and
- h. it failed to post or make available adequate and realistic warnings concerning the risks presented by wildlife to aircraft using the KCEU facilities.

36.

As a direct and proximate result of the breaches of duty by Oconee County in its operation of the KCEU, which breaches constituted negligence, plaintiff's

aircraft collided with multiple deer on the KCEU runway, sustaining damage in an amount in excess of \$311,000.00.

37.

Plaintiff is therefore entitled to have and recover from the defendant Oconee County its damages, subject to any applicable statutory cap, for the injury proximately caused by the negligence of Oconee County in the operation of the KCEU.

Second Claim for Relief — Negligence Per Se

38.

Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 32, above.

39.

As part of the National Plan of Integrated Airport Systems (NPIAS) of the Federal Aviation Administration (FAA) of the United States government and as a recipient of grants from the FAA's Airport Improvement Project (AIP), defendant Oconee County's KCEU airport was contractually and statutorily obligated, pursuant to assurances imposed upon KCEU by 49 U.S.C. § 47107, to maintain its terminal airspace so as to protect against airport hazards, which term is defined by 49 U.S.C. § 47107 to include "a use of land near the airport, that obstructs or otherwise is hazardous to the landing or taking off of aircraft at or from the

airport.”.

40.

At all times relevant to this civil action, defendant Oconee County’s KCEU airport was aware of the risk and hazard presented by deer to landing and departing aircraft and was also aware of the duty imposed by 49 U.S.C. § 47107 to maintain its terminal airspace so as to protect against airport hazards to landing and departing aircraft.

41.

The statutory duties imposed upon Oconee County’s KCEU airport by 49 U.S.C. § 47107 were, among other things, intended to provide for the safety and protection of persons using such airports, because of the material risk of injury to persons and property presented by potential collisions between aircraft and other objects, such as deer.

42.

Plaintiff Randolph M. James, P.C., as owner of the aircraft at issue in this civil action and as a user of defendant Oconee County’s KCEU airport, was and is a member of the class of persons or entities intended to be protected by 49 U.S.C. § 47107.

43.

Defendant Oconee County and its KCEU airport breached and failed to comply

with 49 U.S.C. § 47107, in that Oconee County and/or KCEU did not conduct any wildlife hazard assessment for its facility, did not prepare or implement any wildlife hazard management plan, and, at the time of the collision at issue in this litigation, had suspended even the minimal level of action it had previously taken to abate deer hazards on its runways.

44.

Plaintiff Randolph M. James, P.C. has sustained damages as a direct and proximate result of defendant Oconee County's KCEU airport to comply with 49 U.S.C. § 47107.

45.

The failure to comply with 49 U.S.C. § 47107 constitutes negligence *per se* on the part of defendant Oconee County and its KCEU airport.

46.

As a direct and proximate result of defendant's negligence *per se*, plaintiff's aircraft collided with multiple deer on the KCEU runway, sustaining damage in an amount in excess of \$311,000.00.

47.

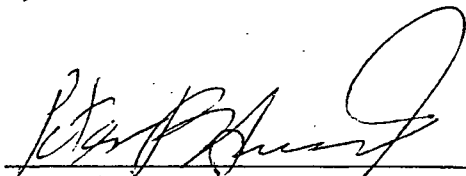
Plaintiff is therefore entitled to have and recover from the defendant Oconee County its damages, subject to any applicable statutory cap, for the injury proximately caused by the negligence *per se* of Oconee County in the operation of

its KCEU airport.

WHEREFORE, having fully set forth its claims for relief, plaintiff Randolph M. James P.C. respectfully prays the Court:

1. that process issue for service upon the defendant;
2. that all costs of this action be taxed to the defendant;
3. that it have and recover its damages as allowed by law from the defendant as compensation for the injury proximately caused by the defendant's negligence and negligence *per se*;
4. for trial by jury of all issues raised by this Complaint;
5. for prejudgment interest at the legal rate; and
6. for such other and further relief as the Court may deem just and proper.

Respectfully submitted this 30 day of March, 2012.


Peter F. Asmer, Jr., Esq.
S. C. Bar Number 64211
Attorney for plaintiff

COZEN O'CONNOR
One Wachovia Center, Suite 2100
301 South College Street
Charlotte, North Carolina 28202
Tel: (704) 376-3400
Fax: (704) 335-9312
E-Mail: pasmer@cozen.com

Of Counsel:

Jefferson C. McConnaughey

COZEN O'CONNOR

SunTrust Plaza, Suite 2200

303 Peachtree Street NE

Atlanta, Georgia 30308

(404) 572-2000

(404) 572-2199 (facsimile)

E-Mail: jmcconnaughey@cozen.com

STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

COUNTY OF OCONEE

TENTH JUDICIAL DISTRICT

Case No.: 2012-CP-37-319

RANDOLPH M. JAMES, P.C., a North
Carolina Professional Corporation,

Plaintiff

vs.

OCONEE COUNTY d/b/a OCONEE
COUNTY AERONAUTICS COMMISSION
and d/b/a OCONEE COUNTY REGIONAL
AIRPORT (KCEU),

Defendant.

SUMMONS
(Jury Trial Demanded)

2012 APR -3 P 2:46
CLERK OF COURT
COURT OF COMMON PLEAS
TENTH JUDICIAL DISTRICT
OCONEE COUNTY

TO: The Defendant Above Named:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is hereby served upon you, and to serve a copy of your Answer to said Complaint upon the subscriber at his office at 301 S. College Street, Suite 2100, Charlotte, North Carolina 28202 within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, plaintiff will apply to the Court for the relief demanded in the Complaint.

Respectfully submitted, this the 2nd day of April 2012.

COZEN O'CONNOR

By: 

Peter F. Asmer, Jr.
SC Bar No.: 064211
301 College Street, Suite 2100
Charlotte, North Carolina 28202
Tel: (704) 376-3400
Fax: (704) 334-3351
Email: pasmer@cozen.com
COUNSEL FOR PLAINTIFF

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF OCONEE)	
)	
Randolph M. James, P.C., a North Carolina	)	C.A. No. 2012-CP-37-319
Professional Corporation,)	
)	
Plaintiff,	)	MOTION TO DISMISS
)	
v.)	
)	
Oconee County, South Carolina, a political)	
subdivision of the State of South Carolina,)	
d/b/a Oconee County Regional Airport,)	
)	
Defendant.)	
_____)	

Pursuant to Rule 12(b)(5), SCRCF, Defendant Oconee County, South Carolina, a political subdivision of the State of South Carolina, d/b/a Oconee County Regional Airport (“Oconee”) specially appears to move this Court for an order dismissing all claims asserted against Oconee by Plaintiff in Plaintiff’s Complaint for Damages. Oconee requests Plaintiff’s claims to be dismissed, because Plaintiff’s method of service of process fails to comply with the requirements of Rule 4(d)(6), SCRCF, for a Governmental Subdivision, such as Oconee.


Oconee is a governmental subdivision of the State of South Carolina. Pursuant to Rule 4(d)(6), SCRCF, service must be made on such entities by “delivering a copy of the summons and complaint to the chief executive officer or clerk thereof, or by serving the summons and complaint in the manner prescribed by statute for the service of summons and complaint or any like process upon such defendant.” Plaintiff did not effectuate personal service in the manner prescribed, but by certified mail on April 9, 2012. Neither the South Carolina Tort Claims Act or Rule 4(d)(8), SCRCF, provides for service of process via certified mail on a Governmental Subdivision such as Defendant. *See* S.C. Code Ann. §§ 15-78-10 et. seq. (1976). Rule 4(d)(8),

SCRCP, specifically includes only defendants classed as Individuals and Corporations and Partnerships as proper parties for service via certified mail. Defendant is separately classed as a Governmental Subdivision under Rule 4(d)(6) SCRCP, therefore service of process must have been made by personal service of a copy of the complaint to the chief executive officer or clerk of Oconee County.

Plaintiff's claims should be dismissed with prejudice pursuant to Rule 41(b), SCRCP. Plaintiff's Complaint is its third attempt to properly commence an action in this matter. Plaintiff voluntarily dismissed its first action on June 30, 2011, in federal court. Plaintiff then re-filed in federal court against a different named entity, but one that was determined to be a subordinate advisory board of Oconee. That second Complaint in federal court was dismissed for lack of subject matter jurisdiction on November 28, 2011. Copies of these two orders are attached hereto as Exhibits 1 and 2. Plaintiff's repeated failure to properly commence its action by failing to adhere to South Carolina law and the SCRCP is proper grounds for dismissal with prejudice. Plaintiff has been given an abundant opportunity to commence its suit in the proper forum in compliance with the rules of court. Plaintiff's failure to properly serve defendant surpasses the "limit beyond which the court should not allow a litigant to consume the time of the court and to prolong unnecessarily time, effort, and costs to defending parties." *Georganne Apparel, Inc. v. Todd*, 303 S.C. 87, 92, 399 S.E.2d 16, 19 (Ct. App. 1990).

This motion is based upon the pleadings in this case, Orders entered in companion cases, South Carolina law, and any memorandum of authority to be submitted hereafter.

May 2, 2012

By: 
Michael B.T. Wilkes (S.C. Bar #6107)
mwilkes@wilkeslaw.com
C. Daniel Atkinson (S.C. Bar #72721)

datkinson@wilkeslaw.com

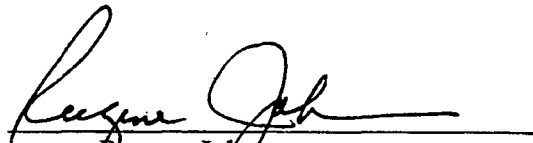
WILKES LAW FIRM, P.A.
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
Telephone 864.591.1113
Facsimile 864.591.1767

ATTORNEYS FOR DEFENDANT
OCONEE COUNTY, SOUTH CAROLINA,
A POLITICAL SUBDIVISION OF THE
STATE OF SOUTH CAROLINA, D/B/A
OCONEE COUNTY REGIONAL
AIRPORT

I, the undersigned, hereby certify that I caused a true and correct copy of the foregoing document to be served via U.S. Mail, postage prepaid upon the following counsel of record:

Peter Asmer, Esquire
Cozen O'Connor
301 South College Street, Suite 2100
Charlotte, NC 28202
Email: pasmer@cozen.com

May 2, 2014
Date


Eugene Johnson
Paralegal

STATE OF SOUTH CAROLINA,)
)
) IN THE COURT OF COMMON PLEAS
COUNTY OF OCONEE)

RANDOLPH M. JAMES, PC, a North)
Carolina Professional Corporation) TENTH JUDICIAL CIRCUIT
)
)

Plaintiff(s))
vs.) AFFIDAVIT OF SERVICE
)

OCONEE COUNTY d/b/a OCONEE) FILE NO: 12-CP-37-319
COUNTY)
AERONAUTICS)

COMMISSION and d/b/a OCONEE)
COUNTY REGIONAL AIRPORT)
(KCEU))

Defendant(s)) Tony Finley

PERSONALLY PREPARED BEFORE ME, the undersigned deponent, who being duly sworn

says that (s)he served the SUMMONS and COMPLAINT in this action
(Describe document(s) served)

on ELIZABETH HULSE, Clerk to Oconee County Council, by delivery to
(Name of party served)

ELIZABETH HULSE, Clerk to Oconee County Council personally;
(Name of party served)

D. Glenn Breed, Assist Admin. Co-worker of the party served,
(Name of person served) (Note relationship to party)

and a person of discretion residing at the residence of the party served;

Elizabeth Hulse, the Clerk to Council of Oconee County
(Name of person served) (Title) (Name of corporate party served)

and leaving with (him) (her) a copy at 415 S. Pine Street
(Street address)

in Walhalla Oconee County, South Carolina,
(City or Town) (County)

on May 11th 2012 at 1:05 pm o'clock

that deponent knows the person so served, and that deponent is not a party of this action, is not less than eighteen (18) years of age and has no interest therein or connection therewith.

Unable to locate and serve the above process on the defendant after diligent efforts to do so.

The process is returned unexecuted.

Sworn to and Subscribed before me)
this 11th day of May, 2012)

Pat J. Beecor)
Notary Public for South Carolina)

Tony Finley
Signature of Deponent

My Commission expires 5/2/2022)

Entered in the Sheriff's Service Book on

Book

Page

Number

STATE OF SOUTH CAROLINA,)
COUNTY OF OCONEE)

RANDOLPH M. JAMES, P.C., a)
North Carolina Professional)
Corporation)
Plaintiff(s))

vs.)
OCONEE COUNTY d/b/a oconee)
COuntY Aeronautics Commission and)
d/b/a Oconee County Regional Airport)
(KCEU))
Defendant(s).)

IN THE COURT OF COMMON PLEAS
TENTH JUDICIAL CIRCUIT

AFFIDAVIT OF SERVICE

FILE NO: 12-CP-37-319

Tony Furley

FILED
MAY 16 2012
CLERK OF COURT
SOUTH CAROLINA

PERSONALLY PREPARED BEFORE ME, the undersigned deponent, who being duly sworn

says that (s)he served the Summons and Complaint in this action
(Describe document(s) served)

on Reginald Dexter, Chairman, Oconee County Council, by delivery to
(Name of party served)

Reginald Dexter, Chairman, Oconee County Council personally;
(Name of party served)

_____ the _____ of the party served,
(Name of person served) (Note relationship to party)

and a person of discretion residing at the residence of the party served;

_____ the _____ of _____
(Name of person served) (Title) (Name of corporate party served)

and leaving with (him) (her) a copy at 124 S. Shore Drive
(Street address)

in Fair Play Oconee County, South Carolina,
(City or Town) County

on May 16th 2012 at 12:20 pm o'clock

that deponent knows the person so served, and that deponent is not a party of this action, is not less than eighteen (18) years of age and has no interest therein or connection therewith.

Unable to locate and serve the above process on the defendant after diligent efforts to do so.
The process is returned unexecuted.

Sworn to and Subscribed before me)
this 16th day of May, 2012)
Port J. Becock)
Notary Public for South Carolina)

Tony Furley
Signature of Deponent

My Commission expires 12/22)

Entered in the Sheriff's Service Book on

Book

Page

Number

STATE OF SOUTH CAROLINA

COUNTY OF OCONEE

RANDOLPH M. JAMES, PC, a North
Carolina Professional Corporation

Plaintiff,

vs.

OCONEE COUNTY d/b/a OCONEE
COUNTY AERONAUTICS COMMISSION
and d/b/a OCONEE COUNTY REGIONAL
AIRPORT (KCEU)

Defendant.

) IN THE COURT OF COMMON PLEAS
) IN THE TENTH JUDICIAL DISTRICT

) CIVIL ACTION NO. 2012-CP-37-319

) AFFIDAVIT OF TONY FINLEY

I, Tony Finley, swear and depose the following:

1. The information which forms the basis of this Affidavit is personally known by me to be true.
2. I am over eighteen (18) years of age and I am employed with Upstate Carolina Legal Services located at 1754 Woodruff Road, Greenville, South Carolina.
3. As an employee of Upstate Carolina Legal Services I serve as a process server, serving legal documents primarily in the upstate of South Carolina including Oconee County.
4. In regard to the above-captioned lawsuit, I was retained by the law firm of Cozen O'Connor to serve the Summons and Complaint upon Mr. Reginald Dexter, the Chairman of the Oconee County Counsel, and upon Elizabeth Hulse, the Clerk to the Oconee County Counsel.
5. I personally served Chairman Dexter with the Summons and Complaint on May 10, 2012 at 12:20 p.m. at 124 S. Shore Drive, Fair Play, South Carolina, County of Oconee. Attached hereto as Exhibit A is a true and correct copy of the Affidavit of Service, signed by me stating that I personally served Chairman Dexter on May 11, 2012.
6. On May 10, 2012, I traveled to the Oconee County administrative offices located at 415 S. Pine Street, Walhalla, South Carolina, County of Oconee to serve Ms. Hulse.

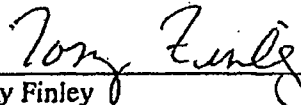
7. Upon arriving at the administrative offices, I learned that Ms. Hulse was not present. I explained to the personnel in the office that I was there to serve legal papers upon the County and asked if anyone could accept service on Ms. Hulse's behalf.

8. Mr. D. Glenn Breed, the Assistant Administrator for E&E Services in Oconee County, advised that he worked with Ms. Hulse and could accept service of the Summons and Complaint on her behalf. Upon the representation of Mr. Breed, I served him with the Summons and Complaint for the above-captioned lawsuit.

9. Attached hereto as Exhibit B is a true and correct copy of my Affidavit of Service signed by me stating that I served Mr. Breed with the Summons and Complaint for Ms. Hulse on May 10, 2012 at 1:05 p.m.

FURTHER, AFFIANT SAYETH NOT.

IN WITNESS WHERE OF, I hereunto set my hand and seal this 28th day of August 2012.



Tony Finley

Subscribed and sworn to before me
this 28 day of August 2012.



Notary Public for the State of South Carolina

My Commission Expires: August 17, 2019

STATE OF SOUTH CAROLINA,)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

RANDOLPH M. JAMES, P.C., a)
North Carolina Professional)
Corporation)

TENTH JUDICIAL CIRCUIT

Plaintiff(s))
vs.)

AFFIDAVIT OF SERVICE

OCONEE COUNTY d/b/a oconee)
County Aeronautics Commission and)
d/b/a Oconee County Regional Airport)
(KCEU))

FILE NO: 12-CP-37-319

Defendant(s.))

Tony Finley

PERSONALLY PREPARED BEFORE ME, the undersigned deponent, who being duly sworn

says that (s)he served the Summons and Complaint in this action
(Describe document(s) served)

on Reginald Dexter, Chairman, Oconee County Council, by delivery to
(Name of party served)

Reginald Dexter, Chairman, Oconee County Council personally;
(Name of party served)

_____ the _____ of the party served,
(Name of person served) (Note relationship to party)

and a person of discretion residing at the residence of the party served;

_____ the _____ of _____
(Name of person served) (Title) (Name of corporate party served)

and leaving with (him) (her) a copy at

124 S. Shore Drive
(Street address)

in Fair Play Oconee County, South Carolina,
(City or Town) County

on May 11th 2012 at 12:20 pm o'clock

that deponent knows the person so served, and that deponent is not a party of this action, is not less than eighteen (18) years of age and has no interest therein or connection therewith.

Unable to locate and serve the above process on the defendant after diligent efforts to do so.

The process is returned unexecuted.

Sworn to and Subscribed before me)
this 11th day of May, 2012)

Pat J. Bocock)
Notary Public for South Carolina)

Tony Finley)
Signature of Deponent)

My Commission expires 12/22)

Entered in the Sheriff's Service Book on

Book

Page

Number

EXHIBIT A

STATE OF SOUTH CAROLINA,)

COUNTY OF OCONEE)

RANDOLPH M. JAMES, PC, a North Carolina Professional Corporation)

Plaintiff(s))

vs.)

OCONEE COUNTY d/b/a OCONEE COUNTY COMMISSION and d/b/a OCONEE COUNTY REGIONAL AIRPORT (KCEU))

Defendant(s).)

IN THE COURT OF COMMON PLEAS

TENTH JUDICIAL CIRCUIT

AFFIDAVIT OF SERVICE

FILE NO: 12-CP-37-319

Tony Finley

PERSONALLY PREPARED BEFORE ME, the undersigned deponent, who being duly sworn says that (s)he served the SUMMONS and COMPLAINT in this action (Describe document(s) served)

on ELIZABETH HULSE, Clerk to Oconee County Council, by delivery to (Name of party served)

ELIZABETH HULSE, Clerk to Oconee County Council personally; (Name of party served)

D. Glenn Breed, Assist Admin. for E & E Services the Co-worker of the party served, (Name of person served) (Note relationship to party)

and a person of discretion residing at the residence of the party served;

Elizabeth Hulse, the Clerk to Council of Oconee County (Name of person served) (Title) (Name of corporate party served)

and leaving with (him) (her) a copy at 415 S. Pine Street (Street address)

in Walhalla Oconee County, South Carolina, (City or Town) County

on May 11th 2012 at 1:05 pm o'clock

that deponent knows the person so served, and that deponent is not a party of this action, is not less than eighteen (18) years of age and has no interest therein or connection therewith.

Unable to locate and serve the above process on the defendant after diligent efforts to do so. The process is returned unexecuted.

Sworn to and Subscribed before me this 11th day of May, 2012

Pat J. Beecor
Notary Public for South Carolina

Tony Finley
Signature of Deponent

EXHIBIT B

My Commission expires 5/2/2022)

Entered in the Sheriff's Service Book on

Book

Page

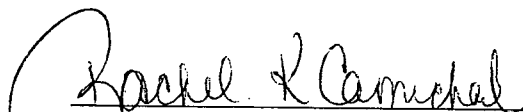
Number

EXHIBIT B

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Affidavit of Tony Finley* has been served this 29th day of August, 2012, upon all counsel of record via electronic mail, and US Mail, postage pre-paid, addressed to such counsel as follows:

C. Daniel Atkinson, Esq.
datkinson@wilkeslaw.com
Wilkes Law Firm
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
Counsel for Defendant



Rachel K. Carmichael

FILED O'CONNOR, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2012 AUG 31 PM 2 38

STATE OF SOUTH CAROLINA)
)
 COUNTY OF OCONEE)
)
 Randolph M. James, P.C., a North Carolina)
 Professional Corporation,)
)
 Plaintiff,)
)
 v.)
)
 Oconee County, South Carolina, a political)
 subdivision of the State of South Carolina,)
 d/b/a Oconee County Regional Airport,)
)
 Defendant.)
 _____)

IN THE COURT OF COMMON PLEAS

C.A. No. 2012-CP-37-319

**DEFENDANT’S BRIEF IN SUPPORT OF
 MOTION TO DISMISS**

Defendant Oconee County, a body politic and corporate, and a political subdivision of the State of South Carolina, incorrectly identified by Plaintiff as “Oconee County, South Carolina, a political subdivision of the State of South Carolina,” (hereinafter “Oconee”) specially appears to submit the following Brief in Support of Its Motion to Dismiss Plaintiff’s Complaint, pursuant to Rule 12(b)(5), SCRPC.

RELEVANT FACTUAL BACKGROUND

Plaintiff Randolph M. James, P.C. (“Plaintiff”), is a North Carolina professional corporation acting as a law firm, with its principal place of business in Winston-Salem, North Carolina. Plaintiff owned a Piper aircraft, which allegedly struck a deer while attempting to take off from Oconee County Regional Airport, on April 23, 2010. (Complaint, ¶ 12 and ¶26.)

Oconee is a governmental subdivision of the State of South Carolina. (Complaint ¶ 2.) Oconee owns and operates the Oconee Regional Airport. Oconee operates under a Council-Administrator form of government, and the Chief Administrative Officer of Oconee is the

County Administrator. *See* Oconee County Code §2-2.¹ Scott Moulder is the present Oconee County Administrator.

Oconee also has a Clerk of the County Council. Oconee County Code §2-271. Elizabeth Hulse presently serves as Oconee's Clerk of County Council.

RELEVANT PROCEDURAL BACKGROUND

Plaintiff first attempted to initiate a civil action against Oconee by filing a Summons and Complaint against "Oconee County, South Carolina d/b/a Oconee County Regional Airport" in the U.S. District Court for the District of South Carolina on May 27, 2011. (A copy of that Summons and Complaint is attached hereto as Exhibit B.) Plaintiff eventually voluntarily withdrew that Summons and Complaint. Plaintiff then filed a second Summons and Complaint against "Oconee County Aeronautics Commission d/b/a Oconee County Regional Airport (KCEU)," on July 29, 2011. (A copy of the Summons and Complaint is attached hereto as Exhibit C.) On September 22, 2011, Oconee County filed a Motion to Dismiss this Summons and Complaint, pursuant to Fed. R. Civ. P. 12(b)(1), because the District Court lacked subject-matter jurisdiction to adjudicate the matter. (A copy of the Motion is attached hereto as Exhibit D.) On November 28, 2011, Judge Henry M. Herlong, Jr., issued an Order dismissing the District Court action, finding that Oconee County was the proper Defendant, that Plaintiff's claims were subject to the S.C. Tort Claims Act, and that the U.S. District Court had no subject-matter jurisdiction to hear the claim. (A copy of the Order is attached hereto as Exhibit E.)

On April 4, 2012, Plaintiff filed the present action in the Court of Common Pleas for Oconee County. Plaintiff initially attempted to effect service on Oconee by sending copies of the Summons and Complaint to various people via certified mail. Oconee objected to the efforts at

¹ Pertinent pages of the Oconee County Code are attached hereto as Exhibit A.

service by mail, by filing a Motion to Dismiss, pursuant to Rule 12(b)(5), SCRCPP, on May 2, 2012.

After the Motion was filed, Plaintiff attempted to effect personal service. Plaintiff has filed affidavits of Service on Reginald Dexter, Chair of Oconee County Council, and Glenn Breed. In the affidavit of service, Process Server Tony Finley contended that Breed was a co-worker of Elizabeth Hulse, and service upon Breed constituted valid substitute service upon Hulse. (A copy of the affidavit purporting to reflect service on Hulse is attached hereto as Exhibit F.)

STANDARD OF REVIEW

In a civil action “[t]he plaintiff has the burden to establish that the court has personal jurisdiction over the defendant. The plaintiff need only show compliance with the rules. When the civil rules on service are followed, there is a presumption of proper service. Rule 4, SCRCPP, [which sets for the rules for service of process upon defendants] serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action.” *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996). Without following the rules of service set forth in Rule 4, SCRCPP, the Court of Common Pleas does not obtain personal jurisdiction over a defendant.

A defendant is allowed to challenge the sufficiency of service of process through Rule 12(b)(5), SCRCPP. *Unisun Ins. v. Hawkins*, 342 S.C. 537, 541, 537 S.E.2d 559, 561 (Ct. App. 2000). Any motion must assert the defects in the purported service. A party must challenge the sufficiency of service of process at the outset of litigation, either by Motion to Dismiss or by challenging the sufficiency of service of process in its responsive pleading. Rule 12(h), SCRCPP.

“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 [rather than by a jury]. 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.” *Brown v. Carolina Emergency Physicians, P.A.*, 348 S.C. 569, 583, 560 S.E.2d 624, 631 (Ct. App. 2001) (internal citations omitted).

LEGAL ANALYSIS

Plaintiff has failed to comply with the rules governing service upon a county in its efforts to effect service upon Oconee. Accordingly, this Honorable Court does not have personal jurisdiction over Oconee, and Plaintiff’s Complaint is subject to dismissal pursuant to improper service.

1. Pursuant to S.C. Law, Oconee Is Not Subject to Service Via Certified Mail.

Based on the language of Plaintiff’s Complaint, Oconee is political or governmental subdivision of the State of South Carolina. (Complaint, ¶ 2.) Accordingly, service on Oconee is governed by Rule 4(d)(6), SCRCP, which states service can be effected upon a county “by delivering a copy of the summons and complaint to the chief executive officer or clerk thereof, or by serving the summons and complaint in the manner prescribed by statute for the service of summons and complaint or any like process upon any such defendant.” *Id.* (emphasis added). According to Rule 4(d)(8), SCRCP, service by certified mail is only available for use against defendants within the categories of “individuals,” “minors, incompetents, and persons confined,” and “corporations and partnerships.” There is no provision for service upon a county by certified mail. Accordingly, Plaintiff’s efforts to serve Oconee through certified mail constitute insufficient service.

2. Plaintiff Has Failed to Effect Service Upon Any Person Authorized to Receive Service On Behalf of Oconee.

After Oconee objected to service upon Oconee via certified mail, Plaintiff attempted personal service upon agents authorized to receive service on Oconee's behalf; however, Plaintiff has not properly served any person authorized to receive service on Oconee's behalf. As stated by the plain language of Rule 4(d)(6), SCRPC, Plaintiff could serve one of two people to effect service on Oconee: (1) the Clerk of the Council, Elizabeth Hulse; or (2) Oconee's chief executive officer, County Administrator Scott Moulder. Plaintiff has never personally served Hulse or Moulder.

a. The County Administrator, and Not the Council Chair, Is the Chief Executive Officer of Oconee.

Through Ordinance 2003-07, which was enacted May 20, 2003, Oconee adopted the Council-Administrator form of government. The elements of a Council-Administrator government are set forth in the South Carolina Code. The County Administrator is "the administrative head of the county government and [is] responsible for the administration of all the departments of the county government which the council has the authority to control." S.C. Code Ann. §4-9-620. Under Oconee County Code §2-152, the powers and duties of the County Administrator are those set by S.C. Code Ann. § 4-9-620 *et seq.*, as well as duties specified by Oconee's Council. Under the S.C. Code, these duties include serving as chief administrative officer of county government, executing policies, directives and legislative actions of the council, preparing budgets for council review and requiring reports from county departments and agencies, supervising the expenditure of appropriated funds, preparing reports to the council on finances and administrative activities of the county, administering county personnel policies,

being responsible for employment and discharge of county personnel, and performing other duties as required by council. S.C. Code Ann. §4-9-630. In the context of a corporation, these are the duties a President or CEO performs under the direction of a Board of Directors.

Under current county law setting forth provisions of administration of the county government, Oconee's Council has "operating authority only through its direction of the County Administrator." *See* Oconee County Code §2-3. The County Council appoints the County Administrator, who acts as the "chief administrative officer of the county." Oconee County Code §2-2. Under state law, council members, including the chair, only deal with county employees subject to supervision of the administrator, through said administrator. S.C. Code Ann. §4-9-660. The council chair's duties include presiding at council meetings and execution of documents on behalf of the council, but only when authorized by the council. *See* Oconee County Code §2-32.

By delineation of duties, it is clear that the County Administrator, rather than the County Council Chair, is the Chief Executive Officer of Oconee. Accordingly, service on the Council Chair, rather than on the County Administrator, does not constitute service on Oconee's Chief Executive Officer. Accordingly, service on the County Council Chair does not constitute effective service on Oconee.

b. Plaintiff Did Not Effect Service on Elizabeth Hulse By Delivering Papers to Glenn Breed.

It is undisputed that Elizabeth Hulse is the Clerk of Oconee's County Council. Further, it is undisputed that Plaintiff failed to effect service directly and personally upon Elizabeth Hulse. Plaintiff apparently contends that it served Elizabeth Hulse by delivering a Summons and Complaint to Glenn Breed, a man who works in the same office building as Ms. Hulse. Rule

4(d)(6), SCRCF, contains no provisions provision allowing for substitute service on someone working in the same office. Rule 4(d)(1) is the only rule provision allowing service by delivery to someone else, and that rule requires delivery at the person being served's "dwelling house or usual place of abode." There is no provision for substitute service upon a County, by delivery to someone other than the Clerk of the Council or the County's Chief Executive Officer. The only persons who can receive service for a County are the Chief Executive Officer and the Clerk of the County Council. *See* Rule 4(d)(6), SCRCF.

Plaintiff apparently contends, through its affidavit of service, that Glenn Breed was authorized to accept service on Hulse's behalf; however, this contention is not supported by South Carolina law. In *Roberson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 615 S.E.2d 112 (2005), the Supreme Court of South Carolina addressed the authority of a non-registered, non-designated agent to receive service on behalf of a corporation. In *Roberson*, the Court considered the trial court's denial of Southern's motion to set aside default. Southern's Motion to Set Aside Default was premised upon the argument that Southern was not properly served with the Summons and Complaint in the matter. The trial court ruled that Plaintiff properly served Southern by certified mail, when the letter was accepted by Amy Jones Bair, a clerical employee of Southern's registered agent, Charles Brooks. Although Southern unarguably authorized Brooks to accept process on its behalf, by listing him as the company's registered agent, Southern argued that Bair was not so authorized. *Id.* at 9. The plaintiff argued that Bair was authorized to accept service on behalf of Southern because Bair had accepted service on behalf of Southern in other cases. *Id.* Essentially, the plaintiff argued that prior dealing cloaked Bair with apparent authority to accept service on Southern's behalf.

In evaluating Bair's authority, the court noted "[a]n agent's authority is composed of his or her actual authority, whether express or implied, together with the apparent authority which the principal by his or her conduct is precluded from denying." *Id.* at 10. The Court noted that Southern Finance never authorized Bair to accept service on its behalf. *Id.* at 11. As a result Bair had no express authority. Furthermore, there was no evidence that the plaintiff knew that Bair had accepted service in the past. Therefore, the plaintiff could not claim that Bair was impliedly authorized to accept service on Southern's behalf. Accordingly, the Court found Bair unauthorized to accept service on behalf of Southern pursuant to Rule 4(d)(8), SCRCF, and held the default judgment void. *Id.* at 11-12.

In the present matter, there is no evidence that Breed has ever accepted service on behalf of Oconee, nor is there any evidence that Breed knew that the process server was attempting to serve Oconee in so delivering papers. There is also no evidence that Oconee, the principal, ever made any representation that Breed was authorized to accept service on Oconee's behalf. As a result, the *Roberson* precedent is directly applicable.

The Court of Appeals again refused to allow for substitute service upon a corporate entity in *Moore v. Simpson, supra*. In *Moore*, the Court of Appeals reviewed a trial court's order quashing service upon a law firm, based on a finding that delivery to a secretary within the firm did not constitute valid service upon the law firm. In that case, there was no Motion to Set Aside Default. The Motion considered was simply to dismiss for improper service of process, largely because dismissal would render the plaintiffs' claims barred under the applicable Statute of Limitations.² In *Moore*, the Court of Appeals determined that "SCRCF 4(d)(1), like its federal counterpart, Rule 4(d)(1) of the Federal Rules of Civil Procedure, provides for service upon an

² Based on the two-year limitations period applied under the S.C. Tort Claims Act, Plaintiff's claims in this action may also be barred under the applicable limitations period.

agent only if authorized by appointment or by law. *Moore, supra*, 322 S.C. at 523, 473 S.E.2d at 66. Further, for a person to be deemed an entity's agent for the purpose of receiving service of process, "[a]ctual appointment for the specific purpose of receiving process normally is expected and the mere fact a person may be considered to act as defendant's agent for some purpose does not necessarily mean that the person has authority to receive process." *Id.* As with any issue of agency, a person's status as an agent must be determined through manifestations of the principal, rather than those of the purported agent. Accordingly, "[c]laims by one to possess authority to receive process or actual acceptance of process [, where such claims are made,] by an alleged agent will not necessarily bind the defendant. Rather there must be evidence the defendant intended to confer such authority." *Id.* at 523, 473 S.E.2d at 67. "Without specific authorization to receive process, service is not effective when made upon an employee of the defendant, such as a secretary." *Id.* at 523-24, 473 S.E. at 67. In *Moore*, the Court of Appeals affirmed the trial court's ruling quashing service, where the process server delivered suit papers to a law firm secretary, rather than to a member of the firm.

The *Moore* precedent is directly applicable to the present case. Oconee disputes that Glenn Breed stated to the process server that he had authority to accept process on Oconee's behalf. Further, Oconee disputes that the process server made any representations that he was attempting to effect service on Oconee. In fact, the process server simply stated he had papers that needed to be given to Ms. Hulse. Even if the allegations of the process server's affidavit are all deemed true, there still is no basis for legal service. Plaintiff has provided no evidence (because there is no evidence) indicating that Oconee (or Moulder or Hulse) ever represented that Glenn Breed was authorized to receive service of process on behalf of Oconee. As in

Moore, even if Breed had previously received deliveries for Ms. Hulse, such previous course of action is insufficient to make Breed a legal agent for receipt of process for Oconee.

Plaintiff has failed to provide any evidence, by affidavit, brief or any citation of law, to demonstrate that Mr. Breed was authorized to accept service on Oconee's behalf. Accordingly, Plaintiff has failed to demonstrate compliance with the service requirements for counties under Rule 4, SCRPC.

CONCLUSION

Despite repeated attempts, Plaintiff has failed to comply with the requirements for proper service upon a county. Plaintiff has failed to comply with these rules, even though they are explicitly set forth in Rule 4, SCRPC. Including the repeated efforts to assert a tort claim against Oconee in the U.S. District Court, this constitutes the third time that Plaintiff has failed to properly initiate a claim against Oconee. Mr. Moulder and Ms. Hulse work in their public offices nearly every work day; so there is no evidence that Oconee has attempted to avoid service of process. Despite clear procedures on proper service on counties and political subdivisions, Plaintiff has failed to properly serve Oconee in the approximately 150 days that have elapsed between Plaintiff's filing of the present action and the hearing on Oconee's Motion. Accordingly, Oconee is entitled to dismissal of Plaintiff's action due to improper service.

August 30, 2012

By: C. Dan Atkinson
Michael B.T. Wilkes (S.C. Bar #6107)
mwilkes@wilkeslaw.com
C. Daniel Atkinson (S.C. Bar #72721)
datkinson@wilkeslaw.com

WILKES LAW FIRM, P.A.
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
Telephone 864.591.1113

Facsimile 864.591.1767

ATTORNEYS FOR DEFENDANT
OCONEE COUNTY, A BODY POLITIC
AND CORPORATE, AND A POLITICAL
SUBDIVISION OF THE STATE OF
SOUTH CAROLINA

I, the undersigned, hereby certify that I caused a true and correct copy of the foregoing document to be served via U.S. Mail, postage prepaid, as well as via electronic mail upon the following counsel of record:

Peter Asmer, Esquire
Cozen O'Connor
301 South College Street, Suite 2100
Charlotte, NC 28202
Email: pasmer@cozen.com

8-30-12
Date



Rogene Johnson
Paralegal

EXHIBIT A

Oconee County, South Carolina, Code of Ordinances >> - CODE OF ORDINANCES >> Chapter 2 -
ADMINISTRATION >> ARTICLE I. - IN GENERAL >>

ARTICLE I. - IN GENERAL

Sec. 2-1. - Effective date.

Sec. 2-2. - Form of government.

Sec. 2-3. - Operations managed by the county administrator.

Sec. 2-4. - Operations managed by elected county officials.

Secs. 2-5—2-30. - Reserved.

Sec. 2-1. - Effective date.

This chapter shall take effect on January 1, 2005, or upon the vacancy of the office of the chief administrative officer, whichever occurs first.

(Ord. No. 2003-07, art. I, 5-20-2003)

Sec. 2-2. - Form of government.

The form of government for the county shall be the council-administrator form of government. The county council shall consist of the five members elected from single member districts, the boundaries of which shall be determined by the county council. The chief administrative officer of the county shall be the county administrator, who shall be appointed by the county council in accordance with this chapter.

(Ord. No. 2003-07, art. II, 5-20-2003)

Sec. 2-3. - Operations managed by the county administrator.

The county council shall exercise its governing responsibility and authority through officially enacted ordinances, resolutions, policy statements and directives. The county council has operating authority only through its direction of the county administrator. Except for purposes of inquiries and official investigations, the council chair or council members shall not give direct orders either publicly or privately to any elected county official or county employee, other than the county administrator and the clerk of council.

(Ord. No. 2003-07, art. VII, § 7.1, 5-20-2003)

Sec. 2-4. - Operations managed by elected county officials.

Elected officials are responsible to the people for the performance of the duties prescribed by state and local laws for their respective offices. Elected officials are responsible to the county council as follows:

- (1) Elected county officials are responsible to the council for the proper expenditure of funds budgeted to their offices by the council.

Oconee County, South Carolina, Code of Ordinances >> - CODE OF ORDINANCES >> Chapter 2 -
ADMINISTRATION >> ARTICLE II. - COUNTY COUNCIL >> DIVISION 1. - GENERALLY >>

DIVISION 1. - GENERALLY

Sec. 2-31. - Officers.

Sec. 2-32. - Council chair.

Sec. 2-33. - Council vice-chair.

Sec. 2-34. - Quorum.

Sec. 2-35. - County departments.

Sec. 2-36. - Council committees.

Secs. 2-37—2-60. - Reserved.

Sec. 2-31. - Officers.

The county council shall elect a council chair, a council vice-chair, a council chair pro tem and such other officers from among its members as it may deem necessary for terms as hereinafter set forth at the initial meeting of the county council in January of each year. Vacancies shall be filled for the unexpired term of any office vacated in the same manner as for the initial selection of an officer for that office. All elections shall be by majority vote of the quorum present. Officers may succeed themselves.

(Ord. No. 2003-07, art. III, § 3.1, 5-20-2003)

Sec. 2-32. - Council chair.

At the initial county council meeting in January of each year, the county council shall elect one of its members to serve as council chair for a one-year term, or until a successor is elected and qualified. The council chair shall preside at all regular and special meetings of the county council; shall execute, on behalf of the county council, all ordinances, resolutions, directives, deeds, bonds, contracts, and other official instruments or documents unless council specifically authorizes execution by another county official; and shall have such other duties and perform such other functions as are set forth in this chapter and as authorized or required by state law.

(Ord. No. 2003-07, art. III, § 3.2, 5-20-2003)

Sec. 2-33. - Council vice-chair.

At the initial county council meeting in January of each year, the county council shall elect one of its members to serve as council vice-chair for a one-year term. If the council chair shall be temporarily absent or unable to serve, the council vice-chair shall serve as council chair in his stead.

(Ord. No. 2003-07, art. III, § 3.3, 5-20-2003)

Sec. 2-34. - Quorum.

Unless otherwise provided, three members of the council shall constitute a quorum of the county council.

(Ord. No. 2003-07, art. IX, § 9.6, 5-20-2003)

Sec. 2-35. - County departments.

The county council shall establish, modify or discontinue such operating departments as required by law or deemed necessary for the effective operation of county government. The county administrator shall recommend changes to the organization, reporting structure and duties of each department under county council jurisdiction as deemed appropriate, for consideration and approval of the county council.

(Ord. No. 2003-07, art. V, 5-20-2003)

Sec. 2-36. - Council committees.

(a) *Standing committees.*

- (1) *Names and responsibilities.* The county council shall maintain five standing committees. The county council shall deal with matters at the committee level prior to its being brought to the full county council if it is judged appropriate by the council chair or by a majority vote of council members. Each standing committee shall be responsible for doing appropriate research and preparing informed recommendations on specific matters that are assigned. The five standing committee names reflect their general areas of jurisdiction:
 - a. Budget, finance and administration committee;
 - b. Transportation committee;
 - c. Real estate, facilities and land management committee;
 - d. Law enforcement, public safety, health and welfare committee;
 - e. Planning and economic development committee.
- (2) *Chair and membership.* Each standing committee shall be chaired by a council member appointed in January by the council chair, with the approval of the council, to a one-year term. Each council member, except the council chair who may choose to chair a standing committee or not, shall be appointed to chair at least one standing committee, and no council member shall be appointed to chair more than two standing committees. All council members shall be members of the budget, finance and procurement committee. All other standing committees shall have two additional council members appointed by the council chair with the approval of the council. Each standing committee shall, at its first meeting of the year, select one of its members other than the committee chair as its vice-chair for the year. Standing committee vacancies shall be filled in the same manner as the vacated position was originally filled.
- (3) *Meetings.* In standing committee meetings, a quorum shall consist of at least two members of such committee being present, except in the case of the budget and finance committee which shall require at least three members present to constitute a quorum. Meetings shall be advertised and open to the public as provided by law. The purpose of standing committee meetings is to address assigned matters to determine facts and decide on appropriate recommendations to the county council.

(b)

Other council committees. Other committees may be established as needed by the council chair, with county council approval.

(Ord. No. 2003-07, art. VI, 5-20-2003; Ord. No. 2012-06, § 2, 4-3-2012)

Secs. 2-37—2-60. - Reserved.

Oconee County, South Carolina, Code of Ordinances >> - CODE OF ORDINANCES >> Chapter 2 - ADMINISTRATION >> ARTICLE III. - OFFICERS AND EMPLOYEES >> DIVISION 2. - COUNTY ADMINISTRATOR >>

DIVISION 2. - COUNTY ADMINISTRATOR

Sec. 2-151. - Position created.

Sec. 2-152. - Powers and duties.

Sec. 2-153. - Interim administrator.

Secs. 2-154—2-170. - Reserved.

Sec. 2-151. - Position created.

The position of county administrator is hereby created. The county administrator shall be appointed by and serve at the pleasure of the county council. The county administrator shall be the chief administrative officer of the county, and shall be responsible to the county council for the proper administration of all county affairs. The county council shall, on an annual basis, set performance objectives for the county administrator and shall annually review and rate job performance with the county administrator.

(Ord. No. 2003-07, art. IV, § 4.1, 5-20-2003)

Sec. 2-152. - Powers and duties.

The county administrator shall have those powers and duties provided for in S.C. Code 1976, § 4-9-620 et seq. and shall have such other powers and duties as may be required by the council.

(Ord. No. 2003-07, art. IV, § 4.2, 5-20-2003)

Sec. 2-153. - Interim administrator.

If the position of administrator becomes vacant, the county council shall appoint an interim administrator to act in the absence of the administrator. The person appointed by the council shall not be a member of the council. The terms of employment as interim administrator shall be determined at the time of the appointment of the interim administrator.

(Ord. No. 2003-07, art. IV, § 4.3, 5-20-2003)

Secs. 2-154—2-170. - Reserved.

Oconee County, South Carolina, Code of Ordinances >> - CODE OF ORDINANCES >> Chapter 2 - ADMINISTRATION >> ARTICLE III. - OFFICERS AND EMPLOYEES >> DIVISION 3. - CLERK OF COUNCIL >>

DIVISION 3. - CLERK OF COUNCIL

Sec. 2-171. - Appointment; duties.

Secs. 2-172—2-190. - Reserved.

Sec. 2-171. - Appointment; duties.

The county council shall appoint a person, not a member of the county council, to serve as clerk of council at the pleasure of the county council. The clerk of council shall prepare the agenda for county council meetings at the direction of the council chair and the county administrator; record all proceedings of the county council; deliver copies of the minutes of each county council meeting to all members prior to the next regular county council meeting; keep the minutes of all county council committee meetings when requested by the chair of such committee; keep a register of all proposed ordinances and resolutions, assigning them a number and arranging them in order of introduction; compile, index, codify, and publish by title all ordinances adopted by the county council; serve as secretary of the county council in typing and preparation of reports, recommendations, ordinances, resolutions, directives and correspondence; and such other duties as may be determined by the council. The clerk of council will report to the council for the performance of the duties of the office.

(Ord. No. 2003-07, art. III, § 3.5, 5-20-2003)

Secs. 2-172—2-190. - Reserved.

- (2) The work of elected officials, unless otherwise provided in this chapter, will be coordinated with other county offices through the office of the county administrator.
- (3) The county council may assign duties to an elected official in addition to those prescribed by law only with the consent of the elected official and only if not prohibited by state law. The county council may provide additional specified pay for such duties when, in the opinion of the council, such pay is justified.

(Ord. No. 2003-07, art. VII, § 7.2, 5-20-2003)

Secs. 2-5—2-30. - Reserved.

EXHIBIT B

AO 440 (Rev. 12/09) Summons in a Civil Action

UNITED STATES DISTRICT COURT

for the

District of South Carolina

Randolph M. James, P.C., a North Carolina
Carolina Professional Corporation,

Plaintiff

v.

Oconee County, South Carolina d/b/a Oconee
County Regional Airport

Defendant

Civil Action No. 8:11-1290-JMC

SUMMONS IN A CIVIL ACTION

To: (Defendant's name and address) Oconee County, South Carolina, a political subdivision of
the State of South Carolina, d/b/a Oconee County Regional Airport
c/o The Honorable Joel Thrift
Chairman of the County Council
629 Seed Farm Road
Westminster, South Carolina 29693

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) — or 60 days if you
are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ.
P. 12 (a)(2) or (3) — you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of
the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney,
whose name and address are:

Peter F. Asmer, Jr.
Cozen O'Connor
301 S. College Street, Ste. 2100
Charlotte, NC 28202

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint.
You also must file your answer or motion with the court.



CLERK OF COURT

s/Angela Lewis, Deputy Clerk

Signature of Clerk or Deputy Clerk

Date: May 27, 2011

AO 440 (Rev. 12/09) Summons in a Civil Action (Page 2)

Civil Action No. _____

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))

This summons for *(name of individual and title, if any)* _____
was received by me on *(date)* _____.

I personally served the summons on the individual at *(place)* _____
on *(date)* _____; or

I left the summons at the individual's residence or usual place of abode with *(name)* _____
_____, a person of suitable age and discretion who resides there,
on *(date)* _____, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* _____, who is
designated by law to accept service of process on behalf of *(name of organization)* _____
on *(date)* _____; or

I returned the summons unexecuted because _____; or

Other *(specify)*: _____

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc:

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Randolph M. James, P.C., a North)
Carolina Professional Corporation,)
)
Plaintiff,)
)
vs.)
)
Oconee County, South Carolina,)
a political subdivision of the State of)
South Carolina, d/b/a Oconee County)
Regional Airport,)
)
Defendant.)

Civil Action File Number

COMPLAINT FOR DAMAGES — JURY TRIAL REQUESTED

Plaintiff Randolph M. James, P.C. (“James”) herewith makes its complaint of the defendant Oconee County, South Carolina, d/b/a Oconee County Regional Airport (“OCRA” or “KCEU”) as follows, respectfully showing the Court:

Jurisdiction and Venue

1.

Plaintiff is a professional corporation organized and existing under the laws of the State of North Carolina with its principal place of business located at 116 North Spruce Street, Winston-Salem, North Carolina 27101.

2.

Defendant Oconee County is a political subdivision of the State of South Carolina which, among other things, operates as a business the Oconee County Regional Airport. Defendant Oconee County may be served by service of process upon its chief executive, the Hon. Joel Thrift, Chairman of the County Council, at 629 Seed Farm Road, Westminster, South Carolina 29693 or upon the County Council's Clerk, the Hon. Elizabeth G. Hulse, Oconee County Administrative Offices, 415 South Pine Street, Walhalla, South Carolina 29691.

3.

This Court has jurisdiction over this civil action pursuant to 28 U.S.C. § 1332(a)(1) as this matter is between citizens of different states and the amount in controversy exceeds the sum of \$75,000.00, exclusive of interest and costs.

4.

Venue is proper for this action pursuant to 28 U.S.C. § 1391(a) in that the events or omissions giving rise to the claims of this civil action occurred in the district and division in which this action is brought and the defendant resides, for purposes of service of process, in the district and division in which this action is brought.

Predicate Facts

5.

At all times relevant to this civil action, plaintiff James was the registered owner of an airplane manufactured by Piper Corporation, model PA-46-350P, serial number 4636364, Federal Aviation Administration (FAA) Registration Number N-364ST.

6.

At all times relevant to this civil action, defendant Oconee County operated the OCRA, FAA identifier KCEU, as a public regional general aviation facility, including runways, at which facility planes could and did land and take off, take on fuel, be serviced and otherwise use KCEU for general aviation purposes.

7.

At all times relevant to this civil action, defendant Oconee County's KCEU was a general aviation facility included as part of the National Plan of Integrated Airport Systems (NPIAS) of the Federal Aviation Administration (FAA) of the United States government.

8.

At all times relevant to this civil action and at least since 2008, defendant Oconee County's KCEU has been a recipient of grants from the FAA's Airport Improvement Project (AIP).

9.

At all times relevant to this civil action, defendant Oconee County's KCEU, as part of the FAA's NPIAS and a recipient of FAA AIP grants, was subject to the wildlife hazard management provisions of Title 14 CFR 139.337, as further described in the FAA's Advisory Circular 150/5200-33B published August 28, 2007.

10.

At all times relevant to this civil action, defendant Oconee County's KCEU was required by the rules and regulations of the Federal Aviation Administration, to conduct wildlife hazard assessments and to institute and maintain a wildlife management plan for its runways to protect aircraft using KCEU from hazards and collisions caused by wildlife on or in the vicinity of KCEU's runways.

11.

At all times relevant to this civil action, Randolph M. James, the pilot of the Piper Mirage aircraft described in paragraph 5, above, was duly licensed, trained and certified for the operation of the aircraft and for landings and take-offs from general aviation facilities such as the KCEU.

12.

As of April 23, 2010, Oconee County's OCRA did not have any wildlife management plan in force and effect for its runway or other facilities.

13.

As of April 23, 2010, the runway of defendant Oconee County's KCEU airport adjoined a portion of Clemson University's protected forest, which forest was inhabited by various types of wildlife, including deer.

14.

As of April 23, 2010, there was no perimeter fence or other barrier to protect the runways of defendant Oconee County's KCEU airport from incursion of deer or other wildlife from the immediately adjoining forest lands of Clemson University.

15.

Prior to April 23, 2010, in April of 2009, a collision occurred between an aircraft carrying former Clemson head football coach Tommy Bowden and a deer while the aircraft was landing, resulting in more than \$70,000.00 damage to the aircraft.

16.

This aircraft / wildlife collision was not reported to the U.S. Department of Transportation's Federal Aviation Administration.

17.

Defendant Oconee County's KCEU airport did not amend or enhance its published warnings to users of its facilities regarding hazards presented by wildlife

on or in the vicinity of its runways, despite this significant aircraft / wildlife collision at its facility in 2009.

18.

Defendant Oconee County's KCEU airport did not perform any wildlife hazard assessment, implement any wildlife management plan or otherwise take any steps to address or mitigate the wildlife hazard at its facility, despite this significant aircraft / wildlife collision at its facility.

19.

On or about the 28th day of March, 2010, Kevin Short, the director of KCEU acknowledged the need for perimeter fencing for the KCEU's runway in an interview with a reporter for the Anderson, South Carolina *Independent Mail*.

20.

On or about the 23rd day of April 2010 at approximately 10:40 p.m., plaintiff's aircraft, piloted by Randolph M. James, attempted to take off from defendant's KCEU airport.

21.

Prior to take off at the KCEU airport, pilot James had investigated the warnings for wildlife published by Oconee County / KCEU for the airport, which warnings made only general reference to the possibility of wildlife in the area of the runway and did not disclose either the free access to the runway by deer and other wildlife

from the Clemson University forest or the occurrence of any prior collision between aircraft and wildlife at defendant's KCEU airport.

22.

Had defendant Oconee County, in operation of its KCEU airport, properly reported prior aircraft / deer collisions and provided full and appropriate warnings concerning the potential for wildlife on the defendant's KCEU runway, pilot James could have taken additional precautions in making his departure at night from KCEU, could have taken off at a different and earlier time while lighting conditions were better and otherwise have taken steps to avoid colliding with a herd of deer on the KCEU runway.

23.

After making his preparations for takeoff and committing the aircraft to takeoff, pilot James felt a collision with an object, later determined to be deer. The split second prior to impact, pilot James observed one deer on KCEU's runway 7, immediately in front of N364ST's spinning prop that made collision inevitable and unavoidable by pilot James.

24.

Plaintiff's aircraft collided with the deer, killing them and sustaining significant damage to the aircraft resulting from the nose gear collapse caused by striking one or more of the deer.

25.

The total damages sustained by plaintiff, including the cost of returning the aircraft to an airworthy condition, plus other damages sustained as a result of the collision was in excess of \$311,000.00.

26.

Oconee County's KCEU did not report the deer / aircraft collision that occurred on April 23, 2010 to the FAA.

27.

On January 30, 2011, an aircraft carrying a returning Clemson soccer coach collided with a deer upon landing at Oconee County's KCEU airport.

28.

This collision required repairs to the aircraft involved of approximately \$178,000.00.

29.

This aircraft / wildlife collision was not reported to the U.S. Department of Transportation's Federal Aviation Administration.

First Claim for Relief — Negligence

30.

Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 29, above.

31.

Defendant Oconee County, by its operation of KCEU, owed duties to the general aviation public, including plaintiff, which duties included:

- a. the duty to use due care in the operation of KCEU to avoid creation or maintenance of conditions that presented risks or hazards to persons and aircraft using the KCEU facilities;
- b. the duty to keep the KCEU runways clear and free of obstructions so that landing or departing planes would not collide with objects, obstructions or animals;
- c. the duty to erect perimeter fences or other barriers to protect its runways from the free and unhindered access of wildlife from adjacent forest lands;
- d. the duty to monitor runway conditions for departing and landing aircraft once KCEU learned of and experienced an aircraft / wildlife collision resulting from the incursion of deer from adjacent forest lands onto the KCEU runway;
- e. the general duty to use due care and reasonable diligence to avoid causing or permitting harm to business invitees using the KCEU facilities; and

- f. the duty to warn business invitees and users of the KCEU facility of known risks and hazards that would not otherwise be known or apparent to operators of aircraft landing at or taking off from the KCEU facilities.

32.

Oconee County, in its operation of the KCEU, breached these duties, in that:

- a. it failed to use due care in the operation of the KCEU to avoid creation or maintenance of conditions that presented risks or hazards to persons and aircraft using the KCEU facilities;
- b. it failed to keep the KCEU runways clear and free of obstructions so that landing or departing planes would not collide with objects, obstructions or animals;
- c. it failed to erect perimeter fences or other barriers to protect its runways from the free and unhindered access of wildlife from adjacent forest lands;
- d. it failed to monitor runway conditions for landing aircraft once KCEU learned of and experienced an aircraft / wildlife collision resulting from the encroachment of deer from adjacent forest lands onto the KCEU runway;

- e. it failed to use due care and reasonable diligence to avoid causing or permitting harm to business invitees using the KCEU facilities;
- f. it failed to warn business invitees and users of the KCEU facility of known risks and hazards that would not otherwise be known or apparent to operators of aircraft landing at or taking off from the KCEU facilities;
- g. it failed to report prior collisions between aircraft and wildlife to the Federal Aviation Administration of the U.S. Department of Transportation; and
- h. it failed to post or make available adequate and realistic warnings concerning the risks presented by wildlife to aircraft using the KCEU facilities.

33.

As a direct and proximate result of the breaches of duty by Oconee County in its operation of the KCEU, which breaches constituted negligence, plaintiff's aircraft collided with multiple deer on the KCEU runway, sustaining damage in an amount in excess of \$311,000.00.

34.

Plaintiff is therefore entitled to have and recover from the defendant Oconee County the sum in excess of \$311,000.00 as damages for the injury proximately caused by the negligence of Oconee County in the operation of the KCEU.

Second Claim for Relief — Negligence Per Se

35.

Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 29, above.

36.

As part of the National Plan of Integrated Airport Systems (NPIAS) of the Federal Aviation Administration (FAA) of the United States government and as a recipient of grants from the FAA's Airport Improvement Project (AIP), defendant Oconee County's KCEU was subject to the wildlife hazard management provisions of Title 14 CFR 139.337, as further described in the FAA's Advisory Circular 150/5200-33B published August 28, 2007.

37.

At all times relevant to this civil action, defendant Oconee County's KCEU was required by the rules and regulations of the Federal Aviation Administration, to conduct wildlife hazard assessments and to institute and maintain a wildlife management plan for its runways, including construction of perimeter fences or other barriers to protect runways from wildlife, for the protection of aircraft using

KCEU and the mitigation of hazards and risks of collision caused by wildlife on or in the vicinity of KCEU's runways.

38.

The FAA regulations requiring wildlife hazard assessments and wildlife management plans for NPIAS airports, including Oconee County's KCEU airport, were instituted for the safety and protection of persons using such airports, because of the material risk of injury to persons and property presented by the potential for aircraft / wildlife collisions.

39.

Plaintiff Randolph M. James, P.C., as owner of the aircraft at issue in this civil action and as a user of defendant Oconee County's KCEU airport, was and is a member of the class of persons or entities intended to be protected by the FAA's regulations governing wildlife hazard assessments and wildlife management plans for NPIAS airports.

40.

Defendant Oconee County's KCEU airport breached and failed to comply with the applicable FAA regulations regarding wildlife hazard assessments and wildlife hazard management plans, in that KCEU neither conducted any wildlife hazard assessment for its facility nor prepared or implemented any wildlife hazard management plan.

41.

Plaintiff Randolph M. James, P.C. has sustained damages as a direct and proximate result of defendant Oconee County's KCEU airport to comply with applicable FAA regulations.

42.

The failure to comply with applicable FAA regulations constitutes negligence *per se* on the part of defendant Oconee County and its KCEU airport.

43.

As a direct and proximate result of defendant's negligence *per se*, plaintiff's aircraft collided with multiple deer on the KCEU runway, sustaining damage in an amount in excess of \$311,000.00.

44.

Plaintiff is therefore entitled to have and recover from the defendant Oconee County the sum of \$311,000.00 as damages for the injury proximately caused by the negligence *per se* of Oconee County in the operation of its KCEU airport.

WHEREFORE, having fully set forth its claims for relief, plaintiff Randolph M. James P.C. respectfully prays the Court:

1. that process issue for service upon the defendant;
2. that all costs of this action be taxed to the defendant;

3. that it have and recover the sum in excess of \$311,000.00 from the defendant as compensation for the injury proximately caused by the defendant's negligence and negligence *per se*;
4. for trial by jury of all issues raised by this Complaint;
5. for prejudgment interest at the legal rate; and
6. for such other and further relief as the Court may deem just and proper.

Respectfully submitted this 27th day of May, 2011.

s/ Peter F. Asmer, Jr.

Peter F. Asmer, Jr., Esq.
District Court ID No. 5575
Attorney for plaintiff

COZEN O'CONNOR
One Wachovia Center, Suite 2100
301 South College Street
Charlotte, North Carolina 28202
Tel: (704) 376-3400
Fax: (704) 335-9312
E-Mail: pasmer@cozen.com

Of Counsel:

Jefferson C. McConnaughey
COZEN O'CONNOR
SunTrust Plaza, Suite 2200
303 Peachtree Street NE
Atlanta, Georgia 30308
(404) 572-2000
(404) 572-2199 (facsimile)
E-Mail: jmcconnaughey@cozen.com

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Randolph M. James, P.C., a North Carolina Professional Corporation,

Plaintiff,

vs.

Oconee County Aeronautics Commission, d/b/a Oconee County Regional Airport (KCEU),

Defendant.

Civil Action File Number

COMPLAINT FOR DAMAGES — JURY TRIAL REQUESTED

Plaintiff Randolph M. James, P.C. ("James") herewith makes its complaint of the defendant Oconee County, South Carolina, d/b/a Oconee County Regional Airport ("OCRA" or "KCEU") as follows, respectfully showing the Court:

Jurisdiction and Venue

1.

Plaintiff is a professional corporation organized and existing under the laws of the State of North Carolina with its principal place of business located at 116 North Spruce Street, Winston-Salem, North Carolina 27101.

2.

Defendant Oconee County Aeronautics Commission is a commission elected by the Board of Commissioners of Oconee County, South Carolina pursuant to Oconee County, South Carolina Code of Ordinances Chapter 2, § 2-261 *et. seq.*, for the purpose of operating, as a business and as a proprietary commercial function, the Oconee County Regional Airport ("OCRA"). Defendant Oconee County Aeronautics Commission may be served by service of process upon the members of the commission, to wit, Mr. Wayne Rholetter, 268 East Bennett Road, Westminster, South Carolina 29693, Mr. Paul Mack, 128 Sunsel Boulevard, Seneca, South Carolina 29672, Mr. Tom Luke, Chairman of the Commission, 106 Terry Drive, Seneca, South Carolina 29678, and Mr. Fred Golden, 2010 Kaye Street, Seneca South Carolina 29678.

3.

This Court has jurisdiction over this civil action pursuant to 28 U.S.C. § 1332(a)(1) as this matter is between citizens of different states and the amount in controversy exceeds the sum of \$75,000.00, exclusive of interest and costs.

4.

Venue is proper for this action pursuant to 28 U.S.C. § 1391(a) in that the events or omissions giving rise to the claims of this civil action occurred in the district and division in which this action is brought and the defendant resides, for

purposes of service of process, in the district and division in which this action is brought.

Predicate Facts

5.

At all times relevant to this civil action, plaintiff James was the registered owner of an airplane manufactured by Piper Corporation, model PA-46-350P, serial number 4636364, Federal Aviation Administration (FAA) Registration Number N-364ST.

6.

At all times relevant to this civil action, defendant Oconee County Aeronautics Commission ("OCAC") operated the OCRA, FAA identifier KCEU, as a public regional general aviation facility, selling airplane and jet fuel, constructing hangars for the storage of air craft and generally providing the types of services normally provided by a fixed base operator ("FBO"), including construction and maintenance of facilities for the take-off and landing of aircraft, such as runways. At all times relevant to this civil action, planes could and did land and take off, take on fuel, be serviced and otherwise use OCAC's KCEU airport for general aviation purposes.

7.

At all times relevant to this civil action, defendant Oconee County's KCEU

was a general aviation facility included as part of the National Plan of Integrated Airport Systems (NPIAS) of the Federal Aviation Administration (FAA) of the United States government.

8.

At all times relevant to this civil action and continuously since 1997, defendant OCAC's KCEU airport has been a recipient of grants from the FAA's Airport Improvement Project (AIP).

9.

At all times relevant to this civil action, defendant OCAC's KCEU airport, as part of the FAA's NPIAS and a recipient of FAA AIP grants, was subject to the wildlife hazard management provisions of Title 14 CFR 139.337, as further described in the FAA's Advisory Circular 150/5200-33B published August 28, 2007.

10.

At all times relevant to this civil action, defendant OCAC's KCEU airport was required by the rules and regulations of the Federal Aviation Administration, to conduct wildlife hazard assessments and to institute and maintain a wildlife management plan for its runways to protect aircraft using KCEU from hazards and collisions caused by wildlife on or in the vicinity of KCEU's runways.

11.

At all times relevant to this civil action, Randolph M. James, the pilot of the Piper Mirage aircraft described in paragraph 5, above, was duly licensed, trained and certified for the operation of the aircraft and for landings and take-offs from general aviation facilities such as the KCEU.

12.

As of April 23, 2010, OCAC's KCEU airport did not have any wildlife management plan in force and effect for its runway or other facilities.

13.

As of April 23, 2010, the runway of defendant OCAC's KCEU airport adjoined a portion of Clemson University's protected forest, which forest was inhabited by various types of wildlife, including deer.

14.

As of April 23, 2010, there was no perimeter fence or other barrier to protect the runways of defendant OCAC's KCEU airport from incursion of deer or other wildlife from the immediately adjoining forest lands of Clemson University.

15.

Prior to April 23, 2010, in April of 2009, a collision occurred between a landing aircraft carrying former Clemson head football coach Tommy Bowden and a deer on the runway, resulting in more than \$70,000.00 damage to the aircraft.

16.

This aircraft / wildlife collision was not reported to the U.S. Department of Transportation's Federal Aviation Administration.

17.

Defendant OCAC's KCEU airport did not amend or enhance its published warnings to users of its facilities regarding hazards presented by wildlife on or in the vicinity of its runways, despite this significant aircraft / wildlife collision at its facility in 2009.

18.

Defendant OCAC's KCEU airport did not perform any wildlife hazard assessment, implement any wildlife management plan or otherwise take any steps to address or mitigate the wildlife hazard at its facility, despite this significant aircraft / wildlife collision at its facility.

19.

On or about the 28th day of March, 2010, Kevin Short, the director/manager of OCAC's KCEU airport acknowledged the need for perimeter fencing for the KCEU's runway in an interview with a reporter for the Anderson, South Carolina *Independent Mail*.

20.

On or about the 23rd day of April 2010 at approximately 10:40 p.m., plaintiff's

aircraft, piloted by Randolph M. James, attempted to take off from OCAC's KCEU airport

21.

Prior to take off at the KCEU airport, pilot James had investigated the warnings for wildlife published by OCAC's KCEU airport for this airport, which warnings made only general reference to the possibility of wildlife in the area of the runway and did not disclose either the free access to the runway by deer and other wildlife from the Clemson University forest or the occurrence of any prior collision between aircraft and wildlife at OCAC's KCEU airport.

22.

Had defendant OCAC, in operation of its KCEU airport, properly reported prior aircraft / deer collisions and provided full and appropriate warnings concerning the potential for wildlife on the defendant's KCEU runway, pilot James could have taken additional precautions in making his departure at night from KCEU, could have taken off at a different and earlier time while lighting conditions were better and otherwise have taken steps to avoid colliding with a herd of deer on the KCEU runway.

23.

After making his preparations for takeoff and committing the aircraft to takeoff, pilot James felt a collision with an object, later determined to be deer. The

split second prior to impact, pilot James observed one deer on KCEU's runway 7, immediately in front of N364ST's spinning prop that made collision inevitable and unavoidable by pilot James.

24.

Plaintiff's aircraft collided with the deer, killing them and sustaining significant damage to the aircraft resulting from the nose gear collapse caused by striking one or more of the deer.

25.

The total damages sustained by plaintiff, including the cost of returning the aircraft to an airworthy condition, plus other damages sustained as a result of the collision was in excess of \$311,000.00.

26.

OCAC's KCEU airport did not report the deer / aircraft collision that occurred on April 23, 2010 to the FAA.

27.

On January 30, 2011, an aircraft carrying a returning Clemson soccer coach collided with a deer upon landing at OCAC's KCEU airport.

28.

This collision required repairs to the aircraft involved of approximately \$178,000.00.

29.

This aircraft / wildlife collision was not reported to the U.S. Department of Transportation's Federal Aviation Administration.

First Claim for Relief — Negligence

30.

Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 29, above.

31.

Defendant OCAC, by its operation of KCEU, owed duties to the general aviation public, including plaintiff, which duties included:

- a. the duty to use due care in the operation of KCEU to avoid creation or maintenance of conditions that presented risks or hazards to persons and aircraft using the KCEU facilities;
- b. the duty to keep the KCEU runways clear and free of obstructions so that landing or departing planes would not collide with objects, obstructions or animals;
- c. the duty to erect perimeter fences or other barriers to protect its runways from the free and unhindered access of wildlife from adjacent forest lands;

- d. the duty to monitor runway conditions for departing and landing aircraft once KCEU learned of and experienced an aircraft / wildlife collision resulting from the incursion of deer from adjacent forest lands onto the KCEU runway;
- e. the general duty to use due care and reasonable diligence to avoid causing or permitting harm to business invitees using the KCEU facilities; and
- f. the duty to warn business invitees and users of the KCEU facility of known risks and hazards that would not otherwise be known or apparent to operators of aircraft landing at or taking off from the KCEU facilities.

32.

Defendant OCAC, in its operation of the KCEU, breached these duties, in that:

- a. it failed to use due care in the operation of the KCEU to avoid creation or maintenance of conditions that presented risks or hazards to persons and aircraft using the KCEU facilities;
- b. it failed to keep the KCEU runways clear and free of obstructions so that landing or departing planes would not collide with objects, obstructions or animals;

- c. it failed to erect perimeter fences or other barriers to protect its runways from the free and unhindered access of wildlife from adjacent forest lands;
- d. it failed to monitor runway conditions for landing aircraft once KCEU learned of and experienced an aircraft / wildlife collision resulting from the encroachment of deer from adjacent forest lands onto the KCEU runway;
- e. it failed to use due care and reasonable diligence to avoid causing or permitting harm to business invitees using the KCEU facilities;
- f. it failed to warn business invitees and users of the KCEU facility of known risks and hazards that would not otherwise be known or apparent to operators of aircraft landing at or taking off from the KCEU facilities;
- g. it failed to report prior collisions between aircraft and wildlife to the Federal Aviation Administration of the U.S. Department of Transportation; and
- h. it failed to post or make available adequate and realistic warnings concerning the risks presented by wildlife to aircraft using the KCEU facilities.

As a direct and proximate result of the breaches of duty by OCAC in its operation of the KCEU, which breaches constituted negligence, plaintiff's aircraft collided with multiple deer on the KCEU runway, sustaining damage in an amount in excess of \$311,000.00.

34.

Plaintiff is therefore entitled to have and recover from the defendant OCAC the sum in excess of \$311,000.00 as damages for the injury proximately caused by the negligence of OCAC in the operation of the KCEU.

Second Claim for Relief — Negligence Per Se

35.

Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 29, above.

36.

As part of the National Plan of Integrated Airport Systems (NPIAS) of the Federal Aviation Administration (FAA) of the United States government and as a recipient of grants from the FAA's Airport Improvement Project (AIP), defendant OCAC's KCEU airport was subject to the wildlife hazard management provisions of Title 14 CFR 139.337, as further described in the FAA's Advisory Circular 150/5200-33B published August 28, 2007.

37.

At all times relevant to this civil action, defendant OCAC's KCEU airport was required by the rules and regulations of the Federal Aviation Administration, to conduct wildlife hazard assessments and to institute and maintain a wildlife management plan for its runways, including construction of perimeter fences or other barriers to protect runways from wildlife, for the protection of aircraft using KCEU and the mitigation of hazards and risks of collision caused by wildlife on or in the vicinity of KCEU's runways.

38.

The FAA regulations requiring wildlife hazard assessments and wildlife management plans for NPIAS airports, including OCAC's KCEU airport, were instituted for the safety and protection of persons using such airports, because of the material risk of injury to persons and property presented by the potential for aircraft / wildlife collisions.

39.

Plaintiff Randolph M. James, P.C., as owner of the aircraft at issue in this civil action and as a user of defendant OCAC's KCEU airport, was and is a member of the class of persons or entities intended to be protected by the FAA's regulations governing wildlife hazard assessments and wildlife management plans for NPIAS airports.

40.

Defendant OCAC's KCEU airport breached and failed to comply with the applicable FAA regulations regarding wildlife hazard assessments and wildlife hazard management plans, in that OCAC and/or KCEU neither conducted any wildlife hazard assessment for its facility nor prepared or implemented any wildlife hazard management plan.

41.

Plaintiff Randolph M. James, P.C. has sustained damages as a direct and proximate result of defendant OCAC's KCEU airport to comply with applicable FAA regulations.

42.

The failure to comply with applicable FAA regulations constitutes negligence *per se* on the part of defendant OCAC and its KCEU airport.

43.

As a direct and proximate result of defendant's negligence *per se*, plaintiff's aircraft collided with multiple deer on the KCEU runway, sustaining damage in an amount in excess of \$311,000.00.

44.

Plaintiff is therefore entitled to have and recover from the defendant OCAC the sum of \$311,000.00 as damages for the injury proximately caused by the

negligence *per se* of OCAC in the operation of its KCEU airport.

WHEREFORE, having fully set forth its claims for relief, plaintiff Randolph M. James P.C. respectfully prays the Court:

1. that process issue for service upon the defendant;
2. that all costs of this action be taxed to the defendant;
3. that it have and recover the sum in excess of \$311,000.00 from the defendant as compensation for the injury proximately caused by the defendant's negligence and negligence *per se*;
4. for trial by jury of all issues raised by this Complaint;
5. for prejudgment interest at the legal rate; and
6. for such other and further relief as the Court may deem just and proper.

Respectfully submitted this 29th day of July, 2011.

s/ Peter F. Asmer, Jr.
Peter F. Asmer, Jr., Esq.
District Court ID No. 5575
Attorney for plaintiff

COZEN O'CONNOR
One Wachovia Center, Suite 2100
301 South College Street
Charlotte, North Carolina 28202
Tel: (704) 376-3400
Fax: (704) 335-9312
E-Mail: pasmer@cozen.com

Of Counsel:

Jefferson C. McConnaughey
COZEN O'CONNOR
SunTrust Plaza, Suite 2200
303 Peachtree Street NE
Atlanta, Georgia 30308
(404) 572-2000
(404) 572-2199 (facsimile)
E-Mail: jmconnaughey@cozen.com

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Randolph M. James, P.C., a North Carolina)
Professional Corporation,)
)
Plaintiff,)
)
v.)
)
Oconee County Aeronautics Commission,)
d/b/a Oconee County Regional Airport)
(KCEU),)
)
Defendant.)

CIVIL ACTION FILE
NO. 8:11-CV-01855-HMH

DEFENDANT'S MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b), Defendant Oconee County, a body politic of the State of South Carolina, incorrectly identified by Plaintiff Randolph M. James, P.C., a North Carolina Professional Corporation ("Plaintiff") as Oconee County Aeronautics Commission, d/b/a Oconee County Regional Airport (KCEU) ("Oconee") hereby this Court for an Order dismissing Plaintiff's Complaint, pursuant to Fed. R. Civ. P. 12(b)(1), because this Court lacks subject-matter jurisdiction to entertain Plaintiff's Complaint. Additionally, Plaintiff's Complaint fails to state a claim upon which relief can be granted; therefore, Oconee is entitled to dismissal of Plaintiff's Complaint under Fed. R. Civ. P. 12(b)(6).

In its Complaint, Plaintiff seeks civil relief from Oconee for causes of action for negligence and negligence per se, both of which constitute tort actions. Oconee is a political subdivision of the state of South Carolina. (See Plaintiff's Complaint, ¶ 2.) Plaintiff is a corporate citizen of North Carolina. (See Plaintiff's Complaint, ¶ 1.) Tort liability for political subdivisions of South Carolina is governed by the South Carolina Tort Claims Act, S.C. Code Ann. §15-78-10 *et seq.* S.C. Code Ann. §15-78-50 requires persons who allegedly suffered

losses proximately caused by a state agency or political subdivision to file a claim under the procedure provided in the Tort Claims Act. S.C. Code Ann. §15-78-100(b) of the Tort Claims Act states that “jurisdiction for any action brought under [the Tort Claims Act] is in the circuit court and brought in the county in which the act or omission occurred.” The statute does not allow for jurisdiction in the U.S. District Court.

Because this Motion is a Motion to Dismiss, it is exempt from the consultation requirement set forth in Local Rule 7.02, DSC.

September 22, 2011

By: /s/ C. Daniel Atkinson

Michael B.T. Wilkes, Fed. ID # 4658
mwilkes@wilkeslaw.com
C. Daniel Atkinson, Fed. ID # 9626
datkinson@wilkeslaw.com

WILKES LAW FIRM, P.A.
127 Dunbar Street, Suite 200
Spartanburg, South Carolina 29306
Telephone: 864-591-2355
Facsimile: 864-591-1767

Attorneys for Defendant

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ANDERSON DIVISION

Randolph M. James, P.C., a North Carolina Professional Corporation,)	
)	
Plaintiff,	)	C.A. No. 8:11-1855-HMH
)	
vs.	)	OPINION & ORDER
)	
Oconee County Aeronautics Commission, d/b/a Oconee County Regional Airport (KCEU),)	
)	
Defendant.)	

This matter is before the court on Defendant's motion to dismiss pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Plaintiff alleges in the complaint that its aircraft struck a deer while attempting to takeoff from the Oconee County Regional Airport. (Compl. ¶¶ 23-24.) As a result, the Plaintiff alleges that the aircraft suffered damage because of the Defendant's negligence. (*Id.*, generally.)

In its complaint, the Plaintiff alleges that the Defendant, Oconee County Aeronautics Commission ("Commission"), operates the Oconee County Regional Airport

as a public regional general aviation facility, selling airplane and jet fuel, constructing hangars for the storage of air craft and generally providing the types of services normally provided by a fixed base operator ("FBO"), including construction and maintenance of facilities for the take-off and landing of aircraft, such as runways. At all times relevant to this civil action, planes could and did land and take off, take on fuel, be serviced and otherwise use OCAC's KCEU airport for general aviation purposes.

(Id. ¶ 6.) The Commission filed this motion to dismiss on September 22, 2011, alleging that the proper party defendant is Oconee County, not the Commission. The Commission submits that the court lacks subject matter jurisdiction because this case arises under the South Carolina Tort Claims Act and exclusive jurisdiction lies in the South Carolina Circuit Court. The Plaintiff filed a memorandum in opposition on October 11, 2011. This matter is now ripe for consideration.

II. DISCUSSION OF THE LAW

When presented with a Rule 12(b)(6) motion to dismiss, the court must restrict its inquiry to the sufficiency of the complaint rather than “resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.” Republican Party of North Carolina v. Martin, 980 F.2d 943, 952 (4th Cir. 1992). To withstand a Rule 12(b)(6) motion, “a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (internal quotation marks omitted). Under this plausibility standard, the court should “assume th[e] veracity” of well-pled factual allegations “and then determine whether they plausibly give rise to an entitlement to relief.” Id. at 1950.

In a motion to dismiss pursuant to Rule 12(b)(1), “[t]he plaintiff has the burden of proving that subject matter jurisdiction exists.” Evans v. B.F. Perkins Co., 166 F.3d 642, 647 (4th Cir. 1999). “When a defendant challenges subject matter jurisdiction pursuant to 12(b)(1), the . . . court is to regard the pleadings as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment.” Id. (internal quotation marks omitted). The motion to dismiss should be granted “only if the

material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law.” Richmond, Fredericksburg & Potomac R.R. Co. v. United States, 945 F.2d 765, 768 (4th Cir. 1991).

A. South Carolina Tort Claims Act (“SCTCA”)

The Commission alleges that (1) it is a “dependent commission of Oconee County, created by Oconee County Council and subject to the authority and control of Oconee County Counsel” and thus, Oconee County is the proper defendant whose liability is controlled by the SCTCA; and (2) even assuming that the Commission is an independent agency, “the Commission would be a governmental agency, whose liability is controlled by the” SCTCA. (Def. Mot. Dismiss 1.); (Def. Mem. Supp. Mot. Dismiss 7.)

Under the SCTCA, “[a]ny person who may suffer a loss proximately caused by a tort of the State, an agency, a political subdivision, or a governmental entity, and its employee acting within the scope of his official duty may file a claim [under the SCTCA].” S.C. Code Ann. § 15-78-50(a). “The [SCTCA] governs all tort claims against governmental entities and is the exclusive civil remedy available in an action against a governmental entity or its employees.” Proctor v. Dep’t of Health & Envtl. Control, 628 S.E.2d 496, 502 (S.C. Ct. App. 2006) (internal quotation marks omitted). “The [SCTCA] waives sovereign immunity for torts committed by the State, its political subdivisions, and governmental employees acting within the scope of their official duties.” Id. (internal quotation marks omitted). “However, the Act’s waiver of governmental immunity is limited [and] . . . the provisions of the Act must be liberally construed in favor of limiting the liability of the State.” Id. (internal quotation marks and citations omitted). Thus, the Commission submits that this court is without jurisdiction to hear this

matter because S.C. Code Ann. § 15-78-100(b) provides that jurisdiction for an action brought under the SCTCA “is in the circuit court and brought in the county in which the act or omission occurs.”

In support of its position that Oconee County is the proper defendant, the Commission alleges that it was established

by Oconee County Council through Oconee County Ordinance No. 79-18, and it was created on January 1, 1980. This Ordinance is codified at §2-261 of the Oconee County Code of Ordinances. . . . [(hereinafter “Ordinance”)] Section 5 of the Ordinance defines the duties of the Commission as, inter alia, “advis[ing] Oconee County Council on any matter affecting aeronautics, the operation of the County’s airport and airport facilities.” Section 5 of the Ordinance does not provide the Commission any independent authority – its duties are limited by the creating body, Oconee County Council, to advising and consulting with the Oconee County Council regarding aeronautics issues, including ownership, maintenance and profitability of the Oconee County Regional Airport. Specifically, . . . the Commission has no authority to act on behalf of the County.

(Def. Mem. Supp. Mot. Dismiss 2.) The Plaintiff submits that it is premature to determine whether Oconee County is the proper party because

plaintiff has had no opportunity to determine in discovery whether, by usage, custom or practice, the Oconee County Aeronautics Commission has properly fulfilled its duties under the ordinance or whether the Commission has assumed a greater scope or extent of authority and action than argued by the defendant.

(Pl. Mem. Opp’n Mot. Dismiss 5.) Further, the Plaintiff alleges that the court cannot consider the Ordinance in deciding a motion to dismiss for failure to state a claim because it falls outside of the pleadings. (Id. at 6.) However, in deciding a Rule 12(b)(6) dismissal, the court “may properly take judicial notice of matters of public record.” Philips v. Pitt County Men’s Hosp., 572 F.3d 176, 180 (4th Cir. 2009). The court “may also consider documents attached to the complaint, . . . as well as those attached to the motion to dismiss, so long as they are integral to

the complaint and authentic.” Id.; Sec’y of State for Def. v. Trimble Navigation, Ltd., 484 F.3d 700, 705 (4th Cir. 2007) (finding that court is authorized to take judicial notice of public information such as court documents without converting a motion to dismiss under Rule 12(b)(6) into a motion for summary judgment.) The Ordinance is a matter of public record, and the court may take judicial notice of the Ordinance without converting this matter to a motion for summary judgment. There is no evidence that this Ordinance has been amended. Further, the Plaintiff cites the Ordinance in its complaint. (Compl. ¶ 2.)

The Ordinance identifies that the role of the Commission is to advise and make recommendations to Oconee County Council, prepare plans for Oconee County Council, and participate in the “formulation of the budget.” Ordinance § 2-265. The Ordinance specifically provides that

[i]n no event, . . . shall this Commission enter into any contracts, contractual obligations, employment of personnel, purchase of equipment or expenditure of funds not itemized and authorized in the budget under which it shall operate, without the prior written consent, affirmation and authorization of Oconee County Council. In any event, the power and authority to enter into any contract binding Oconee County is vested with and shall remain in the Supervisor and Oconee County Council and is not herein delegated to this Commission.

Id. § 2-265(1). The Commission submits that it was created by Oconee County pursuant to S.C. Code Ann. § 4-9-30(6), which provides that counties may

establish such agencies, departments, boards, commissions and positions in the county as may be necessary and proper to provide services of local concern for public purposes, to prescribe the functions thereof and to regulate, modify, merge or abolish any such agencies, departments, boards, commissions and positions, except as otherwise provided for in this title.

The Ordinance is devoid of any inference that the Commission has independent authority to operate the airport. To the contrary, as set forth above, the Commission is dependent and

reports directly to the Oconee County Council for decisions regarding the operation of the airport.

Further, the Commission in this case is distinguishable from Willis Constr. Co. v. Sumter Airport Comm'n, 419 S.E.2d 240, 241 (S.C. Ct. App. 1992), in which the airport commission was a named defendant. In contrast to the powers of the Commission in the instant case, in Willis, the airport commission was authorized by statute to receive money from any source, "to hold and enjoy property . . . in the County of Sumter . . . for the purpose of establishing and maintaining airports in the County of Sumter," and to make rules and regulations for the operation of the airports in Sumter County. Id. Based on the foregoing, Oconee County, as the owner and operator of the airport, is the proper party defendant in this case. Therefore, the Commission's motion to dismiss is granted pursuant to Rule 12(b)(6) for failure to state a claim for relief against the Commission.

In addition, Oconee County is a political subdivision of South Carolina under the SCTCA and thus, its tort liability is governed by the SCTCA. S.C. Code Ann. §§ 15-78-30(h) & 50(a). "Political subdivision" is defined in the SCTCA as

the counties, municipalities, school districts, a regional transportation authority established pursuant to Chapter 25 of Title 58, and an operator as defined in item (8) of § 58-25-20 which provides public transportation on behalf of a regional transportation authority, and special purpose districts of the State and any agency, governmental health care facility, department, or subdivision thereof.

Id. As a result, the court is without jurisdiction to hear this matter because S.C. Code Ann. § 15-78-100(b) provides that jurisdiction for an action brought under the SCTCA lies "in the circuit court and brought in the county in which the act or omission occurred." Having found

that Oconee County is the proper defendant, the court lacks subject matter jurisdiction.¹ Martin v. Lott, C/A No. 3:07-3782-JFA, 2010 WL 547175, at *11 (D.S.C. Feb. 9, 2010) (unpublished) (“Because Mr. and Mrs. Martin assert SCTCA claims solely against Sheriff Leon Lott, this court lacks jurisdiction to hear the state-law claims.”).

It is therefore

ORDERED that the Defendant’s motion to dismiss, docket number 9, is granted.

IT IS SO ORDERED.

s/Henry M. Herlong, Jr.
Senior United States District Judge

Greenville, South Carolina
November 28, 2011

¹ Having granted the motion to dismiss, the court declines to address the Defendant’s additional arguments in support of dismissal.

EXHIBIT F

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE TENTH JUDICIAL DISTRICT
COUNTY OF OCONEE)	
	)	CIVIL ACTION NO. 2012-CP-37-319
RANDOLPH M. JAMES, PC, a North)	
Carolina Professional Corporation)	
)	
Plaintiff,)	
)	
vs.)	
	)	AFFIDAVIT OF TONY FINLEY
OCONEE COUNTY d/b/a OCONEE)	
COUNTY AERONAUTICS COMMISSION)	
and d/b/a OCONEE COUNTY REGIONAL)	
AIRPORT (KCEU))	
)	
Defendant.)	
)	

I, Tony Finley, swear and depose the following:

1. The information which forms the basis of this Affidavit is personally known by me to be true.
2. I am over eighteen (18) years of age and I am employed with Upstate Carolina Legal Services located at 1754 Woodruff Road, Greenville, South Carolina.
3. As an employee of Upstate Carolina Legal Services I serve as a process server, serving legal documents primarily in the upstate of South Carolina including Oconee County.
4. In regard to the above-captioned lawsuit, I was retained by the law firm of Cozen O'Connor to serve the Summons and Complaint upon Mr. Reginald Dexter, the Chairman of the Oconee County Counsel, and upon Elizabeth Hulse, the Clerk to the Oconee County Counsel.
5. I personally served Chairman Dexter with the Summons and Complaint on May 10, 2012 at 12:20 p.m. at 124 S. Shore Drive, Fair Play, South Carolina, County of Oconee. Attached hereto as Exhibit A is a true and correct copy of the Affidavit of Service, signed by me stating that I personally served Chairman Dexter on May 11, 2012.
6. On May 10, 2012, I traveled to the Oconee County administrative offices located at 415 S. Pine Street, Walhalla, South Carolina, County of Oconee to serve Ms. Hulse.

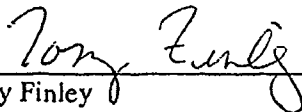
7. Upon arriving at the administrative offices, I learned that Ms. Hulse was not present. I explained to the personnel in the office that I was there to serve legal papers upon the County and asked if anyone could accept service on Ms. Hulse's behalf.

8. Mr. D. Glenn Breed, the Assistant Administrator for E&E Services in Oconee County, advised that he worked with Ms. Hulse and could accept service of the Summons and Complaint on her behalf. Upon the representation of Mr. Breed, I served him with the Summons and Complaint for the above-captioned lawsuit.

9. Attached hereto as Exhibit B is a true and correct copy of my Affidavit of Service signed by me stating that I served Mr. Breed with the Summons and Complaint for Ms. Hulse on May 10, 2012 at 1:05 p.m.

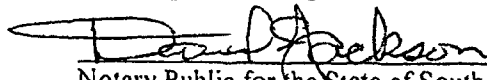
FURTHER, AFFIANT SAYETH NOT.

IN WITNESS WHERE OF, I hereunto set my hand and seal this 28th day of August 2012.



Tony Finley

Subscribed and sworn to before me
this 28 day of August 2012.



Notary Public for the State of South Carolina

My Commission Expires
My Commission Expires: August 17, 2019

STATE OF SOUTH CAROLINA,)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

RANDOLPH M. JAMES, P.C., a)
North Carolina Professional)
Corporation)

TENTH JUDICIAL CIRCUIT

Plaintiff(s))

vs.)

AFFIDAVIT OF SERVICE

OCONEE COUNTY d/b/a oconee)
COuntY Aeronautics Commission and)
d/b/a Oconee County Regional Airport)
(KCEU))

FILE NO: 12-CP-37-319

Defendant(s).)

Tony Finley

RECEIVED
MAY 16 11:11
CLERK OF COURT
SOUTH CAROLINA

PERSONALLY PREPARED BEFORE ME, the undersigned deponent, who being duly sworn

says that (s)he served the Summons and Complaint in this action
(Describe document(s) served)

on Reginald Dexter, Chairman, Oconee County Council, by delivery to
(Name of party served)

Reginald Dexter, Chairman, Oconee County Council personally;
(Name of party served)

_____ the _____ of the party served,
(Name of person served) (Note relationship to party)

and a person of discretion residing at the residence of the party served;

_____ the _____ of _____
(Name of person served) (Title) (Name of corporate party served)

and leaving with (him) (her) a copy at 124 S. Shore Drive
(Street address)

in Fair Play Oconee County, South Carolina,
(City or Town) County

on May 16th 2012 at 12:20 pm o'clock

that deponent knows the person so served, and that deponent is not a party of this action, is not less than eighteen (18) years of age and has no interest therein or connection therewith.

Unable to locate and serve the above process on the defendant after diligent efforts to do so.
The process is returned unexecuted.

Sworn to and Subscribed before me)
this 16th day of May, 2012)
Pat J. Beckett)
Notary Public for South Carolina)

Tony Finley
Signature of Deponent

My Commission expires 12/22)

Entered in the Sheriff's Service Book on

Book

Page

Number

EXHIBIT A

STATE OF SOUTH CAROLINA,)

COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

RANDOLPH M. JAMES, PC, a North Carolina Professional Corporation)

TENTH JUDICIAL CIRCUIT

Plaintiff(s))

vs.)

AFFIDAVIT OF SERVICE

OCONEE COUNTY d/b/a OCONEE COUNTY AERONAUTICS COMMISSION and d/b/a OCONEE COUNTY REGIONAL AIRPORT (KCEU)

FILE NO: 12-CP-37-319

Defendant(s).)

Tony Finley

PERSONALLY PREPARED BEFORE ME, the undersigned deponent, who being duly sworn

says that (s)he served the SUMMONS and COMPLAINT in this action
(Describe document(s) served)

on ELIZABETH HULSE, Clerk to Oconee County Council, by delivery to
(Name of party served)

ELIZABETH HULSE, Clerk to Oconee County Council personally;
(Name of party served)

D. Glenn Breed, Assist Admin. for E & E Services the Co-worker of the party served,
(Name of person served) (Note relationship to party)

and a person of discretion residing at the residence of the party served;

Elizabeth Hulse, the Clerk to Council of Oconee County
(Name of person served) (Title) (Name of corporate party served)

and leaving with (him) (her) a copy at 415 S. Pine Street
(Street address)

in Walhalla Oconee County, South Carolina,
(City or Town) County

on May 11th 2012 at 1:05 pm o'clock

that deponent knows the person so served, and that deponent is not a party of this action, is not less than eighteen (18) years of age and has no interest therein or connection therewith.

Unable to locate and serve the above process on the defendant after diligent efforts to do so.

The process is returned unexecuted.

Sworn to and Subscribed before me
this 11th day of May, 2012

Pot J. Beecool
Notary Public for South Carolina

Tony Finley
Signature of Deponent

EXHIBIT B

My Commission expires 3/2/2022)

Entered in the Sheriff's Service Book on

Book

Page

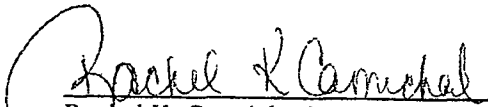
Number

EXHIBIT B

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *Affidavit of Tony Finley* has been served this 29th day of August, 2012, upon all counsel of record via electronic mail, and US Mail, postage pre-paid, addressed to such counsel as follows:

C. Daniel Atkinson, Esq.
datkinson@wilkeslaw.com
Wilkes Law Firm
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
Counsel for Defendant



Rachel K. Carmichael

STATE OF SOUTH CAROLINA)
)
 COUNTY OF OCONEE)
)
 Randolph M. James, P.C., a North)
 Carolina Professional Corporation,)
)
 Plaintiff,)
)
 vs.)
)
 Oconee County, d/b/a Oconee County)
 Aeronautics Commission and d/b/a)
 Oconee County Regional Airport)
 (KCEU),)
)
 Defendant.)

COURT OF COMMON PLEAS
 TENTH JUDICIAL CIRCUIT

Civil Action File Number
 2012-CP-37-319

FILED OCONEE, SC
 BEVERLY H. WHITEFIELD
 CLERK OF COURT
 2012 SEP -11 AM 10:41

**FIRST AMENDED COMPLAINT FOR DAMAGES
 JURY TRIAL REQUESTED**

Plaintiff Randolph M. James, P.C. ("James"), in due time as provided by the South Carolina Rules of Civil Procedure, herewith makes its First Amended Complaint of the defendant Oconee County, South Carolina, d/b/a Oconee County Aeronautics Commission and d/b/a Oconee County Regional Airport ("OCRA" or "KCEU") as follows, respectfully showing the Court:

Jurisdiction and Venue

1.

Plaintiff is a professional corporation organized and existing under the laws of the State of North Carolina with its principal place of business located at 116 North

Spruce Street, Winston-Salem, North Carolina 27101.

2.

Defendant Oconee County is a political subdivision of the State of South Carolina which, among other things, operates as a business the Oconee County Regional Airport. Defendant Oconee County may be served by service of process upon the County Council's Clerk, the Hon. Elizabeth G. Hulse, Oconee County Administrative Offices, 415 South Pine Street, Walhalla, South Carolina 29691.

3.

Oconee County Aeronautics Commission is a commission elected by the Board of Commissioners of Oconee County, South Carolina pursuant to Oconee County, South Carolina Code of Ordinances Chapter 2, § 2-261 *et. seq.*, for the purpose of operating, as a business and as a proprietary commercial function, the Oconee County Regional Airport ("OCRA").

4.

This Court has jurisdiction over this civil action as this matter involves an amount in controversy in excess of the sum of \$7,500.00.

5.

Venue is proper for this action pursuant to S.C. Code Ann. § 15-78-100(b) in that the tortious acts giving rise to plaintiff's complaint occurred in Oconee County, South Carolina.

Predicate Facts

6.

At all times relevant to this civil action, plaintiff James was the registered owner of an airplane manufactured by Piper Corporation, model PA-46-350P, serial number 4636364, Federal Aviation Administration (FAA) Registration Number N-364ST.

7.

At all times relevant to this civil action, defendant Oconee County, through the Oconee County Aeronautics Commission ("OCAC") operated the OCRA, FAA identifier KCEU, as a public regional general aviation facility, selling airplane and jet fuel, constructing hangars for the storage of air craft and generally providing the types of services normally provided by a fixed base operator ("FBO"), including construction and maintenance of facilities for the take-off and landing of aircraft, such as runways. At all times relevant to this civil action, planes could and did land and take off, take on fuel, be serviced and otherwise use Oconee County's KCEU airport for general aviation purposes.

8.

At all times relevant to this civil action, defendant Oconee County's KCEU was a general aviation facility included as part of the National Plan of Integrated Airport Systems (NPIAS) of the Federal Aviation Administration (FAA) of the

United States government.

9.

At all times relevant to this civil action, Oconee County's KCEU airport engaged in proprietary functions associated with the airport operation, including the sale of fuel to aircraft, thus waiving any governmental immunity as to its operation.

10.

At all times relevant to this civil action and continuously since 1997, defendant OCAC's KCEU airport has been a recipient of grants from the FAA's Airport Improvement Project (AIP).

11.

At all times relevant to this civil action, defendant Oconee County's KCEU airport, as a recipient of FAA AIP (Airport Improvement Project) grants, was contractually obligated, pursuant to assurances imposed upon KCEU by 49 U.S.C. § 47107, to maintain its terminal airspace so as to protect against airport hazards, which term is defined by 49 U.S.C. § 47107 to include "a use of land near the airport, that obstructs or otherwise is hazardous to the landing or taking off of aircraft at or from the airport."

12.

Fulfillment of the assurances made by defendant Oconee County's KCEU airport in consideration of receipt of funds from AIP grants would require the KCEU airport to assess and mitigate the hazard presented to aircraft using the airport runways by deer coming on to the airport's runways, including runway 7, from adjacent land known to be habitat for deer and for which there was no fencing or other barrier to keep the deer off the runways.

13.

At all times relevant to this civil action, Randolph M. James, the pilot of the Piper Mirage aircraft described in paragraph 5, above, was duly licensed, trained and certified for the operation of the aircraft and for landings and take-offs from general aviation facilities such as the KCEU.

14.

As of April 23, 2010, Oconee County's KCEU airport had not conducted any wildlife assessment of its facility, did not have any wildlife management plan in force and effect for its runway or other facilities and had taken no action to erect any barrier or fence to keep deer off the airport's runways.

15.

As of April 23, 2010, the runway of defendant Oconee County's KCEU airport adjoined a portion of Clemson University's protected forest, which forest was

known by KCEU personnel to be inhabited by various types of wildlife, including deer.

16.

As of April 23, 2010, there was no perimeter fence or other barrier to protect the runways of defendant Oconee County's KCEU airport from incursion of deer or other wildlife from the immediately adjoining forest lands of Clemson University.

17.

Prior to April 23, 2010, in April of 2009, a collision occurred between a landing aircraft carrying former Clemson head football coach Tommy Bowden and a deer on the runway, resulting in more than \$70,000.00 damage to the aircraft.

18.

This aircraft / wildlife collision was not reported to the U.S. Department of Transportation's Federal Aviation Administration.

19.

Defendant Oconee County's KCEU airport did not amend or enhance its published warnings to users of its facilities regarding hazards presented by wildlife on or in the vicinity of its runways, despite this significant aircraft / wildlife collision at its facility in 2009.

20.

Defendant Oconee County's KCEU airport did not perform any wildlife hazard assessment, implement any wildlife management plan or otherwise take any steps to address or mitigate the wildlife hazard at its facility, despite this significant aircraft / wildlife collision at its facility.

21.

On or about the 28th day of March, 2010, Kevin Short, the director/manager of Oconee County's KCEU airport acknowledged the need for perimeter fencing for the KCEU's runway in an interview with a reporter for the Anderson, South Carolina *Independent Mail*.

22.

On or about the 23rd day of April, 2010, Randolph M. James, pilot of plaintiff's aircraft, purchased fuel from the Oconee County's KCEU fuel facility, which is operated as a proprietary function by the KCEU airport.

23.

Thereafter, on or about the 23rd day of April 2010 at approximately 10:40 p.m., plaintiff's aircraft, piloted by Randolph M. James, attempted to take off from Oconee County's KCEU airport.

24.

Prior to take off at the KCEU airport, pilot James had investigated the warnings

for wildlife published by Oconee County's KCEU airport for this airport, which warnings made only general reference to the possibility of wildlife in the area of the runway and did not disclose either the free access to the runway by deer and other wildlife from the Clemson University forest or the occurrence of any prior collision between aircraft and wildlife at Oconee County's KCEU airport.

25.

Had defendant Oconee County's, in operation of its KCEU airport, properly reported prior aircraft / deer collisions and provided full and appropriate warnings concerning the potential for wildlife on the defendant's KCEU runway, pilot James could have taken additional precautions in making his departure at night from KCEU, could have taken off at a different and earlier time while lighting conditions were better and otherwise have taken steps to avoid colliding with a herd of deer on the KCEU runway.

26.

After making his preparations for takeoff and committing the aircraft to takeoff, pilot James felt a collision with an object, later determined to be deer. The split second prior to impact, pilot James observed one deer on KCEU's runway 7, immediately in front of N364ST's spinning prop that made collision inevitable and unavoidable by pilot James.

27.

Plaintiff's aircraft collided with the deer, killing them and sustaining significant damage to the aircraft resulting from the nose gear collapse caused by striking one or more of the deer.

28.

The total damages sustained by plaintiff, including the cost of returning the aircraft to an airworthy condition, plus other damages sustained as a result of the collision was in excess of \$311,000.00.

29.

Oconee County's KCEU airport did not report the deer / aircraft collision that occurred on April 23, 2010 to the FAA.

30.

On January 30, 2011, an aircraft carrying a returning Clemson soccer coach collided with a deer upon landing at Oconee County's KCEU airport.

31.

This collision required repairs to the aircraft involved of approximately \$178,000.00.

32.

This aircraft / wildlife collision was not reported to the U.S. Department of Transportation's Federal Aviation Administration.

First Claim for Relief — Negligence

33.

Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 32, above.

34.

Defendant Oconee County, by its operation of KCEU, owed duties to the general aviation public, including plaintiff, which duties included:

- a. the duty to use due care in the operation of KCEU to avoid creation or maintenance of conditions that presented risks or hazards to persons and aircraft using the KCEU facilities;
- b. the duty to keep the KCEU runways clear and free of obstructions so that landing or departing planes would not collide with objects, obstructions or animals;
- c. the duty to erect perimeter fences or other barriers to protect its runways from the free and unhindered access of wildlife from adjacent forest lands;
- d. the duty to monitor runway conditions for departing and landing aircraft;

- e. the general duty to use due care and reasonable diligence to avoid causing or permitting harm to business invitees using the KCEU facilities; and
- f. the duty to warn business invitees and users of the KCEU facility of known risks and hazards that would not otherwise be known or apparent to operators of aircraft landing at or taking off from the KCEU facilities.

35.

Defendant Oconee County, in its operation of the KCEU, breached these duties, in that:

- a. it failed to use due care in the operation of the KCEU to avoid creation or maintenance of conditions that presented risks or hazards to persons and aircraft using the KCEU facilities;
- b. it failed to keep the KCEU runways clear and free of obstructions so that landing or departing planes would not collide with objects, obstructions or animals;
- c. it failed to erect perimeter fences or other barriers to protect its runways from the free and unhindered access of wildlife from adjacent forest lands;

- d. it failed to use due care and reasonable diligence to avoid causing or permitting harm to business invitees using the KCEU facilities;
- e. it failed to warn business invitees and users of the KCEU facility of known risks and hazards that would not otherwise be known or apparent to operators of aircraft landing at or taking off from the KCEU facilities;
- f. it failed to report prior collisions between aircraft and wildlife to the Federal Aviation Administration of the U.S. Department of Transportation; and
- g. it failed to post or make available adequate and realistic warnings concerning the risks presented by wildlife to aircraft using the KCEU facilities.

36.

In addition to the duties and breaches described above, after the April 2009 collision between a landing aircraft carrying former Clemson head football coach Tommy Bowden and a deer on the runway, Defendant Oconee County was on actual notice that wildlife coming onto the runway was a hazard to incoming and outbound aircraft, and as a result of this actual knowledge, it owed additional duties to the general aviation public, including plaintiff, which duties included:

- a. the duty to specifically prevent the incursion of deer, now a known wildlife hazard, from adjacent forest lands onto the KCEU runway;
- b. the duty to report the collision to the Federal Aviation Administration of the U.S. Department of Transportation and other appropriate State authorities;
- c. the duty to keep the KCEU runways clear and free of other obstructions so that landing or departing planes would not collide with objects, obstructions or animals;
- d. the duty to erect perimeter fences or other barriers to protect its runways from the free and unhindered access of wildlife, especially deer, from adjacent forest lands;
- e. the duty to monitor runway conditions for departing and landing aircraft;
- f. the general duty to use due care and reasonable diligence to avoid causing or permitting harm to business invitees using the KCEU facilities; and
- g. the duty to warn business invitees and users of the KCEU facility of known risks and hazards, such as those specifically caused by deer entering the runway, that would not otherwise be known or

apparent to operators of aircraft landing at or taking off from the KCEU facilities.

37.

Defendant Oconee County, in its operation of the KCEU, breached these additional duties, in that it:

- a. failed to take any steps to prevent the incursion of deer from coming onto the runway;
- b. failed to report the Bowden collision between aircraft and wildlife to the Federal Aviation Administration of the U.S. Department of Transportation and other appropriate State authorities;
- c. failed to keep the KCEU runways clear and free of obstructions such as deer so that landing or departing planes would not collide with objects, obstructions or animals;
- d. failed to erect perimeter fences or other barriers to protect its runways from the free and unhindered access of wildlife from adjacent forest lands;
- d. failed to monitor runway conditions for landing aircraft once KCEU learned of and experienced an aircraft / wildlife collision resulting from the encroachment of deer from adjacent forest lands onto the KCEU runway;

Second Claim for Relief — Negligence Per Se

40.

Plaintiff re-alleges and incorporates by reference the allegations contained in paragraphs 1 through 32, above.

41.

As part of the National Plan of Integrated Airport Systems (NPIAS) of the Federal Aviation Administration (FAA) of the United States government and as a recipient of grants from the FAA's Airport Improvement Project (AIP), defendant Oconee County's KCEU airport was contractually and statutorily obligated, pursuant to assurances imposed upon KCEU by 49 U.S.C. § 47107, to maintain its terminal airspace so as to protect against airport hazards, which term is defined by 49 U.S.C. § 47107 to include "a use of land near the airport, that obstructs or otherwise is hazardous to the landing or taking off of aircraft at or from the airport."

42.

At all times relevant to this civil action, defendant Oconee County's KCEU airport was aware of the risk and hazard presented by deer to landing and departing aircraft and was also aware of the duty imposed by 49 U.S.C. § 47107 to maintain its terminal airspace so as to protect against airport hazards to landing and departing aircraft.

43.

The statutory duties imposed upon Oconee County's KCEU airport by 49 U.S.C. § 47107 were, among other things, intended to provide for the safety and protection of persons using such airports, because of the material risk of injury to persons and property presented by potential collisions between aircraft and other objects, such as deer.

44.

Plaintiff Randolph M. James, P.C., as owner of the aircraft at issue in this civil action and as a user of defendant Oconee County's KCEU airport, was and is a member of the class of persons or entities intended to be protected by 49 U.S.C. § 47107.

45.

Defendant Oconee County and its KCEU airport breached and failed to comply with 49 U.S.C. § 47107, in that Oconee County and/or KCEU did not conduct any wildlife hazard assessment for its facility, did not prepare or implement any wildlife hazard management plan, and, at the time of the collision at issue in this litigation, had suspended even the minimal level of action it had previously taken to abate deer hazards on its runways.

46.

Plaintiff Randolph M. James, P.C. has sustained damages as a direct and

proximate result of defendant Oconee County's KCEU airport to comply with 49 U.S.C. § 47107.

47.

The failure to comply with 49 U.S.C. § 47107 constitutes negligence *per se* on the part of defendant Oconee County and its KCEU airport.

48.

As a direct and proximate result of defendant's negligence *per se*, plaintiff's aircraft collided with multiple deer on the KCEU runway, sustaining damage in an amount in excess of \$311,000.00.

49.

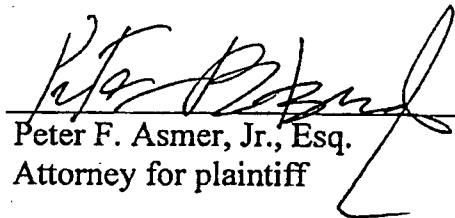
Plaintiff is therefore entitled to have and recover from the defendant Oconee County its damages, subject to any applicable statutory cap, for the injury proximately caused by the negligence *per se* of Oconee County in the operation of its KCEU airport.

WHEREFORE, having fully set forth its claims for relief, plaintiff Randolph M. James P.C. respectfully prays the Court:

1. that process issue for service upon the defendant;
2. that all costs of this action be taxed to the defendant;

3. that it have and recover its damages as allowed by law from the defendant as compensation for the injury proximately caused by the defendant's negligence and negligence *per se*;
4. for trial by jury of all issues raised by this Complaint;
5. for prejudgment interest at the legal rate; and
6. for such other and further relief as the Court may deem just and proper.

Respectfully submitted this 5th day of September, 2012.


Peter F. Asmer, Jr., Esq.
Attorney for plaintiff

COZEN O'CONNOR
One Wells Fargo Center, Suite 2100
301 South College Street
Charlotte, North Carolina 28202
Tel: (704) 376-3400
Fax: (704) 335-9312
E-Mail: pasmer@cozen.com

Of Counsel:

Jefferson C. McConnaughey
COZEN O'CONNOR
SunTrust Plaza, Suite 2200
303 Peachtree Street NE
Atlanta, Georgia 30308
(404) 572-2000
(404) 572-2199 (facsimile)
E-Mail: jmcconnaughey@cozen.com

STATE OF SOUTH CAROLINA,)
)
COUNTY OF OCONEE)

IN THE COURT OF COMMON PLEAS

RANDOLPH M. JAMES, PC, a North)
Carolina Professional Corporation)

TENTH JUDICIAL CIRCUIT

Plaintiff(s))

vs.)

AFFIDAVIT OF SERVICE

OCONEE COUNTY d/b/a Oconee)
County Aeronautics Commission and)
d/b/a Oconee County Regional Airport)
(KCEU))

FILE NO: 12-CP-37-319

Defendant(s).)

PERSONALLY PREPARED BEFORE ME, the undersigned deponent, who being duly sworn

says that (s)he served the SUMMONS and COMPLAINT in this action
(Describe document(s) served)

on ELIZABETH HULSE, Clerk to Oconee County Council, by delivery to
(Name of party served)

ELIZABETH HULSE, Clerk to Oconee County Council personally;
(Name of party served)

_____ the _____ of the party served,
(Name of person served) (Note relationship to party)

and a person of discretion residing at the residence of the party served;

Elizabeth Hulse, the Clerk to Council of Oconee County
(Name of person served) (Title) (Name of corporate party served)

and leaving with (him) (her) a copy at 415 S. Pine Street
(Street address)

in Walhalla Oconee County, South Carolina,
(City or Town) County

on September 7, 2012 at 11:40 am o'clock

that deponent knows the person so served, and that deponent is not a party of this action, is not less than eighteen (18) years of age and has no interest therein or connection therewith.

Unable to locate and serve the above process on the defendant after diligent efforts to do so.

The process is returned unexecuted.

Sworn to and Subscribed before me)
this 12th day of Sept, 2012)

[Signature])
Notary Public for South Carolina)

[Signature]
Signature of Deponent

My Commission expires 5/2/22)

SCCA 402 (Revised 12/07)

Entered in the Sheriff's Service Book on

Book _____

Page _____

Number _____

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF OCONEE)	
	)	C.A. No. 2012-CP-37-319
Randolph M. James, P.C., a North Carolina Professional Corporation,)	
	)	ANSWER TO PLAINTIFF'S AMENDED COMPLAINT
Plaintiff,)	
)	
v.)	
)	
Oconee County, South Carolina, a political subdivision of the State of South Carolina, d/b/a Oconee County Regional Airport,)	
)	
Defendant.)	
_____)	

Defendant Oconee County, a body politic and corporate, and a political subdivision of the State of South Carolina, incorrectly identified in Plaintiff's Amended Complaint as "Oconee County, South Carolina, a political subdivision of the State of South Carolina," (hereinafter "Oconee") answers the Amended Complaint of Plaintiff Randolph M. James, P.C., a North Carolina Professional Corporation ("Plaintiff"), as follows:

FIRST RESPONSE

(Paragraphs 1 through 49 Correspond to the Allegations of Plaintiff's Amended Complaint)

1. Admitted upon information and belief.
2. Oconee admits that it is a body politic and corporate, and a political subdivision of the State of South Carolina. Oconee operates Oconee County Regional Airport as a public service to the taxpayers and citizens of Oconee. Oconee admits that Elizabeth Hulse is authorized by law to receive process for Oconee.

3. Denied. Plaintiff is collaterally estopped from presenting the allegations in Paragraph 3, due to a ruling from Judge Henry Herlong in the U.S. District Court for the District of South Carolina.
4. Oconee admits that this Court has jurisdiction over Plaintiff's claims, pursuant to the South Carolina Tort Claims Act.
5. Oconee denies any tortious acts. Venue is proper, due to the provisions of the S.C. Tort Claims Act.
6. Admitted upon information and belief.
7. Oconee admits only that Oconee owns and operates Oconee County Regional Airport, and that planes used the Oconee County Regional Airport for take offs and landings, and that Oconee provided fuel as a service for persons and entities using the Airport.
8. Admitted.
9. Denied. Plaintiff is collaterally estopped from presenting the allegations in Paragraph 9, due to a ruling from Judge Henry Herlong in the U.S. District Court for the District of South Carolina.
10. Admitted.
11. Oconee craves reference to any contracts for obligations performed thereunder. Oconee notes that 49 U.S.C. §47107 does not contain a definition of "airport hazard," contrary to Plaintiff's contentions.
12. Oconee craves reference to any contracts for AIP grants for any obligations imposed thereunder.
13. Oconee is without information sufficient to admit or deny the allegations of Paragraph 13 and therefore denies same.

14. Denied.
15. Oconee admits that the Oconee County Regional Airport was adjacent to the Clemson University Experimental Forest.
16. As of April 23, 2010, Oconee was implementing plans for the erection of a perimeter fence, in conjunction with various governmental authorities.
17. Oconee admits that an aircraft previously struck a deer at the Oconee County Regional Airport. In response to this Incident, Oconee prepared a Notice to Airmen regarding the presence of deer at the Oconee County Regional Airport.
18. Denied.
19. Denied.
20. Denied.
21. Oconee admits that Short acknowledged the need for fencing, and Oconee further states that, at the time of the interview, Short had already taken actions in an effort to obtain perimeter fencing.
22. Oconee admits only that James purchased fuel at Oconee County Regional Airport on April 23, 2012.
23. Admitted upon information and belief.
24. Denied.
25. Denied. Had James reviewed available information, he would have noted warnings of "deer on and in vicinity of [the] runway."
26. Oconee admits that James struck a deer on a runway at Oconee County Regional Airport.
27. Oconee admits that Plaintiff's aircraft collided with a deer.

28. Oconee is without information sufficient to admit or deny Paragraph 28 and therefore denies same.

29. Denied.

30. Oconee admits that an aircraft collided with a deer at Oconee County Regional Airport in January, 2011.

31. Oconee is without information sufficient to admit or deny the allegations of Paragraph 31 and therefore denies same.

32. Denied.

33. Oconee incorporates its responses to Paragraphs 1 through 32 to the extent consistent herewith.

34. Oconee admits that it owed certain duties to the public, related to operation of Oconee County Regional Airport. Oconee worked with the FAA and other aviation authorities to comply with any and all applicable duties.

35. Oconee denies breaching any duties in its operation of Oconee County Regional Airport.

36. Oconee reported the 2009 deer strike to appropriate authorities, and it acted with reasonable prudence, and FAA guidance, to respond to hazards posed. Oconee published a Notice to Airmen regarding the presence of deer, and such notice was added to Southeastern Airfield Directory.

37. Oconee denies breaching any applicable duties.

38. Denied.

39. Denied.

40. Oconee incorporates its responses to Paragraphs 1 through 39 to the extent consistent herewith.

41. Oconee craves reference to any contracts or statutes for duties imposed thereunder. Oconee notes that 49 U.S.C. §47107 does not define "airport hazard."

42. Oconee issued a Notice to Airmen, added to the Southeast Regional Airfield Directory, noting the presence of deer on and in the vicinity of runways. Oconee coordinated all construction efforts with the FAA, including addition of perimeter fencing.

43. Oconee acted to protect persons and property at its airport, acting on guidance from the FAA. Oconee denies that 49 U.S.C. §47107 creates any private right of action.

44. Oconee County denies that 49 U.S.C. §47107 creates any private rights of action.

45. Denied.

46. Denied.

47. Denied.

48. Denied.

49. Denied.

50. Oconee denies each and every allegation of Plaintiff's Amended Complaint not expressly admitted above.

SECOND DEFENSE

51. Oconee is entitled to dismissal of Plaintiff's Amended Complaint, pursuant to Rule 12(b)(6), SCRCP, because Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

52. Plaintiff's claims are barred by the Statute of Limitations, imposed under the S.C. Tort Claims Act.

FOURTH DEFENSE

53. Plaintiff's claims may be barred by the doctrine of sovereign immunity.

54. To the extent Plaintiff's claims fall within the limited waiver of immunity provided under the S.C. Tort Claim Act, Oconee is entitled to every right and privilege afforded to political subdivisions under the S.C. Tort Claims Act. This includes, but is not limited to, the statutory cap on damages, as well as the bar on the award of punitive damages.

FIFTH DEFENSE

55. Plaintiff's claims are barred by the doctrine of assumption of risk.

SIXTH DEFENSE

56. If Plaintiff's negligent or reckless conduct, or the conduct of Plaintiff's agents and/or employees, was a proximate cause of its injuries, such fault is pleaded as a complete defense to Plaintiff's claims, and in the alternative, is pleaded in proportionate reduction of Plaintiff's damages.

SEVENTH DEFENSE

57. Plaintiff is not entitled to recover from Oconee, because Plaintiff's injuries are a result of an Act of God.

EIGHTH DEFENSE

58. Plaintiff's claims may be barred by the doctrine of waiver.

NINTH DEFENSE

59. Plaintiff's claims may be barred by the doctrine of estoppel.

TENTH DEFENSE

60. Plaintiff's claims may be barred by the doctrine of laches.

ELEVENTH DEFENSE

61. Oconee expressly denies breaching any duty owed to Plaintiff.

62. To the extent Oconee is found to have breached any duties owed to Plaintiff, such breaches are not the proximate cause of Plaintiff's damages, because Plaintiff's damages were caused by the intervening and superseding acts of third parties.

TWELFTH DEFENSE

63. Plaintiff's common law claims against Oconee may be pre-empted by federal law, including, but not limited to, the Federal Aviation Act and the Federal Aviation Regulations.

THIRTEENTH DEFENSE

64. Plaintiff's claims against Oconee may be barred by the doctrine of unavoidable accident.

WHEREFORE, having Answered fully, Oconee respectfully requests the following:

1. Dismissal of all claims with prejudice, due to Plaintiff's failure to state a claim upon which relief can be granted;
2. Dismissal of Plaintiff's claims with prejudice;
3. For the costs of this Action;
4. For a trial by jury of all issues triable thereto; and
5. For such other and further relief as the Court shall deem just and proper.

September 17, 2012

By:



Michael B.T. Wilkes (S.C. Bar #6107)

mwilkes@wilkeslaw.com

C. Daniel Atkinson (S.C. Bar #72721)

datkinson@wilkeslaw.com

STATE OF SOUTH CAROLINA)
)
 COUNTY OF OCONEE)
)
 Randolph M. James, P.C., a North Carolina)
 Professional Corporation,)
)
 Plaintiff,)
)
 v.)
)
 Oconee County, South Carolina, a political)
 subdivision of the State of South Carolina,)
 d/b/a Oconee County Regional Airport,)
)
 Defendant.)
 _____)

IN THE COURT OF COMMON PLEAS

C.A. No. 2012-CP-37-319

**MOTION TO DISMISS, WITH PREJUDICE,
 PURSUANT TO RULE 12(b)(6), SCRCF**

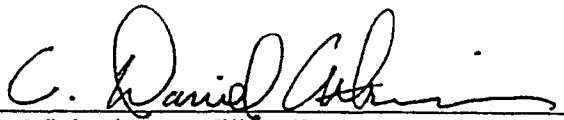
Defendant Oconee County, a body politic and corporate, and a political subdivision of the State of South Carolina, incorrectly identified in Plaintiff's Amended Complaint as "Oconee County, South Carolina, a political subdivision of the State of South Carolina," (hereinafter "Oconee") hereby moves this Court, pursuant to Rule 12(b)(6), SCRCF, for an Order dismissing, with prejudice, Plaintiff's Amended Complaint for failure to state a claim upon which relief can be granted.

Oconee brings this Motion, because the pleadings, on their face, demonstrate that Plaintiff's claims against Oconee are barred by the two-year Statute of Limitations set forth in the S.C. Tort Claims Act. *See* S.C. Code Ann. §15-78-110. According to Plaintiff's Amended Complaint, the Incident complained of occurred on April 23, 2010. (Amended Complaint, ¶ 23.) Plaintiff first filed a Complaint in this action on April 4, 2012. Plaintiff filed an Amended Complaint on September 7, 2012, and Plaintiff did not make its initial proper service of pleadings on Oconee until September 7, 2012, when Plaintiff served Elizabeth Hulse with a copy of the Amended Complaint. Accordingly, 156 days elapsed between Plaintiff's first filing of a

Complaint, and Plaintiff's proper service of suit papers on Oconee. According to Rule 3, SCRCP, and S.C. Code Ann. §15-3-20, the action was not commenced until Plaintiff properly served Oconee with the Summons and Amended Complaint, because Plaintiff failed to accomplish service within 120 days of first filing its action. With a commencement date of September 7, 2012, Plaintiff's claims are, on the face of the pleadings, barred by S.C. Code Ann. §15-78-110. Accordingly, Plaintiff fails to state a claim upon which relief can be granted.

This Motion is based upon the pleadings, court record, previous rulings on service, South Carolina law, and any affidavit of authority to be filed hereafter.

September 17, 2012

By: 
Michael B.T. Wilkes (S.C. Bar #6107)
mwilkes@wilkeslaw.com
C. Daniel Atkinson (S.C. Bar #72721)
datkinson@wilkeslaw.com

WILKES LAW FIRM, P.A.
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
Telephone 864.591.1113
Facsimile 864.591.1767

ATTORNEYS FOR DEFENDANT
OCONEE COUNTY, A BODY POLITIC
AND CORPORATE, AND A POLITICAL
SUBDIVISION OF THE STATE OF
SOUTH CAROLINA

I, the undersigned, hereby certify that I caused a true and correct copy of the foregoing document to be served via U.S. Mail, postage prepaid, upon the following counsel of record:

Peter Asmer, Esquire
Cozen O'Connor
301 South College Street, Suite 2100
Charlotte, NC 28202
Email: pasmer@cozen.com

9-17-2012

Date



C. Daniel Atkinson

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF OCONEE)	
	)	C.A. No. 2012-CP-37-319
Randolph M. James, P.C., a North Carolina)	
Professional Corporation,)	
	)	DEFENDANT'S BRIEF IN SUPPORT OF ITS
Plaintiff,	)	MOTION TO DISMISS, PURSUANT TO
	)	RULE 12(b)(6), SCRPC
v.)	
)	
Oconee County, South Carolina, a political)	
subdivision of the State of South Carolina,)	
d/b/a Oconee County Regional Airport,)	
)	
Defendant.)	
_____)	

Defendant Oconee County, a body politic and corporate, and a political subdivision of the State of South Carolina, incorrectly identified by Plaintiff as "Oconee County, South Carolina, a political subdivision of the State of South Carolina," (hereinafter "Oconee") submits the following Brief in Support of Its Motion to Dismiss Plaintiff's Complaint, pursuant to Rule 12(b)(6), SCRPC.

RELEVANT FACTUAL BACKGROUND

Because this Motion is one to dismiss pursuant to Rule 12(b)(6), SCRPC, all factual allegations contained herein are taken directly from Plaintiff's Amended Complaint or from relevant provisions of law contained within public records, which are subject to the Court's judicial notice.

Plaintiff Randolph M. James, P.C. ("Plaintiff"), is a North Carolina professional corporation acting as a law firm, with its principal place of business in Winston-Salem, North Carolina. (Amended Complaint, ¶ 1.) Plaintiff owned a Piper aircraft, which allegedly struck a

deer while attempting to take off from Oconee County Regional Airport, on April 23, 2010. (Amended Complaint, ¶ 23 and ¶27.)

Oconee is a governmental subdivision of the State of South Carolina. (Amended Complaint, ¶ 2.) Oconee owns and operates the Oconee Regional Airport. (*Id.*)

Oconee also has a Clerk of the County Council. *See* Oconee County Code §2-271. Elizabeth Hulse presently serves as Oconee's Clerk of County Council. (Amended Complaint, ¶ 2.)

RELEVANT PROCEDURAL BACKGROUND

Plaintiff first attempted to initiate a civil action against Oconee by filing a Summons and Complaint against "Oconee County, South Carolina d/b/a Oconee County Regional Airport" in the U.S. District Court for the District of South Carolina on May 27, 2011. Plaintiff eventually voluntarily withdrew that Summons and Complaint. Plaintiff then filed a second Summons and Complaint against "Oconee County Aeronautics Commission d/b/a Oconee County Regional Airport (KCEU)," on July 29, 2011. On September 22, 2011, Oconee County filed a Motion to Dismiss this Summons and Complaint, pursuant to Fed. R. Civ. P. 12(b)(1), because the District Court lacked subject-matter jurisdiction to adjudicate the matter. On November 28, 2011, Judge Henry M. Herlong, Jr., issued an Order dismissing the District Court action, finding that Oconee County was the proper Defendant, that Plaintiff's claims were subject to the S.C. Tort Claims Act, and that the U.S. District Court had no subject-matter jurisdiction to hear the claim.

On April 4, 2012, Plaintiff filed a Complaint in the present action in the Court of Common Pleas for Oconee County. Plaintiff initially attempted to effect service on Oconee by sending copies of the Summons and Complaint to various people via certified mail. Oconee

objected to the efforts at service by mail, by filing a Motion to Dismiss, pursuant to Rule 12(b)(5), SCRPC, on May 2, 2012.

After the Motion was filed, Plaintiff attempted to effect personal service. Plaintiff has filed affidavits of Service on Reginald Dexter, who it contended was Chair of Oconee County Council, and Glenn Breed, a Deputy County Administrator. In reality, and even according to Plaintiff's Complaint, Joel Thrift was the Chairman of the Oconee County Council. (See Complaint, ¶ 2.)

Judge Alexander Macaulay conducted a hearing on Oconee's Motion to Dismiss on September 4, 2012. At the hearing, Judge Macaulay instructed counsel for Oconee to draft an Order dismissing Plaintiff's Complaint due to improper service; however, prior to execution of the draft Order, Plaintiff filed an Amended Complaint with the Oconee County Clerk of Court on September 7, 2012. Plaintiff served the Summons and Complaint on Elizabeth Hulse on September 7, 2012. Judge Macaulay did not issue a ruling on the pending Rule 12(b)(5) Motion, because of Plaintiff's filing of the Amended Complaint.

On September 17, 2012, Oconee filed a Motion to Dismiss Plaintiff's Amended Complaint with Prejudice, pursuant to Rule 12(b)(6), SCRPC, based on Plaintiff's claims being barred under the two-year limitations period set forth in S.C. Code Ann. §15-78-110. Because Plaintiff's claim is time-barred based on the allegations contained within the four corners of the Amended Complaint, Plaintiff has failed to state a claim upon which relief can be granted.

STANDARD OF REVIEW

"[Rule 12(b)(6)] permits a defendant to move for a judgment on the pleadings when the defendant contends the complaint fails to state facts sufficient to constitute a cause of action." *Bradshaw v. Anderson County*, 388 S.C. 257, 262, 695 S.E.2d 842, 844 (2010) (internal citations

omitted). “The reviewing Court is required to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deductible from the pleadings would entitle the plaintiff to relief on any theory of the case.” *Id.* (internal citations omitted). A defendant may move for a dismissal pursuant to Rule 12(b)(6), SCRPC, where claims brought are barred under an applicable Statute of Limitations. *See Spell v. South Carolina Dep’t of Highways and Pub. Transp.*, 292 S.C. 228, 355 S.E.2d 860 (1987) (affirming Rule 12(b)(6) dismissal of claims against Highway Department where claims were not brought within statutory claims period).

LEGAL ANALYSIS

Oconee’s basis for dismissal of the Amended Complaint is simple: Plaintiff failed to commence its action within two years of the Incident upon which the alleged claim is based. Viewing the facts based plainly on the allegations of the Amended Complaint, the Incident occurred on April 23, 2010. Plaintiff first served Elizabeth Hulse with a Summons and Complaint on September 7, 2012, which was 157 days after the expiration of the applicable limitations period. Accordingly, Plaintiff’s claims against Oconee are time-barred.

1. Plaintiff Failed to Make Proper Service Upon Oconee Within the Applicable Limitations Period.

Though Plaintiff attempted to effect service upon Oconee in April, 2012, Plaintiff never properly effected service upon Oconee until September 7, 2012. Oconee objected to the improper service in May, 2012, through a Motion to Dismiss Pursuant to Rule 12(b)(5), SCRPC; however, Plaintiff failed to effect in accordance with the Rules of Civil Procedure until September, 2012. As indicated by Plaintiff’s service documents filed with the Court, in April and May of 2012, Plaintiff attempted service upon Oconee via Certified Mail, as well as via hand-delivery to Glenn

Breed, a Deputy County Administrator and Reginald Dexter, a member (but not the Chair) of the Oconee County Council.

a. Pursuant to S.C. Law, Oconee Is Not Subject to Service Via Certified Mail.

Based on the language of Plaintiff's Amended Complaint (as well as Plaintiff's initial Complaint), Oconee is political or governmental subdivision of the State of South Carolina. (Complaint, ¶ 2.) Accordingly, service on Oconee is governed by Rule 4(d)(6), SCRCPP, which states service can be effected upon a county "by delivering a copy of the summons and complaint to the chief executive officer or clerk thereof, or by serving the summons and complaint in the manner prescribed by statute for the service of summons and complaint or any like process upon any such defendant." *Id.* (emphasis added). According to Rule 4(d)(8), SCRCPP, service by certified mail is only available for use against defendants within the categories of "individuals," "minors, incompetents, and persons confined," and "corporations and partnerships." There is no provision for service upon a county by certified mail. Accordingly, Plaintiff's efforts to serve Oconee through certified mail constitute insufficient service.

b. Plaintiff Has Failed to Effect Service Upon Any Person Authorized to Receive Service On Behalf of Oconee.

After Oconee objected to service upon Oconee via certified mail, Plaintiff attempted personal service upon agents authorized to receive service on Oconee's behalf; however, Plaintiff failed to properly serve any person authorized to receive service on Oconee's behalf. As stated by the plain language of Rule 4(d)(6), SCRCPP, Plaintiff could serve one of two people to effect service on Oconee: (1) the Clerk of the Council, Elizabeth Hulse; or (2) Oconee's chief executive officer, County Administrator Scott Moulder. Prior to September 7, 2012, Plaintiff never personally served Hulse or Moulder.

At the September 3 hearing and in previous filings, Plaintiff claimed its service upon the Chair of the County Council was service upon the Chief Executive. It is not necessary to address this matter, because the person served was not County Council Chair at the time the Summons and Complaint was delivered to him. Plaintiff's own Complaint correctly stated that the County Council Chair was Joel Thrift; however, Plaintiff attempted to serve the County through Reginald Dexter, a Council Member who is not the Chair. It is undisputed that Plaintiff did not ever have the original Summons and Complaint delivered to Hulse, to the County Administrator or to the Council Chair. The first personal delivery of process to Hulse came on September 7, 2012, when a process server delivered to her a copy of the Amended Summons and Amended Complaint.

At previous hearings, Plaintiff argued that Glenn Breed had authority to accept service on behalf of the County. As a preliminary matter, Breed is not the Clerk of the County or the Chief Executive Officer; therefore, he is not an authorized agent for service of process on Oconee County under the plain language of Rule 4(d)(6), SCRPC. There is no evidence that Oconee ever granted Breed authority to accept service, and it is the principal, rather than the agent's, actions which establish authority.¹ There is no evidence or reasonable inference to indicate that Glenn Breed was authorized to accept service for Oconee County.²

Plaintiff amended its Complaint after Judge Macaulay stated an intention to grant Oconee's Rule 12(b)(5) Motion to Dismiss. There is no evidence to indicate that Plaintiff ever

¹ Oconee thoroughly addressed the law governing service on Oconee in its August 30, 2012, Brief in Support of Oconee's Rule 12(b)(5) Motion, which has already been filed with the Clerk. Oconee incorporates by reference those arguments in support of the present Motion.

² In a Rule 12(b)(5) Motion, the Court is allowed to receive evidence regarding service of process. At that hearing, both Breed and County Administrator Scott Moulder testified that Breed was not authorized to receive service on Oconee's behalf. Further, Breed testified that the process server did not state he was attempting to serve Oconee when he delivered papers to Breed. (Oconee has not yet obtained a copy of the hearing transcript, but it will provide a copy upon receipt, if necessary.)

served Oconee with the original Summons and Complaint, such that the service complied with the terms of Rule 4(d)(6), SCRPC, which governs service on political subdivisions. Accordingly, the first proper service on Oconee occurred on September 7, 2012.

2. Plaintiff Failed to Timely Commence This Action, Because Plaintiff Failed to Properly Serve Oconee with Process Within 120 Days of Filing Its Summons and Complaint.

“Civil actions may only be commenced within the time periods prescribed [within Title 15 of the S.C. Code] after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute.” S.C. Code Ann. §15-3-20(A). Pursuant to statute, “a civil action is commenced when the summons and complaint are file with the clerk of court if actual service is accomplished within one hundred twenty days after filing.” S.C. Code Ann. §15-3-20(B) (emphasis added).

Based on the plain language of the Amended Complaint, Oconee is a governmental entity, and a political subdivision of the state of South Carolina. (Amended Complaint, ¶ 2.) In the Amended Complaint, Plaintiff asserts two causes of action: (1) negligence, and (2) negligence *per se*. Both causes of action constitute claims based in tort. Pursuant to S.C. Code Ann. §15-78-20, political subdivisions of South Carolina “are only liable for torts within the limitations of [the Tort Claims Act] and in accordance with the principles established [therein].” *See* S.C. Code Ann. §15-78-20. The Tort Claims Act sets a two-year limitations period for claims. *See* S.C. Code Ann. §15-78-110. Accordingly, Plaintiff must have commenced its action within two years of the Incident, which occurred on April 23, 2010, to possess a claim upon which relief can be granted. The last day to commence an action under the applicable limitations period was April 23, 2012.

South Carolina's Supreme Court has recently determined, by jointly interpreting Rule 3(a), SCRPC, and S.C. Code Ann. §15-3-20, that:

- (1) an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, and
- (2) if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days of *filing*.

Mims v. Babcock Center, Inc., 732 S.E.2d 395, 397-98 (2012). In *Mims*, a defendant challenged the propriety of commencement of an action, where that defendant was first served with an Amended Complaint one year after the plaintiff filed the original complaint. As in the case at bar, the defendant was never properly served with the original Complaint. The Supreme Court found commencement to be acceptable, because service of the Amended Complaint came within the applicable limitations period. In the present case, unlike *Mims*, it is undeniable that Plaintiff's service of the Amended Complaint occurred outside the two-year limitations period. Further, the evidence (and the time stamp) on the Amended Complaint clearly demonstrate that the Amended Complaint was served 157 days after the April 4, 2012, date of original filing of Plaintiff's Complaint.

Plaintiff applies a tortured reading of Rule 15, SCRPC, to contend that it has 120 days to serve Oconee from the date of filing the Amended Complaint. This contention is clearly erroneous. Rule 15(c), SCRPC, states that an amended pleading relates back to the date of the original pleading. Accordingly, the date of filing for the Amended Complaint is treated as April 4, 2012. As noted above, Plaintiff first properly served Oconee with process in this case on September 7, 2012, which is 157 days after original filing, and outside the applicable limitations period. The action was therefore not commenced within the applicable limitations period.

CONCLUSION

For 157 days after filing, Plaintiff failed to comply with the provisions for service upon a political subdivision set forth in Rule 4, SCRCP, even though they are explicitly enumerated. Including the repeated efforts to assert a tort claim against Oconee in the U.S. District Court, this constitutes the third time that Plaintiff has failed to properly initiate a claim against Oconee. By failing to properly serve Oconee within the applicable limitations period or within 120 days of original filing, Plaintiff has failed to commence its civil action within the time set forth in S.C. Code Ann. §15-78-110. Accordingly, Plaintiff cannot state a claim on which relief can be granted, and Oconee is entitled to dismissal of Plaintiff's claims pursuant to Rule 12(b)(6), SCRCP.

November 1, 2012

By: 

Michael B.T. Wilkes (S.C. Bar #6107)

mwilkes@wilkeslaw.com

C. Daniel Atkinson (S.C. Bar #72721)

datkinson@wilkeslaw.com

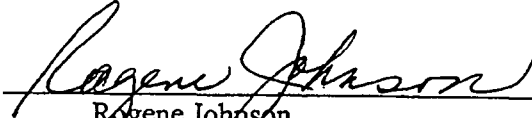
WILKES LAW FIRM, P.A.
127 Dunbar Street, Suite 200
Spartanburg, SC 29306
Telephone 864.591.1113
Facsimile 864.591.1767

ATTORNEYS FOR DEFENDANT
OCONEE COUNTY, A BODY POLITIC
AND CORPORATE, AND A POLITICAL
SUBDIVISION OF THE STATE OF
SOUTH CAROLINA

I, the undersigned, hereby certify that I caused a true and correct copy of the foregoing document to be served via U.S. Mail, postage prepaid, as well as via electronic mail upon the following counsel of record:

Peter Asmer, Esquire
Cozen O'Connor
301 South College Street, Suite 2100
Charlotte, NC 28202
Email: pasmer@cozen.com

11/1/12
Date


Rogene Johnson
Paralegal

STATE OF SOUTH CAROLINA)
)
 COUNTY OF OCONEE)
)
 Randolph M. James, P.C., a North)
 Carolina Professional Corporation,)
)
 Plaintiff,)
)
 vs.)
)
 Oconee County, d/b/a Oconee County)
 Aeronautics Commission and d/b/a)
 Oconee County Regional Airport)
 (KCEU),)
)
 Defendant.)

COURT OF COMMON PLEAS
 TENTH JUDICIAL CIRCUIT

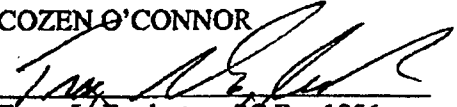
Civil Action File Number
 2012-CP-37-319

FILED OCONEE, SC
 BEVERLY H. WHITFIELD
 CLERK OF COURT
 2013 APR 22 PM 4 01

**MOTION FOR RECONSIDERATION PURSUANT TO
 S.C. R.Civ.P. RULE 59(e)**

Plaintiff Randolph M. James, P.C. ("James"), moves the Court, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, for reconsideration of the Order dismissing plaintiff's action. The Order was entered April 5, 2013, mailed April 8, 2013 and received by plaintiff's counsel April 11, 2013. A memorandum in support of this motion is filed and served contemporaneously.

Respectfully submitted this 22nd day of April, 2013

COZEN O'CONNOR

 Tracy L. Eggleston, SC Bar 1856
 One Wells Fargo Center, Suite 2100
 301 South College Street
 Charlotte, North Carolina 28202
 Tel: (704) 376-3400
 Fax: (704) 335-9312
 E-Mail: teggleston@cozen.com
 Counsel for Plaintiff



STATE OF SOUTH CAROLINA)
)
 COUNTY OF OCONEE)
)
 Randolph M. James, P.C., a North)
 Carolina Professional Corporation,)
)
 Plaintiff,)
)
 vs.)
)
 Oconee County, d/b/a Oconee County)
 Aeronautics Commission and d/b/a)
 Oconee County Regional Airport)
 (KCEU),)
)
 Defendant.)

COURT OF COMMON PLEAS
 TENTH JUDICIAL CIRCUIT

Civil Action File Number
 2012-CP-37-319

FILED OCONEE, SC
 BEVERLY H. WHITFIELD
 CLERK OF COURT
 2013 APR 22 PM 4 01

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION PURSUANT TO S.C. R.Civ.P. RULE 59(e)

Plaintiff Randolph M. James, P.C. ("James"), has moved the Court for reconsideration of its Order dismissing plaintiff's action.¹ The Order was entered April 5, 2013, mailed April 8, 2013 and received by plaintiff's counsel April 11, 2013. Thus, this motion is made timely as the tenth day following receipt of the Court's order by plaintiff's counsel fell upon a Sunday. Plaintiff respectfully submits that the uncontested evidence in this matter, as found by the Court, unequivocally establishes valid service upon the defendant Oconee County.

The focus of the defendant's arguments and the Court's Order primarily addresses whether service upon the Deputy County Administrator (Mr. Glenn Breed), who thereafter delivered the summons and complaint to the Clerk of the County Council (Ms. Elizabeth Hulse), was valid as substituted service upon the Clerk by reason of the apparent authority of Mr. Breed to accept

¹ A motion for reconsideration under Rule 59(e) is deemed to be a motion to alter or amend a judgment. Such a motion both provides an opportunity for a Court to reconsider its prior ruling before the moving party takes an appeal and preserves issues for appellate review. See generally *Elam v. South Carolina Dept. of Transportation*, 361 S.C. 9, 602 S.E.2d 772 (2004) and cases cited therein.

such service. With respect to substituted service, plaintiff respectfully contends that the position of Mr. Breed, coupled with his offer to take the summons and complaint and deliver them to Ms. Hulse, demonstrates sufficient apparent authority on the part of Mr. Breed, regardless of whether he had previously been authorized to accept service for Ms. Hulse. There is no possible reason that a process server would question whether a high-ranking executive officer in the county government had authority to accept the process and deliver it to the Clerk. As was stated in *Robertson v. Southern Finance of South Carolina, Inc.*, 365 S.C. 6, 615 S.E.2d 112 (2005), “[a]n agent’s authority is composed of his or her actual authority, whether express or implied, together with the apparent authority which the principal by his or her conduct is precluded from denying.” *Id.* at 10.

Plaintiff was not afforded any opportunity to conduct discovery as to whether Mr. Breed had accepted similar process in the past, or whether the County had uniformly required service to be made only upon Ms. Hulse. The only evidence from the County available to the plaintiff was the self-serving testimony of Mr. Breed without any opportunity to examine Ms. Hulse regarding her prior activities with respect to service. Accepting at face value defendant’s assertion that Mr. Breed did not have express actual authority to accept service for the county, it remains an open question as to whether he had done so in the past, as to whether other county employees or administrative officers had done so in the past, as to whether there were other types of formal papers that third parties would deliver to Ms. Hulse that Mr. Breed would accept and deliver, or precisely how Ms. Hulse dealt with service when she was not available in the office. Plaintiff contends that, at a minimum, Mr. Breed’s representation that he would take the papers and deliver them to Ms. Hulse was a representation of apparent authority which Oconee County should be estopped to deny, thus validating service on defendant.

However, the evidence most strongly demonstrates that actual, rather than substituted, service was effected upon Oconee County. The relevant facts demonstrate as follows:

- Mr. Glenn Breed is a natural person over the age of 18 years.
- Mr. Breed is not a party to or an attorney in the civil action at issue.
- Mr. Breed accepted the summons and complaint from plaintiff's process server and promised to deliver them to Ms. Hulse.
- Mr. Breed did, in fact, deliver the summons and complaint to Ms. Hulse later that day.
- Ms. Hulse promptly forwarded the summons and complaint to the county's defense counsel, who thereafter appeared for Oconee County and vigorously defended this civil action.
- The summons delivered to Ms. Hulse was issued by plaintiff's attorney.
- The summons delivered to Ms. Hulse was signed by plaintiff's attorney and otherwise was correct in form and content.
- Both the summons and complaint were delivered together to Ms. Hulse by Mr. Breed.

Rule 4 of the South Carolina Rules of Civil Procedure governs service of process in civil actions. Rule 4(a) governs issuance of a summons and the evidence is uncontested that plaintiff complied with this portion of the Rule. Rule 4(b) governs the form of a summons and the evidence of record demonstrates plaintiff's compliance with this portion of the Rule. The relevant portion of Rule 4(c) specifies who may serve a summons:

(c) By Whom Served. Service of summons may be made by the sheriff, his deputy, or by any other person not less than 18 years of age, not an attorney in or a party to the action. . . .

Thus, Mr. Breed is unequivocally within the class of persons who can legally effect service of a summons and complaint.

Rule 4(d)(6) specifies that service upon a governmental subdivision is made “by delivering a copy of the summons and complaint to the chief executive officer or clerk thereof . . .” The only evidence before this Court shows without contest that a copy of the summons and complaint was, in fact, promptly delivered by Mr. Breed to Ms. Hulse, the Clerk of the County Council. Plaintiff respectfully submits that the language of Rule 4, which has the force and effect of statute, in the same manner as other statutes enacted by the South Carolina legislature.

“The primary rule of statutory construction is to ascertain and effectuate the intent of the Legislature,” *Gilstrap v. South Carolina Budget and Control Bd.*, 310 S.C. 210, 213 (1992). “If the statute is ambiguous, . . . courts must construe the terms of the statute.” *Town of Mt. Pleasant v. Roberts*, 393 S.C. 332, 342, 713 S.E.2d 278, 283 (2011). “A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design and policy of lawmakers. In interpreting a statute, the language of the statute must be read in a sense that harmonizes with its subject matter and accords with its general purpose.” *Id.* “Where the statute’s language is plain, unambiguous, and conveys a clear, definite meaning, the rules of statutory interpretation are not needed and **the court has no right to impose another meaning.**” *Gay v. Ariail*, 381 S.C. 341, 345, 673 S.E.2d 418, 420 (2009) (Emphasis supplied).

It is noteworthy to examine what is *not* required by Rule 4. The person effecting delivery of a summons and complaint to a county council’s clerk is not required to be retained by, or even knowingly acting on behalf of, the plaintiff. There is no formula of language that must accompany delivery of a summons and complaint. There is no requirement that the person delivering the summons and complaint even be aware that he or she is doing so. All that is required with respect to governmental subdivisions such as a county is delivery of the summons and complaint to the council’s clerk.

The purpose of Rule 4, as stated by the South Carolina Supreme Court, is to confer jurisdiction on the court and to assure the defendant of reasonable notice of the action. *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 456 S.E.2d 897 (1995). Exacting compliance with the rules is not required to effect service of process—inquiry must be made as to 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.*

Plaintiff has demonstrated from the testimony of the defendant's witnesses that complete and literal compliance with Rule 4 has been accomplished. Although defendant argued that this interpretation of Rule 4(d)(6) would render numerous prior decisions concerning substituted service invalid, defendant correctly notes that this would be the case only when the person receiving the summons and complaint thereafter delivered it in timely fashion to the person who was supposed to get the process. What defendant did not do, and cited no authority to demonstrate, is how the purpose of service, as stated by the South Carolina Supreme Court, is thwarted or subverted when the person who is required to receive delivery of a summons and complaint actually has the summons and complaint delivered in ample time to act upon it.

This matter is not one in which an unauthorized person both accepted the summons and complaint and then failed to deliver it, resulting in a default judgment. There is, in fact, abundant evidence of record that Oconee County has suffered no prejudice whatsoever by the means of service effected by plaintiff, other than the prospect of having to defend the action on its merits instead of a technicality.

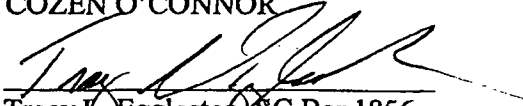
Plaintiff has literally complied with the terms of Rule 4 and has fully complied with the intent of Rule 4 as stated by the South Carolina Supreme Court. While defendant urged the Court to impose a number of additional conditions upon the service effected by plaintiff, none of

those conditions are stated in Rule 4 and there is nothing ambiguous about Rule 4 that requires interpretation and imposition of additional meaning beyond the plain language of the Rule.

Defendant has, successfully thus far, urged the Court to exalt a level of technicality contained neither in Rule 4 or in governing interpretations of that Rule over uncontested evidence that plaintiff complied with Rule 4 by causing a copy of the summons and complaint to be delivered promptly to the Clerk of the Oconee County Council. To deny plaintiff an opportunity to pursue this action on its merits by reason of court-imposed technical conditions that are wholly absent from Rule 4's provisions regarding service of process would represent the highest triumph of meaningless form over actual substance and would violate both the intent and the literal and unambiguous provisions of that Rule. Plaintiff therefore respectfully submits that the Court's ruling regarding service upon Oconee County should be reconsidered, altered and amended to hold that Oconee County was properly and validly served and that plaintiff's action should proceed on the merits.

Respectfully submitted this 22nd day of April, 2013.

COZEN O'CONNOR



Tracy L. Eggleston, SC Bar 1856
301 S. College Street, Suite 2100
Charlotte, North Carolina 28202
Tel: (704) 376-3400
Fax: (704) 335-9312
E-Mail: teggleston@cozen.com
Counsel for Plaintiff

Of Counsel:

Jefferson C. McConnaughey
COZEN O'CONNOR
SunTrust Plaza, Suite 2200
303 Peachtree Street NE
Atlanta, Georgia 30308
(404) 572-2000
(404) 572-2199 (facsimile)
E-Mail: jmcconnaughey@cozen.com

CERTIFICATE OF SERVICE

I herewith certify that a copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION PURSUANT TO S.C. R.Civ.P. RULE 59(e)** has been served upon all counsel this 22nd day of April, 2013 via electronic mail and by mailing a copy of same, first class postage pre-paid, in an envelope addressed as follows:

C. Daniel Atkinson, Esquire
datkinson@wilkeslaw.com
Wilkes Law Firm
127 Dunbar Street, Suite 200
Spartanburg, South Carolina 29306
Attorney for Defendant


Tracy L. Eggleston

FILED O'CONNOR, SC
BEVERLY H. WHITFIELD
CLERK OF COURT
2013 APR 22 PM 4 01

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

R. Lawton McIntosh, Presiding Judge

RECEIVED

MAY 31 2013

SC Court of Appeals

Case No.: 2012-CP-37-319

Randolph M. James, P.C., a North Carolina
Professional Corporation.....Appellant,

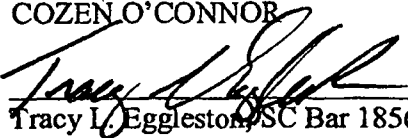
vs.

Oconee County, d/b/a Oconee County Aeronautics Commission
and d/b/a Oconee County Regional Airport (KCEU).....Respondent.

NOTICE OF APPEAL

Randolph M. James, P.C. appeals the Order of the Honorable R. Lawton McIntosh dated March 25, 2013 and the denial of Appellant's Motion for Reconsideration dated May 7, 2013. Appellant received written notice of the entry of these Orders April 11, 2013 and May 16, 2013, respectively.

May 29, 2013.

COZEN O'CONNOR
BY: 
Tracy L. Eggleston, SC Bar 1856
One Wells Fargo Center, Suite 2100
301 South College Street
Charlotte, North Carolina 28202
Tel: (704) 376-3400
Fax: (704) 335-9312
E-Mail: treggleston@cozen.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I herewith certify that a copy of the foregoing **NOTICE OF APPEAL** has been served upon all counsel and the Clerk of Court for Oconee County this 29th day of May, 2013 via electronic mail and by mailing a copy of same, first class postage pre-paid, in an envelope addressed as follows:

C. Daniel Atkinson, Esquire
datkinson@wilkeslaw.com
Wilkes Law Firm
127 Dunbar Street, Suite 200
Spartanburg, South Carolina 29306
Attorney for Defendant

The Honorable Beverly H. Whitfield
Oconee County Clerk of Court
PO Box 678
Walhalla, SC 29691-0678


Tracy L. Eggleston

 **COPY**

State of South)
Carolina) In the Court of Common Pleas
County of Oconee) Case No: 2012-CP-37-00319

Randolph M. James.)
P.C., a North)
Carolina Professional)
Corporation,)
Plaintiff,)

-vs-

Oconee County, South)
Carolina, a political)
subdivision of the)
State of South)
Carolina, d/b/a)
Oconee County)
Regional Airport,)
Defendant.)

) Transcript of Record
) Defendant's Motion to
) Dismiss

September 4, 2012
Walhalla, South Carolina

B E F O R E:

The Honorable Alexander S. Macaulay, Judge.

A P P E A R A N C E S:

Peter F. Asmer, Jr., Esq.
Attorney for the Plaintiff

C. Daniel Atkinson, Esq.
Attorney For the Defendant

Robin Sue Hild, FCRR, RPR
Circuit Court Reporter

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Exhibits

No.	Description	ID/EV
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No exhibits were introduced.

1 ** Start of Requested Certified Transcript of Record **
2 (Whereupon, the Defendant's Motion to Dismiss
3 hearing in the matter of Randolph M. James, P.C., a
4 North Carolina Professional Corporation v. Oconee
5 County, South Carolina, a political subdivision of
6 the State of South Carolina, d/b/a Oconee County
7 Regional Airport, 2012-CP-37-00319, commenced on
8 September 4, 2012, at approximately 1:00 p.m., with
9 all parties being present.)

10 THE COURT: The next case is Randolph M. James,
11 P.C., a North Carolina Professional Association, versus
12 Oconee County, d/b/a Oconee County Aeronautics
13 Commission, d/b/a Oconee County Regional Airport
14 (KCEU) --

15 What is KCEU?

16 MR. ASMER: That's the federal call number for that
17 airport, Your Honor.

18 THE COURT: Oh. I've been in Oconee County for a
19 while now, but I didn't know about KCEU. All right.

20 -- 2012-CP-37-00319. Mr. Asmer here on behalf of
21 the Plaintiff and Mr. Atkinson --

22 MR. ATKINSON: Yes, Your Honor.

23 THE COURT: -- on behalf of the Defendant.

24 All right. This is Defendant's Motion to Dismiss.

25

1 Defendant's Motion to Dismiss:

2 MR. ATKINSON: Your Honor, I submitted a Brief late
3 last week, I wanted to make sure you had a copy of it.
4 If you don't, I would be happy to hand one up.

5 THE COURT: Well, if you would, please. I'm sure
6 it's in here.

7 MR. ATKINSON: Indeed the stack of paper is thick,
8 but most of it is record and not Brief.

9 THE COURT: I don't see this in the file, so it
10 must not have made it here. All right.

11 MR. ATKINSON: Your Honor, the basis for this
12 motion is really simple. The County has moved to
13 dismiss the Complaint of Randolph James based on
14 insufficient service of process upon Oconee County.

15 South Carolina law is clear on who are registered
16 agents for service of process upon counties as set forth
17 in Rule 4(d)(6) of the South Carolina Rules of Civil
18 Procedure.

19 What is specified is (Reading):

20 Service can be effected by delivery of
21 a copy to the Chief Executive Officer of the
22 County or the Clerk thereof.

23 It's 4(d)(6), Your Honor.

24 THE COURT: And you are saying they didn't do that?

25 MR. ATKINSON: Yes, Your Honor. The initial effort

1 at service was certified mail. 4(d)(8) sets forth who
2 can be served by certified mail and counties are not
3 included. The only entities listed in Parts 1 through 3
4 of Rule 4(d), counties are not covered, so personal
5 service is required.

6 By way of background, this is the third action
7 we're here on because there have been two previous
8 actions filed in Federal Court. This is the first time
9 in State Court under the Tort Claims Act. There has
10 been a determination by the Federal Court based on the
11 Tort Claims Act the argument that the proper defendant
12 is Oconee County in this matter.

13 It is a claim related to an airplane striking a
14 deer at the Oconee County Airport on April 23rd, 2010.
15 Obviously, the significance being with the Tort Claims
16 Act claim there is a two-year Statute of Limitations
17 period under that action rather than a three-year for a
18 typical negligence case.

19 Your Honor, the Plaintiff attempted personal
20 service by having a process server deliver copies of
21 papers to two people that are at issue in this case
22 according their own Brief. The first is they purported
23 to effect service upon the Chairman of the Oconee County
24 Council, Reginald Dexter.

25 As a preliminary matter, and I ask the Court to

1 take judicial notice of this, but I have a witness who
2 can testify to this if necessary, Mr. Dexter is not the
3 Chairman of the Oconee County Council. He was the
4 Chairman in 2010. The present Chairman is Joel Thrift.

5 Secondly, even if Mr. Dexter were the Chairman of
6 the Oconee County Council, I don't think there is any
7 reasonable argument that can be made that the Chairman
8 of the Council is the Chief Executive Officer.

9 THE COURT: I was gonna ask you. We have a County
10 Administrator now.

11 MR. ATKINSON: That's correct, Your Honor. As I'm
12 sure you know, being a resident of this county,
13 originally Oconee County had a Council Supervisor form
14 of government. Under that form of government the
15 Chairman would be the Chief Administrative Officer, but
16 in I believe in 2003 ---

17 THE COURT: No, it would have been the Supervisor.

18 MR. ATKINSON: Yes, sir, Your Honor.

19 And my understanding -- maybe I misunderstood -- I
20 believe the Supervisor is an elected position akin to a
21 non-voting Chairman of the Council.

22 Regardless ---

23 THE COURT: So a Supervisor was elected as a Chief
24 Executive Officer?

25 MR. ATKINSON: Yes, Your Honor. And Chair of the

1 Council.

2 THE COURT: And before that you had the County
3 Delegation and the ruling commissions.

4 MR. ATKINSON: Before Home Rule, Your Honor.

5 THE COURT: We always talked about the Senator
6 being the Mayor of the County, but I don't know.

7 But go ahead. All right. So you are just saying
8 that even if they did serve the Chairman of County
9 Council, it was not the Chief Executive Officer.

10 MR. ATKINSON: Correct. Mr. Scott Moulder is here,
11 who is the present Administrator of Oconee County, and
12 if called, he would testify that he is the Chief
13 Executive Officer. By the Home Rule Statute the title
14 is listed as Chief Administrative Officer.

15 I've provided you the Home Rule Statutes for Oconee
16 County as attachments to my Brief.

17 What is clear from this statute is all executive
18 authority lies with the Administrator. The Chairman of
19 the Council's only power is to sign on behalf of the
20 Council, but he doesn't have independent power than
21 that. He can only sign if there is a majority vote of
22 the Council for him to do so.

23 In fact, without the vote of County Council, the
24 Chairman of the Council has no more power than any other
25 citizen of Oconee County to act on behalf of the County.

1 So that does away with the service on Mr. Dexter.

2 The second issue is the Clerk, who can accept
3 service pursuant to Rule 4(d)(6) is Elizabeth Hulse, the
4 Clerk of the County Council, who is, that position is
5 also created by County statute and provided for under
6 the Home Rule Statutes which are cited in my Brief.

7 The effort at service upon Ms. Hulse was a process
8 server came to the County offices. If you look at the
9 time line set forth on the Affidavits, it looks like he
10 came straight from Mr. Dexter's house and looked around
11 for a minute and handed papers to Glenn Breed, who is
12 the Deputy County Administrator.

13 There was an Affidavit submitted by the Plaintiff
14 stating that Mr. Breed stated that he had authority to
15 accept service on behalf of the County.

16 First of all, as a preliminary matter, a rule to
17 dismiss -- a motion to dismiss under Rule 12(b)(5)
18 requires the Court to make findings of facts, it's a
19 little different than a 12(b)(6) motion where you just
20 rely on the Plaintiff's assertions.

21 Mr. Breed is here if the Court wishes to pose
22 questions to him. He denies that he ever stated that he
23 had any authority to accept on behalf of the County. In
24 fact, what his his testimony would be is that someone
25 who was walking around with papers, did not say they

1 were a Summons and Complaint, and said "I need these to
2 go to Ms. Hulse," and he said "I'll give them to her."

3 This is significant because the case law cited in
4 my Brief today that I have provided to you sets forth
5 specific rules for someone to be authorized as an agent
6 for service of process. And the fact that someone says
7 that they are authorized to be an agent for service of
8 process, which we don't even concede happened, does not
9 so make them an agent.

10 I cannot stand up and say I have authority to
11 accept process on behalf of the people of Oconee County
12 on behalf of the County.

13 THE COURT: You can do that.

14 MR. ATKINSON: Well, it's not legally effective.

15 THE COURT: There is a difference.

16 MR. ATKINSON: Your Honor, there's two principal
17 cases from the Court of Appeals on this issue. I know
18 you want some authority so I've got some for you on this
19 issue. There's two principal cases from the Court of
20 Appeals on this issue.

21 The first is *Roberson v. Southern Finance* which is
22 cited in my Brief. That one actually dealt with a
23 motion to set aside the default against a finance
24 company.

25 And there, a process server attempted to deliver

1 process to the registered agent for the corporate
2 entity, and someone working in the office said "Oh, I
3 can accept for him."

4 The Court of Appeals said that's not good service.
5 You can't be an agent of the agent and therefore bind
6 the principal. It's blank letter law of the law of
7 agency that the principal can only be bound by the
8 principal's own actions.

9 For Oconee County to make someone an agent of
10 service of process other than by operation of South
11 Carolina law, I think even at bare minimum it would take
12 a vote of the Oconee County Council to so authorize
13 that, and there's no evidence that that ever occurred
14 with regard to Mr. Breed.

15 The second, I expect there to be an argument that,
16 well, they got notice of the suit, therefore, that's
17 good enough. That's not the law of South Carolina, Your
18 Honor.

19 There's another case cited in my Brief, *Moore v.*
20 *Simpson*, which I think was one of the last cases Judge
21 Kimball argued before he became Judge Kimball. It
22 involved his law firm, and it was a purported service
23 upon the firm by delivery to a secretary. And this was
24 a motion to quash. It was the same motion we're here on
25 today.

1 The issue was a secretary, who received mail all
2 the time on behalf of lawyers, received service. There
3 was an issue with regard to the Statute of Limitations.
4 The law firm said that service on the secretary is not
5 sufficient service upon the firm.

6 The Court, Trial Court dismissed, quashed service
7 on that, and it was affirmed by the Court of Appeals,
8 noting that you have to be appointed by actually the
9 principal or operation of law to be an agent for service
10 of process.

11 Your Honor, the case law is clear here. The
12 statutes of Oconee County and the South Carolina Rules
13 of Civil Procedure empower two people to be served with
14 process on behalf of Oconee County: the County
15 Administrator or the Clerk of the County Council. What
16 is clear in the record here is that neither were served;
17 therefore, there is no good service on the County, and
18 Oconee County is entitled to dismissal for improper
19 service.

20 By a brief way of note on the Affidavit that was
21 submitted by the process server late last week, there
22 are some conflicts and some things that I think question
23 the credibility. One is that in that Affidavit the day
24 he supposedly served the documents was Confederate
25 Memorial Day when the County offices were not open, so I

1 believe it would be difficult to serve Mr. Breed.

2 Now, I'll acknowledge there's a conflict between
3 that Affidavit and the Affidavits of Service, but I'm
4 surprised that he could provide specific details of
5 conversations that he had with people in an Affidavit
6 this long after the fact, but he couldn't get the date
7 right.

8 So, Your Honor, I have the witnesses here if you
9 would like to make inquiry of Mr. Breed regarding his
10 interaction with the process server, but I don't believe
11 it's relevant, because even if you take what the process
12 server said as true at face value, which I do not,
13 there's still no evidence that Mr. Breed was authorized
14 to accept service of process on behalf of Oconee County
15 even if he said he was.

16 THE COURT: Well, I'll hear argument first.

17 All right. Mr. Asmer?

18 Plaintiff's Argument in Opposition of Defendant's Motion
19 to Dismiss:

20 MR. ASMER: Your Honor, we did attempt to serve by
21 certified mail initially. Upon receiving notice from
22 Defense Counsel they didn't believe that was sufficient,
23 by virtue of their brief, we then effected personal
24 service on Mr. Dexter, and the service that was
25 attempted on Mrs. Hulse and ended up on Mr. Breed.

1 Until two weeks ago I was unaware that the
2 Defendant felt that that personal service was invalid.
3 I had bel-, their original objection and the basis of
4 their motion was the certified mail service, and when
5 they filed their motion, it was with the certified mail.

6 I contacted them when I saw that this hearing was
7 set and asked now that they had the affidavits of
8 service of the personal service, was there any issue.
9 And I was simply told, yes, there was. And through a
10 series of emails I then found, I got a response that
11 they didn't believe Mr. Dexter was Chief Executive and
12 they didn't believe Ms. Hulse was certified to accept
13 service.

14 I pointed out that she didn't need to be certified
15 under Rule 4, she's proper as the Clerk, and then I was
16 told, Well, it didn't actually happen upon her, it
17 happened upon Mr. Breed instead, so it's still not good.

18 As a first issue, until just now we were unaware
19 Mr. Dexter was not the Chairman at the time he was
20 served. We were told that he was the Chairman, which is
21 why he was served.

22 THE COURT: Well, regardless of being the Chairman
23 or not, it wouldn't make any difference under the Rule.

24 MR. ASMER: I think it does because I believe he is
25 the Chief Executive. Their assertion that the

1 Administrator is the Chief Executive is not supported by
2 the statutes, nor in case law in South Carolina.

3 THE COURT: Which statute are you referring to?

4 MR. ASMER: I'm referring the Home Rule Statute
5 that makes him the Chief Administrator.

6 THE COURT: I think it would be Title 5, wouldn't
7 it?

8 MR. ASMER: Yes. And the reason I say this, Your
9 Honor, and it's in my Brief, whenever the Legislature
10 has issued a Home Rule Statute for a County or Rule
11 statute for a municipal government, and they set forth
12 the forms of government, if they are appointing a Chief
13 Executive, they list him.

14 And, for example, I have right here Title -- this
15 is Section 5-13-70 of the Municipal Corporation Statute
16 where they are talking about the municipal manager form
17 of government. And in delegating the responsibilities
18 of the manager, it specifically says (Reading):

19 The manager shall be the Chief Executive
20 Officer and head of the administrative
21 branch of the municipal government.

22 And then it goes forth and cites his duties.

23 In the enabling statute for the council
24 administrator form of government, it simply says the
25 administrator is the administrator.

1 THE COURT: Well, let me ---

2 MR. ASMER: It does not designate him as the Chief
3 Executive.

4 THE COURT: Just a moment. Just for the sake of my
5 not having to take testimony and all that, you will
6 concede that -- well, let's see. All right.

7 Who was the one who was served? Mr. Dexter was not
8 the Chairman of County Council?

9 MR. ASMER: Until they just spoke I was not aware
10 of that fact.

11 THE COURT: I mean, do I need to take testimony to
12 that effect or do you have any reason to doubt?

13 MR. ASMER: I have no reason to doubt if they are
14 telling me today that he was not at the time that he was
15 served.

16 THE COURT: I know, because you just heard it.

17 MR. ASMER: Right.

18 THE COURT: But what I'm doing is trying to
19 determine as a matter of fact that Mr. Dexter was not
20 the Chairman of County Council at the time.

21 MR. ASMER: I believe that we need that evidence in
22 the record if that's what you're saying.

23 THE COURT: All right. Then we'll take, we'll take
24 testimony. Go ahead now.

25 MR. ASMER: But, having said that, the Rule does

1 say the Chief Executive Officer and the Clerk can be
2 effected service. Our process server signed his
3 affidavit and what he stated was he went to the
4 administrative offices, Ms. Hulse ---

5 THE COURT: Do you have -- I'm sure that's in here
6 somewhere. Where is it?

7 MR. ASMER: It's attached as Exhibit F to the
8 Defendant's Brief and and it's attached as Exhibit A to
9 mine. And the relevant, what Mr. Finley (phonetic) --

10 THE COURT: All right. Well, let's see. First of
11 all, service was on May the 10th at 12:20 p.m. on
12 Reginald Dexter, the purported Chairman of Oconee County
13 Council.

14 All right. Is that correct?

15 MR. ASMER: That's correct.

16 THE COURT: All right.

17 MR. ASMER: Which is, as you can see, how the
18 process server checked off his name, also, as Chairman.

19 THE COURT: Right.

20 MR. ASMER: And then at 1:05 on May the 11th --
21 either the 11th or the 16th, I'm not sure, this copy is
22 not good -- it was effected on Glenn Breed, Assistant
23 Administrator for E&E Servicing, listed as co-worker of
24 Ms. Hulse. Those are the original Affidavits of
25 Service.

1 Subsequently Mr. Finley did a single Affidavit,
2 which is the one attached as Exhibit F to the
3 Defendant's Brief --

4 THE COURT: Well, let me -- one other thing.

5 The copy that I have has the date May, and if it's
6 a zero, it's a zero but it is not complete. Is that May
7 the 10th, 2012?

8 MR. ASMER: I'll be honest, Your Honor. I thought
9 it was the 16th until Mr. Finley prepared this other
10 Affidavit saying it was May the...

11 THE COURT: Well, let me look at the -- it should
12 have been filed. Let me see if I can't find the
13 original.

14 MR. ASMER: I don't think there's any dispute that
15 those two attempts were made; what the Defendant is
16 saying is that they weren't sufficient.

17 THE COURT: I have to take the Affidavit at its
18 face value that it says whatever it says. And I'm sure
19 you're not challenging your --

20 MR. ASMER: No, I'm not, Your Honor.

21 THE COURT: Oh, come now. Well, it definitely
22 couldn't be the 16th because the date is the 11th. So
23 it would have to be before the 11th. And I see a zero,
24 I mean, the bottom half of it. But really, even the
25 original is not done, is not complete.

1 All right. Go ahead. I'm sorry.

2 MR. ASMER: And then all I was saying is that he
3 then subsequently submitted an affidavit in which he
4 summarizes service efforts both on Mr. Dexter and on
5 Ms. Hulse, and the relevant paragraphs being seven
6 through nine in regard to Ms. Hulse and Mr. Breed.
7 He...

8 (Whereupon, the Court and the Law Clerk conferred
9 off the record and out of the hearing of others.)

10 THE COURT: Go ahead.

11 MR. ASMER: He stated that (Reading):

12 Upon arriving at administrative offices
13 and learned that Ms. Hulse was not
14 present, I explained to the personnel ---

15 THE COURT: What's was the day he says that?

16 MR. ASMER: He says this occurred on May 10th.

17 (Reading):

18 Upon arriving at the administrative
19 offices, I learned that Ms. Hulse was
20 not present. I explained to the personnel
21 in the office I was there to serve legal
22 papers in Oconee County, asked if anyone
23 could receive service on Ms. Hulse's behalf ---

24 THE COURT REPORTER: I'm -- please slow down.

25 THE COURT: Slow down.

1 MR. ASMER: I'm sorry. I'll be happy to also hand
2 this.

3 THE COURT: Well, I understand. Go ahead.

4 MR. ASMER: He then testifies in his affidavit
5 (Reading):

6 Mr. Breed, the Assistant Administrator,
7 advised that he worked with Ms. Hulse
8 and could accept service of the Summons
9 and Complaint on her behalf.

10 Upon the representation of Mr. Breed,
11 I served him with the Summons and Complaint.

12 THE COURT: All right. So, but you are seeking
13 service on Mr. Breed and Mr. Dexter?

14 MR. ASMER: Mr. Breed in two capacities I would
15 argue, Your Honor.

16 THE COURT: I'm just asking -- again, please. It's
17 kind of like you would do a witness. Answer the
18 question and then you can explain the answer.

19 MR. ASMER: Yes, sir. We served Mr. Dexter and
20 Mr. Breed.

21 THE COURT: Those are the two individuals,
22 regardless of what the office might be or not be?

23 MR. ASMER: Correct.

24 THE COURT: Mr. Breed and Mr. Dexter?

25 MR. ASMER: Correct.

1 THE COURT: Now, you are also saying that it was on
2 May the 10th?

3 MR. ASMER: I have to, given that Mr. Finley says
4 it was May the 10th.

5 THE COURT: So that's what you are relying on,
6 those are the three things?

7 MR. ASMER: I have to rely on it, he's the server.

8 THE COURT: All right. Anything else?

9 MR. ASMER: On the one hand I'm saying that
10 Mr. Breed did in this situation have authority to accept
11 service, that Mr. Breed is the Assistant Administrator.
12 With Ms. Hulse out of the office, there is an argument
13 that he also is there to accept service on Mr. Moulder's
14 behalf, Mr. Moulder is not available as the
15 Administrator, he being the Vice Administrator.

16 THE COURT: All right.

17 MR. ASMER: And finally I would point to the case
18 law I cited in my Brief that specifically says, under
19 *Mole v. Richland Realty* (phonetic) that (Reading):

20 The principal object of service
21 of process in South Carolina is to give
22 notice to the Defendant of the proceedings
23 such that he can respond, and that exacting
24 compliance with the rules is not required.

25 What's required is to make sure that

- 1 By Mr. Atkinson:
- 2 Q. Mr. Breed, are you employed by the County of
- 3 Oconee?
- 4 A. Yes, sir.
- 5 Q. What is your title?
- 6 A. Assistant County Administrator.
- 7 Q. Have you previously served as a County
- 8 Administrator elsewhere?
- 9 A. I have.
- 10 Q. Where?
- 11 A. In Spartanburg County.
- 12 Q. What's the significance of May 10th on the
- 13 governmental calendar?
- 14 A. It is an official County holiday, Confederate
- 15 Memorial Day.
- 16 Q. Okay. What happens on official County holidays?
- 17 Are offices open?
- 18 A. Offices are closed.
- 19 Q. Do you have specific memory of delivery of papers
- 20 as we are arguing today?
- 21 A. Not on May the 10th.
- 22 Q. Okay. Do you remember receiving papers that
- 23 ultimately were found to be the Summons and Complaint in
- 24 this action?
- 25 A. On May the 10th?

- 1 Q. At all.
- 2 A. I do on a different date.
- 3 Q. Okay. What day do you remember receiving them?
- 4 A. May the 11th.
- 5 Q. And what do you remember about your interaction
- 6 with the process server on that date?
- 7 A. Simply providing assistance to someone that I
- 8 thought was lost, looking for an office that was closed
- 9 at the time, at lunchtime. I was the only one in the
- 10 office. I was simply trying to help a customer.
- 11 Q. Did the person with whom you spoke identify
- 12 themselves?
- 13 A. They did not.
- 14 Q. Did they say what kind of papers they were
- 15 delivering?
- 16 A. No.
- 17 Q. Did they say why they were seeking Ms. Hulse?
- 18 A. No.
- 19 Q. Did you ever represent having any authority with
- 20 regard to acceptance of service of process?
- 21 A. No, sir.
- 22 Q. Based on your experience, do you believe you have
- 23 such authority?
- 24 A. No, sir.
- 25 Q. And why is that?

1 A. I'm not the Chief Executive Officer of the County,
2 I'm the assistant to that gentleman.

3 Q. When you worked in Spartanburg, who did you deem to
4 be the Chief Executive Officer for purpose of delivery
5 of service?

6 A. Myself as the County Administrator and the Clerk to
7 Council.

8 Q. Okay. Do you know who the current Chair of the
9 County Council is?

10 A. I do.

11 Q. What's his name?

12 A. Mr. Joel Thrift.

13 Q. Do you have any idea how long he's held that
14 position?

15 A. Um, I'm not certain.

16 Q. Let me ask it this way. Has there been a different
17 Chair of the County Council in the calendar year of
18 2012?

19 A. No, sir.

20 MR. ATKINSON: That's all the questions I have at
21 this time, Your Honor.

22 THE COURT: All right. Cross-exam?

23 Cross-Examination by Mr. Asmer:

24 Q. Mr. Breed, you do recall getting the papers served
25 upon you by Mr. Finley?

1 A. I recall meeting in the hall and him handing over
2 papers, but unbeknownst to me.

3 Q. What did you do with those papers?

4 A. I took them to Ms. Hulse's office when she got back
5 from lunch.

6 Q. Did you give them to her?

7 A. I did.

8 Q. Are you over the age of eighteen?

9 A. Yes, sir.

10 MR. ASMER: Nothing further.

11 THE COURT: Re-exam?

12 MR. ATKINSON: No further questions, Your Honor.

13 THE COURT: All right, sir, you may step down.

14 THE WITNESS: Thank you.

15 (Witness leaves stand.)

16 THE COURT: All right. Call your next witness.

17 MR. ATKINSON: Your Honor, I call Scott Moulder.

18 THE CLERK: If you will place your left hand on The
19 Bible and raise your right hand.

20 (Whereupon, the Witness, Timothy Scott Moulder, was
21 sworn by the Clerk of Court.)

22

23

24

25

1 Whereupon,

2 Timothy Scott Moulder,

3 having been first duly sworn by the Clerk of Court, was
4 examined and testified as follows:

5 Direct Examination by Mr. Atkinson:

6 THE WITNESS: Same instructions, I'm assuming?

7 THE COURT: Give us your whole name, spelling your
8 last name.

9 THE WITNESS: Timothy Scott Moulder, M-o-u-l-d-e-r.

10 THE COURT: Thank you, sir.

11 THE WITNESS: Yes, sir, thank you.

12 By Mr. Atkinson:

13 Q. Mr. Moulder, are you employed by Oconee County?

14 A. Yes, sir.

15 Q. In what capacity?

16 A. The Oconee County Administrator.

17 Q. And how long have you been the Administrator?

18 A. Since June 1st of 2010.

19 Q. Who is the present Chair of the County Council?

20 A. Mr. Joel Thrift.

21 Q. Do you know how long he's held that position?

22 A. Since January of 2011.

23 Q. Was Mr. Dexter Chair of County Council at some
24 point?

25 A. He was. He was the Chair when I began employment

1 with Oconee County on June 1st of 2010.

2 Q. Does Oconee County publish the identity of the
3 Chairman of the Council somewhere?

4 A. Yes, sir, very clearly.

5 Q. Where?

6 A. It's on our website as well as every agenda and
7 minute document we produce from a Council meeting.

8 Q. Can you tell me briefly, and as briefly as you can,
9 what are your duties as County Administrator?

10 A. I am responsible for the overall management and
11 operation of the County operations.

12 Q. The Chair of the Council, does he have any
13 executive functions that he performs?

14 A. No, sir.

15 Q. Who signs the checks or drafts the budgets and
16 oversees the departments?

17 A. I do. I draft the budget and present an
18 administrative balanced budget for recommendation to
19 County Council for approval.

20 I manage all department heads other than appointed,
21 elected officials and they still report to me on a
22 budgetary, fiscal responsibility standpoint.

23 And what was the third one? Budget operation?
24 Wasn't there a third one?

25 Q. Supervision.

1 A. Oh, supervision. Yes, I'm responsible for their
2 supervision.

3 Q. The County officials that you don't supervise,
4 would those be in the nature of the Sheriff, the
5 Coroner, elected officials?

6 A. Madam Clerk of Court, Sheriff, Probate Judge,
7 Auditor, Treasurer, Coroner. I believe those would be
8 elected.

9 Q. How long have you served in Oconee and otherwise as
10 a County Administrator?

11 A. I was with, again, in Oconee since June 1st of
12 2010, so that's just over two years' time. Prior to
13 this employment I was with Abbeville County as their
14 County Director.

15 Q. Does Abbeville County have a different form of
16 government than does Oconee?

17 A. They do. They have a strong council form of
18 government with a director that's appointed as their
19 Chief Administrative Officer.

20 Q. Who in Abbeville in your opinion were the entities
21 or persons who were allowed to accept service of process
22 on behalf of Oconee County -- or Abbeville County? I'm
23 sorry.

24 A. Based on my experience I would say the Chairman,
25 Lynn Sokoloski, (phonetic) and the County Director. And

1 I'm saying in that standpoint "the Chairman" because the
2 Director would not be seen as the Chief Executive
3 Officer as they are in the administrator format.

4 Q. What is the form of government in Oconee?

5 A. The form of Government in Oconee is an
6 administrator form of government.

7 Q. And how was that adopted?

8 A. Um, I'm not sure. I haven't seen those documents
9 and I wasn't here when it was done. But I'm assuming,
10 if I remember correctly, that it was voted on through
11 referendum by the public and approved the form of
12 government.

13 Q. Is there any doubt based on your knowledge that
14 Oconee County has the council manager form of
15 government?

16 A. Council does not have a council manager form of
17 government, they have an administrator form of
18 government.

19 Q. I'm sorry. Thank you. Council administrator form
20 of Government.

21 Based on your experience as an Oconee County
22 Administrator, who are the persons that are authorized
23 to receive service on behalf of Oconee County?

24 A. I would say our Clerk of Council as well as the
25 Administrator.

1 Q. Is that somehow communicated to County employees?

2 A. Not on a regular basis, no, sir.

3 Q. Okay. And in your opinion does the Council Chair
4 have the authority to accept process?

5 A. No, sir.

6 Q. Does any other County employee have a -- can --
7 well, let me ask it this way: Can your secretary
8 receive service of process on your behalf?

9 A. No, sir.

10 Q. Can anyone else that works for the County other
11 than Ms. Hulse and yourself receive process on the
12 County's behalf?

13 A. No, sir. Not from my understanding of the law and
14 what I've been told by our County Attorney.

15 Q. Okay. Has the County designated anyone besides
16 yourself and Ms. Hulse to receive process?

17 A. No, sir.

18 MR. ATKINSON: Those are all the questions I have.
19 Thank you.

20 THE COURT: Cross-exam.

21 Cross-Examination by Mr. Asmer:

22 Q. Mr. Moulder, have you ever been directly -- or let
23 me ask it this way.

24 Are you aware of any ordinance that specifically
25 gives you the title of Chief Executive Officer?

1 A. We do have an administrator's ordinance that
2 establishes the position as the lead of the
3 organization, yes, sir.

4 Q. Does it say that you are the Chief Executive
5 Officer?

6 A. I would have to see a copy of the ordinance to
7 confirm that.

8 Q. Are you referring to a local ordinance or to the
9 state statute?

10 A. Local ordinance. You said ordinance --

11 Q. Yes.

12 A. -- because it's different and I wanted to make sure
13 I got you.

14 Q. You're aware that the state statute does not refer
15 to the Administrator as the Chief Executive Officer?

16 A. I would have to see that law in order to confirm
17 that.

18 Q. You have never reviewed that statute?

19 A. I have. But there's a lot of statutes that I've
20 reviewed, so I'd like to see it.

21 Q. Is there some local ordinance in which the County
22 designated your office of the Administrator as able to
23 accept service of process for the County?

24 A. Could you repeat that? I'm sorry. This thing was
25 caught on my foot.

1 Q. Sure. Is there an ordinance that you're aware of
2 at the County level at which the Council designated the
3 Administrator to accept service of process of suit
4 papers?

5 A. Not that I've seen, no, sir.

6 Q. If you are a citizen of Oconee County and wanted to
7 file a lawsuit against Oconee County, how would a
8 citizen know that they could serve you with those
9 documents?

10 A. They could attempt service, and if that person
11 wasn't authorized to do so, and if the server, the
12 process server knew who they were supposed to serve,
13 they could go to the right office.

14 Q. No. My question is: If I am a citizen and I want
15 to serve you with, I want to serve the County with
16 papers, on the website does it say that you are able to
17 accept service as the Administrator?

18 A. There is is no statement that, "Here's who you
19 serve process on."

20 Q. So the County doesn't tell the citizens of Oconee
21 who can accept service of process?

22 A. No, sir. There's a lot of things I don't tell the
23 County citizens.

24 Q. And they would have to rely on the Rule that says
25 that we serve the Chief Executive Officer and I guess

1 the Clerk of the County Council, correct?

2 A. Yes, sir.

3 Q. And in this case do you contend that you would be
4 the Chief Executive Officer by virtue of your duties?

5 Is that how I understand your testimony?

6 A. If I'm answering, if I'm answering your question,
7 yes.

8 Q. You are not aware of any designation by the State
9 specifically designating you as the Chief Executive
10 Officer?

11 A. The Legislature has not specifically said Scott
12 Moulder is the Chief Executive Officer of Oconee County,
13 no, sir.

14 Q. And has the Legislature said that the County
15 Administrator is the Chief Executive Officer?

16 A. Um, I haven't heard them say that, no, sir.

17 Q. Are you aware that when the Legislature set forth
18 the forms of government municipalities, and I'll use the
19 municipal manager form of government, they specifically
20 designated the manager and that form of government as
21 both the Chief Executive and the Chief Administrator?

22 A. Again, I would have to have that law in front of me
23 to confirm that. I've never worked under a manager form
24 of government in a city, so I don't know that one
25 specifically.

1 Q. But you would agree if the Legislature intended to
2 give you the title "Chief Executive," it could have done
3 so ---

4 A. I don't know what their intent was when they
5 approved Home Rule forms of government. I wasn't there.

6 MR. ASMER: Fair enough.

7 Nothing further, Your Honor.

8 MR. ATKINSON: Nothing further, Your Honor.

9 THE COURT: Re-exam?

10 MR. ATKINSON: You can step down.

11 (Witness leaves stand.)

12 MR. ASMER: Your Honor, if I could approach, I have
13 a copy of the municipal corporation manager form of
14 government that I've been referring to.

15 THE COURT: Have you got anything on County form of
16 government?

17 MR. ASMER: The Defendant submitted the authorizing
18 statutes in its Brief to the County form of government,
19 Your Honor. I believe they are attached as one of the
20 exhibits.

21 MR. ATKINSON: They are.

22 Your Honor, may I briefly be heard?

23 THE COURT: Certainly.

24 MR. ATKINSON: What is clear from the law in South
25 Carolina is that the Plaintiff, purporting to complete

1 service, has the burden of demonstrating service is
2 accurate. And I have heard a lot of arguments that
3 there is no statute expressly saying that the County
4 Administrator is the Chief Executive, but I've also seen
5 no statutes anywhere saying that the Chairman of the
6 County Council is.

7 And observing the functions set forth in the Home
8 Rule Statute -- and, Your Honor, if you want the
9 citation of the statute, I can get it really quick. For
10 the County Administrator it's S.C. Code 4-9-620.

11 THE COURT: Okay.

12 MR. ATKINSON: It includes (Reading):

13 Serving as Chief Administrative
14 Officer of government, executing policies,
15 directives, and Legislative actions for
16 the Council, preparing budgets and requiring
17 reports for County departments and agencies,
18 supervising expenditure of funds, and
19 preparing reports to Council on finances
20 and administrative services of the County.

21 That sure sounds like a Chief Executive Officer to
22 me as opposed to someone under this form of government,
23 the County Council Chair has the authority to preside
24 over meetings and sign on behalf of the Council ---

25 THE COURT: What does the second sentence of that

1 citation say?

2 MR. ATKINSON: I'll be honest, Your Honor. I don't
3 have that in front of me.

4 THE COURT: I thought you had it.

5 MR. ATKINSON: I had the cite to it, not the ---

6 THE COURT: Well, let me read it to you. Well,
7 first I'll read the first sentence to you (reading):

8 The Council shall employ an
9 administrator who shall be the
10 administrative head of the County government
11 and shall be responsible for the administration
12 of the department of the County government
13 which the Council has the authority to control.

14 He shall be employed --

15 Well, I guess that means everybody but the Sheriff
16 and the Clerk of Court and all those -- and the Circuit
17 Judge, I trust.

18 MR. ASMER: Absolutely, Your Honor.

19 MR. ATKINSON: Certainly, Your Honor.

20 MR. ASMER: I agree with that, Your Honor. I agree
21 there.

22 THE COURT: All right. But the second sentence
23 says (Reading):

24 He shall be employed with regard
25 to his executive and administrative

1 qualifications only and need not be a
2 resident of the County at the time of
3 employment.

4 MR. ASMER: Your Honor, we wouldn't argue that he
5 doesn't have executive duties, just that it doesn't say
6 he's the Chief Executive.

7 THE COURT: Well, who else does?

8 MR. ASMER: I would assume that it has to be the
9 Chairman of the Council without the power being
10 designated otherwise.

11 THE COURT: Whoa, whoa, whoa. Does it say that the
12 Chairman of a, of the Council under the Council
13 Administrator form of government has any duties?

14 MR. ASMER: Nowhere in the enabling statute does it
15 identify a Chief Executive Officer.

16 THE COURT: Well, I didn't ask you that -- we're
17 getting back -- just remember, just as if ---

18 MR. ASMER: I'm sorry. I misunderstood your
19 question.

20 THE COURT: My question: Is there anywhere in the
21 Council Administrator form of government does it say
22 that the Chairman of the County Council has executive
23 duties, other than ribbon cutting?

24 MR. ASMER: Your Honor, I would have to look at the
25 statute. I do recall it says that Council has to ---

1 THE COURT: I didn't say Council, I said Chairman.

2 MR. ASMER: Well, no. In the statute it's got a
3 section where it says the Council has to elect the
4 Chairman for a year's appointment and then I believe it
5 has his duties. I would have to look at the actual
6 statute to see what it says the Chairman does.

7 THE COURT: He's gonna do that.

8 MR. ASMER: But, Your Honor, I would also
9 submit ---

10 THE COURT: Mr. Atkinson, go back to your --

11 MR. ATKINSON: 630, Your Honor.

12 THE COURT: You are talking about the County
13 Administrator.

14 And that is what you are, right, Mr. Moulder?

15 MR. MOULDER: Yes, sir.

16 THE COURT: It says (Reading):

17 Duties of administrator shall include
18 but are not limited to the following: To
19 serve as the Chief Administrative Officer
20 of the County, to execute the policy,
21 directives, and Legislative actions of the
22 Council.

23 All right.

24 MR. ASMER: Your Honor, I have, I have the
25 statute --

1 THE COURT: Give me your Council Chairman, I want
2 to know that.

3 MR. ASMER: It's section 2-32, Council Chair.

4 THE COURT: Whoa, whoa. Do what?

5 MR. ASMER: I'm reading from --

6 THE COURT: Well, 2 is not under County government,
7 it's Title 4 --

8 MR. ASMER: I apologize.

9 THE COURT: -- and municipal government is Title 5.

10 MR. ASMER: I'm reading the County Ordinance
11 setting forth the Chairman's duties. I apologize. This
12 is the actual sentence for each.

13 It says according to Ordinance Section 2-32 -- let
14 me get to it -- (Reading):

15 The Council Chair shall preside
16 at all regular and special meetings of
17 County Council and shall execute on behalf
18 of County Council all ordinances,
19 resolutions, directives, deeds, bonds,
20 contracts ---

21 THE COURT REPORTER: Please slow down, please.

22 MR. ASMER: Sorry.

23 -- all ordinances, resolutions,
24 directives, deeds, bonds, contracts, and
25 other official instruments or documents

1 unless Council specifically authorizes
2 execution ---

3 THE COURT: Whoa, whoa, whoa, whoa. The operative
4 word there is "instruments".

5 MR. ASMER: It says "and other official instruments
6 and documents."

7 THE COURT: And other official instruments. What
8 he's executing, he's talking about signing. Not
9 executive. Executing. That means if you do a deed, a
10 document, an ordinance, whatever, it has to have his
11 signature on it.

12 MR. ASMER: It then continues and says (Reading):

13 ...and such other duties and to
14 perform such other functions as they are
15 set forth in this chapter and authorized
16 by state law.

17 THE COURT: It doesn't say anything about Chief
18 Executive Officer with all the administrative duties of
19 the County.

20 MR. ASMER: It does not, Your Honor.

21 THE COURT: I'm just curious.

22 MR. ASMER: Your Honor, I think one thing we may be
23 overlooking ---

24 THE COURT: By the way, you do say there is
25 something in the Municipal Code, I think Title 5 --

1 MR. ASMER: Yes, Your Honor.

2 THE COURT: -- that says something about Chief
3 Executive?

4 MR. ASMER: Specifically. I've got a copy if you
5 want.

6 THE COURT: All right. Do you want me to give you
7 a Latin term?

8 MR. ASMER: Sure.

9 THE COURT: *Expressio unus est exclusio alterius.*
10 Do you know what that means?

11 MR. ASMER: I do not, Your Honor.

12 THE COURT: Expression of one excludes all others.
13 So if they express Chief Executive Officer in one place,
14 that means that's where it's limited to, not everywhere.
15 Otherwise, if they knew how to use Chief Executive
16 Officer in the municipal forms of government, they could
17 have used it in the County forms of government.

18 MR. ASMER: That was my argument, Your Honor, that
19 they knew how and they didn't.

20 THE COURT: And they didn't, so that means that's
21 excluded --

22 MR. ASMER: That's --

23 THE COURT: -- excluded from the County form of
24 government.

25 MR. ASMER: But, Your Honor, I think we're

1 overlooking one other issue.

2 THE COURT: I'm more concerned about your question
3 about, and you cited a county, a Richland County or
4 something like that case? I want to look at that.

5 MR. ASMER: The Mole v. Richland Realty. It's --

6 THE COURT: Oh, Richland Realty.

7 MR. ASMER: -- 693 S.E.2d --

8 THE COURT: Oh, that's a little different. I
9 thought it was Richland County. Because there are, in
10 other words, a party can't refuse to accept service or
11 thwart service by some sort of --

12 MR. ASMER: Well, and there's one fact that just
13 came to light that I think we're overlooking, and it's
14 because we don't think of it typically, to be perfectly
15 honest. Mr. Breed testified he handed the suit papers
16 to Ms. Hulse.

17 THE COURT: He's over eighteen.

18 MR. ASMER: He's over eighteen. And under the Rule
19 all you have to do to effect service is any individual
20 over the age of eighteen --

21 THE COURT: I'm trying to find -- where is -- give
22 me --

23 MR. ASMER: It's Rule 4.

24 THE COURT: I'm not looking at Rule 4. I'm looking
25 at your Affidavit.

1 How about this? (Reading):

2 Deponent knows the person so served
3 and the Deponent is not a party of this action.

4 MR. ASMER: He was not.

5 MR. ATKINSON: Your Honor --

6 THE COURT: If we start doing assistants, isn't he
7 the Assistant Administrator?

8 MR. ASMER: He's the Assistant Administrator, but
9 he's -- I'm not sure I follow the question, Your Honor.

10 THE COURT: Well, I mean, in other words, I
11 understand that we usually hire people to serve papers
12 because they are not parties to the action; in other
13 words, they don't have any relation to either of the
14 parties. In other words, I don't know if I would hire
15 your wife -- if you are married.

16 MR. ASMER: I am.

17 THE COURT: -- I wouldn't necessarily hire your
18 wife to sue you, to serve papers on you suing you.

19 MR. ASMER: I would say you're --

20 THE COURT: And she's not a, quote, party to the
21 suit, but she obviously would be, there would be some
22 question about her impartiality in giving an Affidavit.

23 MR. ASMER: But I guess I'm --

24 THE COURT: So I'm not just, I'm not sure of that
25 fact, and we'll have to look at something else.

1 MR. ASMER: Well, I guess my point is, Your Honor,
2 is that under the Mole v. Richland Realty case, the
3 point is in South Carolina, the point is to show that
4 the person who is supposed to get service got the
5 document. And if you can show that, you don't have to,
6 as they say, have exact compliance with the Rules.

7 In this case Mr. Breed ---

8 THE COURT: I didn't know about -- that's also the
9 Chief Justice's observation in Roche (phonetic) --

10 MR. ASMER: Yes.

11 THE COURT: -- that if you got it, you know, that's
12 the most important thing. But there again, that was
13 service on a corporation there was a question about, and
14 they actually tried to thwart service. I haven't heard
15 anything that said they were thwarting service.

16 MR. ATKINSON: Your Honor, if I may briefly --

17 THE COURT: And, by the way, and also in proving
18 service, as I understand, once it's established that
19 service was not followed by the Code or the Rule, then
20 it becomes the duty or the responsibility or the burden
21 of proof on the server.

22 Yes?

23 MR. ATKINSON: I'm well familiar with the Roche
24 case, I've argued it a bunch of times. And there it was
25 an executive in the, it was a corporation, so it's a

1 different entity. But they were actually ducking
2 service and they got it on the ---

3 THE COURT: Isn't that exactly what I said?

4 MR. ASMER: No, we're not claiming they were
5 ducking, Your Honor.

6 MR. ATKINSON: But, Your Honor, the other thing I
7 would note is that Moore v. Simpson, which is the case
8 involving Judge Kimball's firm, that service was
9 effected on the secretary, and there was no argument
10 that the lawyer didn't get the service, it was that the
11 service was improper and, therefore, they were entitled
12 to dismissal.

13 THE COURT: All right. Anything else?

14 MR. ASMER: That's all Your Honor.

15 MR. ATKINSON: Thank you.

16 The Court's Ruling:

17 THE COURT: I'll tell you what I'm going to do. I
18 think -- and by the way, you obviously know that my
19 ruling from the bench today and even my entry of a Form
20 4 is not final. But in order to get this matter
21 resolved as soon as possible to your benefit, that I'm
22 going to grant the motion to dismiss and ask
23 Mr. Atkinson to prepare a proposed Order.

24 How much time do you need?

25 MR. ATKINSON: Ten days, Your Honor?

1 THE COURT: Ten days. All right. Now, usually I
2 give you more, but I'm going to limit you to ten days.
3 Of course, you serve it under Rule 5 on the Plaintiff.
4 But the thing is, I don't sign Orders for five days
5 after I get them. And that's not to reargue as much as
6 to be sure that it is appropriate so you will have time
7 to respond if you would like to.

8 MR. ASMER: May I ask for one clarification, Your
9 Honor?

10 THE COURT: Certainly.

11 MR. ASMER: Their motion asks that this motion to
12 dismiss be granted with prejudice. Are you granting it
13 with or without? Because I would also contend there is
14 absolutely no basis for it to be done with prejudice.

15 THE COURT: I think the prejudice -- and that's
16 where it is -- if he's talking about the Statute of
17 Limitations under the Tort Claim --

18 Is that what this is brought under, the Tort
19 Claims?

20 MR. ATKINSON: Yes, Your Honor, it's a Tort Claims.

21 THE COURT: So it's the two-year statute?

22 MR. ATKINSON: Yes, Your Honor.

23 THE COURT: -- that that's gonna be set by statute.

24 MR. ASMER: I understand, Your Honor. But when --

25 THE COURT: In other words, that's an affirmative

1 defense.

2 MR. ASMER: That's what I was asking.

3 THE COURT: Yes. It's dismissing it based on the
4 service statute 4(b)(6) -- is it 4(b)(6)?

5 MR. ATKINSON: 12(b)(5) is the Rule 12 dismissal.

6 THE COURT: Yes. But the service statute, I said.

7 MR. ATKINSON: 4(b)(6), Yes, Your Honor.

8 THE COURT: But there's a 12(b)(5) motion --

9 MR. ATKINSON: Yes, Your Honor.

10 THE COURT: -- being dismissed because it was not
11 perfected under 4(b)(6).

12 All right. Very good. But no, it's not without
13 prejudice. It's only prejudice to this service is not
14 good.

15 MR. ATKINSON: Your Honor, do you wish to have that
16 sent to you by email?

17 THE COURT: Email, of course.

18 MR. ATKINSON: All right.

19 THE COURT: All right. Well, you already heard it.
20 Again, gentleman, I want to thank you for your
21 patience.

22 MR. ASMER: Thank you, sir.

23 MR. ATKINSON: Thank you, sir.

24 THE COURT: It's always an interesting case.

25 MR. ASMER: Your Honor, it got me out of Charlotte

1 at a time where I did not need to be down there.

2 THE COURT: Congratulations.

3 MR. ASMER: Thank you.

4 (Discussion off the record.)

5 (The above hearing was adjourned at approximately
6 1:46 p.m.)

7 ** End of Requested Certified Transcript of Record **

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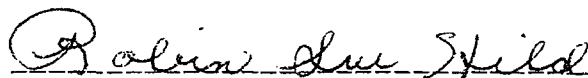
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Certificate of Court Reporter

I, the undersigned, Robin Sue Hild, FCRR, RPR, Official Court Reporter for the Tenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and the evidence introduced in the hearing of the captioned case, relative to appeal, in the Court of Common Pleas for Oconee County, South Carolina, on the 4th day of September, 2012.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

November 12, 2012



Robin Sue Hild, FCRR, RPR
Circuit Court Reporter

STATE OF SOUTH CAROLINA	)	IN THE TENTH JUDICIAL CIRCUIT
COUNTY OF OCONEE	)	THE COURT OF GENERAL SESSIONS
	)	2012-CP-37-00319
RANDOLPH M. JAMES PC,)	
)	
PLAINTIFF,)	
)	
VERSUS)	
)	
COUNTY OF OCONEE d/b/a, et al.)	)	DATE: DECEMBER 11, 2012
	)	WALHALLA, SOUTH CAROLINA
DEFENDANT.)	

MOTION TO DISMISS

B E F O R E:

THE HONORABLE R. LAWTON MCINTOSH

A P P E A R A N C E S:

PETER FREDRICK ASMER, JR., ESQUIRE
ATTORNEY FOR THE PLAINTIFF

CHARLES DANIEL ATKINSON, ESQUIRE
ATTORNEY FOR THE DEFENDANT

PROVIDED FOR: SCCID - DANIEL ATKINSON

FOR COPIES CONTACT: JO RICE
jrice@sccourts.ORG
OFFICIAL COURT REPORTER
SOUTH CAROLINA JUDICIAL DEPARTMENT

1 THE COURT: Okay. The first case on the docket is
2 Randolph M. James, PC, versus County of Oconee. This is a
3 motion to dismiss with prejudice. Is that correct?

4 MR. ATKINSON: Yes, Your Honor.

5 THE COURT: Would you state your name for my court
6 reporter, please, sir?

7 MR. ATKINSON: Yes, Your Honor. Dan Atkinson for the
8 Defendant, Oconee County.

9 MR. ASMER: Peter Asmer for the Plaintiff.

10 THE COURT: Thank you. Good to see you gentlemen.
11 All right. I'll be glad to hear from you.

12 MR. ATKINSON: Judge, there are actually two motions
13 to be heard, because one carried over and was consolidated
14 by order of Judge Macaulay. Initially, in May of this
15 year, I filed a motion to dismiss pursuant to Rule 12(d)(5)
16 because of improper service on Oconee County. After a
17 hearing on September 4th of this year, Judge Macaulay
18 stated an intention that he would likely grant that motion.
19 The Plaintiff amended their complaint and filed a new
20 complaint and served the amended summons and complaint on
21 September 7th. The reason the first motion still needs to
22 be heard is that the time issue for statute of limitation
23 purposes will be determined by when Oconee County was
24 actually served. Judge, there's briefs. I'm not going to
25 read the briefs to you.

1 THE COURT: I've read it.

2 MR. ATKINSON: Thank you. I've provided a transcript
3 from the original hearing. It's a lot of pages. I want to
4 direct your attention to a few so you don't have to review
5 all of them.

6 THE COURT: Now, I have not seen the transcript from
7 the hearing.

8 MR. ATKINSON: I think your law clerk has a copy of
9 it.

10 THE COURT: All right.

11 MR. ATKINSON: The pages, the only pages I'll refer
12 to, Judge, are the testimony of Glenn Breeden as well as
13 the -- who was the Deputy County Administrator for Oconee
14 County, as well as the testimony of Scott Moulder, who is
15 the County Administrator. Those pages are 21 through 34 of
16 the transcript.

17 THE COURT: Okay, sir.

18 MR. ATKINSON: Judge, in fact, the issue here is
19 relatively simple. What it comes down to is, when was
20 Oconee County properly served with process of this case. As
21 you know, Oconee County is a political subdivision of the
22 State of South Carolina and, therefore, the rules for
23 service of process upon it are governed by Rule 4(d)(6) of
24 the South Carolina Rules of Civil Procedure. Initially,
25 Plaintiff attempted to effect service via certified mail.

1 Rule 4(d)(8) governs certified mail. There's no provision
2 for certified mail service on the County. That was the
3 original motion to dismiss that arose from that. In the
4 motion, Oconee County expressly stated there were two
5 people who could be served, and that's the chief executive
6 officer of the county or the clerk of the county council
7 and that comes exactly from Rule 4(d)(6).

8 THE COURT: Tell me a statute other than Rule 4(d)(6)
9 that provides for service on the county.

10 MR. ATKINSON: There is no statute that provides
11 service upon anybody else to my knowledge, Your Honor. At
12 the last hearing a major issue came up, who was the chief
13 administrative officer, chief executive officer of the
14 county: Was it the chairman of the county council or was
15 it the county administrator. My position, and I think the
16 home rule statutes are clear that it's the county
17 administrator, but obviously, for purposes of this motion,
18 it doesn't matter because plaintiff didn't serve either
19 one.

20 If you look to the language of the original complaint,
21 the reference is to the Honorable Joel Thrift, Chairman of
22 the County Council. That is who was the chairman of the
23 county council at the time the complaint was served.
24 Service was made upon Reginald Dexter, who is a member of
25 the county council but not the chair. Again, even if you

1 look to the language -- in paragraph two of the original
2 complaint filed by the Plaintiff, it noted who the proper
3 county administrator was, but that's not who they served.

4 What we come down to, Your Honor, is, was Elizabeth
5 Hulse served. She was not personally served with the
6 summons and complaint. That's clear from the affidavits in
7 this case. What happened is, the process server came to
8 the county administrative offices, which are a couple of
9 blocks from here and delivered papers. There's a conflict
10 in the testimony.

11 And just for way of background, a Rule 12(b)(5) motion
12 -- this isn't like a Rule 12(b)(6) motion, where any facts
13 in the non-moving party's favor dictates that the Court has
14 to make a finding as to what the facts are with regard to
15 service. Glenn Breeden's testimony, which was presented
16 with cross-examination at the September hearing, was that
17 somebody came to him and said they had papers for Ms.
18 Hulse, didn't say it was process, didn't say they were
19 serving the county, they just delivered the papers. An
20 affidavit from the process server conflicts with that.
21 But, Your Honor, the affidavit is not particularly credible
22 because the date of service on the affidavit is Confederate
23 Memorial Day, when he said he served it, which is a day the
24 county offices are not open. So, he didn't get the date
25 right, so I don't think he's credible on much of anything

1 in his affidavit.

2 Regardless, even if the process server told Mr.
3 Breeden, "I'm here to serve the county," and Mr. Breeden
4 took the papers, that's not proper service on the county.
5 Black letter law on agencies for purposes of this is, that
6 Mr. Breeden would have been, had to have been authorized by
7 the principal to accept service of process on his behalf.
8 There's no act of the Oconee County Council or any other
9 act that gives Mr. Breeden, a deputy administrator,
10 authority to accept service on behalf of the county.

11 There were two people who could have been served,
12 Scott Moulder or Elizabeth Hulse, and neither one of them
13 was served until September 7th.

14 The case law cited in my brief fleshes through it.
15 We've got cases where a secretary received process for
16 lawyers. That's not good service on a law firm. It's the
17 Moore versus Simpson case. There is no good service.
18 There was no good service until September 7th of 2012. The
19 reason that's significant, is September 7th, 2012 is a
20 hundred and fifty-seven days after the statute of
21 limitations ran on this case. I think the case you will
22 hear primarily from the Plaintiff is the Mims versus
23 Babcock Center case, which is dealing with this issue, the
24 South Carolina statute interpreting when an action is
25 commenced for statute of limitation purposes.

1 The Supreme Court ruled there are two ways you can
2 commence an action properly within the statute of
3 limitations. One is to serve it within the limitation
4 period, which did not happen in this case. Even if the
5 first service was service, it was not within the limitation
6 period. The second is to serve within one hundred and
7 twenty days of filing. Ms. Hulse was served on September
8 7, 2012, a hundred and fifty-seven days after the filing of
9 the summons and complaint in this action. That's not
10 within a hundred and twenty days.

11 THE COURT: When you say the summons and complaint,
12 you're really referring to the amended summons and
13 complaint?

14 MR. ATKINSON: Yes, Your Honor, You're correct. Thank
15 you. The amended summons and complaint was served the day
16 it was filed, which is September 7th, 2012, on Ms. Hulse as
17 the Clerk of County Council.

18 THE COURT: Was there ever a consent for the
19 amendment?

20 MR. ATKINSON: There was no consent for the amendment.
21 Because the first answer was -- because the first
22 responsive document filed by Oconee was not an answer, but
23 rather a motion to dismiss, I expect Mr. Asmer will argue
24 that there was no requirement for consent at that point.
25 Regardless, the doctrine of relation back doesn't relate

1 back for the dates of service. I agree that if he files an
2 amended complaint, the date of filing is the date of the
3 original complaint's filing, but you don't get a hundred
4 and twenty days from the date of amendment. The statute
5 says, and the Mims case says, you get a hundred and twenty
6 days from the first filing of the complaint. It's a
7 hundred and fifty-seven days -- two years and a hundred and
8 fifty-seven days, which under the statute of limitations is
9 too late. Therefore, the action is time barred and should
10 be dismissed with prejudice.

11 THE COURT: Does everybody agree that there's a two-
12 year statute of limitations in this case?

13 MR. ASMER: Yes, Your Honor.

14 THE COURT: All right. I'll be glad to hear from you,
15 counsel.

16 MR. ASMER: First, I would agree that the issue of the
17 chief executive is no longer an issue. I think that was
18 decided at the first hearing. The issue is service on Ms.
19 Hulse. Addressing the issue first ---

20 THE COURT: Well, hold on just one second so I'm clear
21 on the record.

22 MR. ASMER: Sure.

23 THE COURT: I don't need to address the matter ruled
24 on by Judge Macaulay, but apparently not incorporated into
25 an order. Is that correct?

1 MR. ASMER: I'm not sure. I think Mr. Atkinson wants
2 you to rule on the first motion, also. The first motion
3 dealt with service on the council and on Ms. Hulse. And
4 what I am conceding is that the issue of whether the
5 service on the councilman was correct or not, we concede
6 that his point with the chief executive, regardless of
7 whether you determine it was the administrator or the chair
8 of the council, it's irrelevant because neither of them
9 were served, as he pointed out.

10 THE COURT: Okay.

11 MR. ASMER: Ms. Hulse, though, was always a proper
12 party to receive service. Whether the process server has
13 the date in his affidavit correct or not is also
14 irrelevant, based on Mr. Breeden's testimony, because when
15 he testified he said, "He did come to me. He did give me
16 the papers." I then questioned him. And this is on page
17 25 during the cross-examination. I asked him, "What did
18 you -- did you tell him you would give those papers to Ms.
19 Hulse?" He said, "Yes." Now, there is a dispute. He
20 claims he didn't realize they were suit papers. The
21 process server says, "I told him they were suit papers."
22 Mr. Breeden says that he took the papers from the process
23 server. When Ms. Hulse came back from whatever she was
24 doing, he took them to her and gave them to her.

25 THE COURT: This is Mr. Breeden?

1 MR. ASMER: This is Mr. Breeden. I asked him ---

2 THE COURT: Well, let me stop you there. Assuming
3 that is undisputed, and just for the sake of argument,
4 wouldn't the fact that service was made on Mr. Breeden be
5 sufficient regardless of whether Mr. Breeden subsequently
6 transferred it over to Ms. Hulse or not?

7 MR. ASMER: I think service on Mr. Breeden would be
8 sufficient since he was there acting on behalf of the
9 county and said he could take it for Ms. Hulse who was not
10 in the office at the time and gave it to her. Even if, as
11 Mr. Atkinson says, that's not proper because he's not
12 authorized under agency service in South Carolina, the
13 case, Mull v. Richland, which I cited in my first brief.

14 THE COURT: Mull v. Richland?

15 MR. ASMER: Yes. It's a 2010 case, Your Honor. It's
16 in my first responsive brief. In that case, the Court made
17 the point that exacting compliance with the service rules
18 are not necessary to have effective service. What is
19 necessary is that the Defendant is served such that they --
20 I mean, receives the papers such that the Court gets
21 personal jurisdiction and the Defendant has sufficient
22 notice to protect its interest and acts on the complaint.
23 Here, two things happened. One, we served the assistant
24 administrator, Mr. Breeden, who said to our service
25 processor he could take the papers. Mr. Breeden's over the

1 age of eighteen. He then gives them to Ms. Hulse. He
2 testified he gave them to her. She then, apparently,
3 passed them on to their attorneys because they did file a
4 motion to dismiss. They had the opportunity to read it and
5 protect their interests. The motion to dismiss that they
6 filed, that was all done within the first hundred and
7 twenty days.

8 THE COURT: What date was that served on Mr. Breeden?

9 MR. ASMER: The date of service is the issue in
10 dispute, whether it was May 10th, which was Confederate
11 Memorial Day, or May 11th. I can't remember what the
12 dispute in the first hearing was. But there was a dispute
13 as to the actual date. The process server had one date in
14 his affidavit and Mr. Breeden testified it was another
15 date, but it was within one or two days of each other, all
16 within the one hundred and twenty days. So, I don't think
17 it really matters as to the exact date.

18 What happened then was, they did file a motion to
19 dismiss, claiming that it had to be on the chief executive
20 or personally on Ms. Hulse. When we got to the hearing,
21 the issue of the chief executive, I believe, was dealt
22 with. The issue of Ms. Hulse, the Judge heard my arguments
23 and said, "I'm inclined to grant their motion. I would
24 like him to submit an order." And he says, "Then we'll
25 deal with this." And he said, "But Mr. Asmer, as with all

1 my orders, they're not final until signed and that's to
2 your benefit." I may have taken it wrong, but that was
3 from him telling me if there's something you want to try to
4 do before the motion is heard and finalized, be my guest.
5 I went back, did some research and discovered that just in
6 August the Court has passed this case, which is the Mims v.
7 Babcock Center case and this was just ruled on this year.
8 What happened in Mims is similar to this. There was a
9 complaint filed. It wasn't served. Months go by.
10 Plaintiff files an amended complaint because the only thing
11 that was filed was a motion to dismiss. Under the rules,
12 the plaintiff is always allowed to amend his complaint,
13 once, as a matter of right, until a responsive pleading is
14 filed.

15 THE COURT: Doesn't it require that once, as a matter
16 of right, if it's within the time before the responsive
17 pleading is served?

18 MR. ASMER: It's before the responsive pleading is
19 served. That's correct. The responsive pleading has to be
20 a pleading as defined in the rules. Motions to dismiss
21 are, specifically, not responsive pleadings. Our rule is
22 taken directly from the Federal Rules. The Federal Rules
23 in 2010 realized they had a problem because this was
24 occurring regularly. It was legal. It happened. The
25 cases all said this is fine. You're right, you get one as

1 a right and if the defendant chooses to file a motion
2 rather than an answer, you may always file an amended
3 complaint without consent.

4 In 2010, the Federal Court amended Rule 15 to
5 specifically list a responsive pleading or a motion to
6 dismiss and listed out the other documents, which would
7 also stop the plaintiff from being allowed to file an
8 amended complaint. South Carolina has never done that. As
9 a result, in this case what the Court said is, under our
10 Rule 15(a), it allows filing and service, filing and
11 service of an amended complaint without leave of court,
12 even if the original complaint has not been served. The
13 Defendant's argument was specifically rejected by the
14 Court. Justice Pleicones in his dissent made the same
15 argument the defendant did, that he felt that the original
16 service still had to be made so that the action was
17 "commenced", to allow the amended complaint to go forward.
18 The Court says, no, you don't have to have commencement of
19 the action, because you don't have to serve the first
20 complaint to be allowed to serve the amended and have that
21 amended complaint relate all the way back to the date the
22 original complaint was filed and that's what they ruled in
23 this case. The Defendant would try to argue that because
24 our hundred and twenty days passed before we commenced,
25 we're barred from doing this, but we're not, because the

1 Court specifically held, you don't have to serve the first
2 complaint to file the amended complaint. This is all
3 triggered by the Defendant's action. Did they choose to
4 file a motion or did they file a responsive pleading?
5 Having not filed a responsive pleading, we're allowed to
6 file the amended complaint, it relates back to the first,
7 and we now have a hundred and twenty days to serve that
8 amended complaint and we served it the same day it was
9 filed. So at this point, service is good.

10 THE COURT: All right. Any response to that?

11 MR. ATKINSON: Yes, Your Honor. And I'm going to read
12 directly from the Mims case that's being cited. What is
13 cited is South Carolina Code Annotated §15-3-20, which
14 governs when an action is commenced for limitations
15 purposes. This is directly from the Supreme Court, the
16 majority opinion by Justice Beatty. And this is page three
17 of the opinion. The statute and the rule read together
18 provide that 1) an action is commenced upon filing the
19 summons and complaint if service is made within the statute
20 of limitations, and (2) if filing but no service is
21 accomplished within the statute of limitations, then
22 service must be made within a hundred and twenty days of
23 filing, which is exactly the position that I take here.
24 Filing was made within the limitations period. It was made
25 about fifteen days before the limitations period ended.

1 Service was not accomplished within the limitations period.

2 Turning to page four of that opinion. In amending
3 Rule 3(a) of SCRCP, this Court clearly stated that the
4 hundred and twenty day period begins running from the --
5 emphasis of the Court -- *filing* of the complaint, not after
6 the end of the statute of limitations period as argued by
7 Mims. They had a hundred and twenty days from the date
8 they first filed. A hundred and fifty-seven days later,
9 they accomplished, first accomplished proper service upon
10 Oconee County. The action is time barred. The question is
11 not whether they had freedom to amend. It's did they serve
12 the complaint in time. They didn't. The time has run.

13 THE COURT: Do you stipulate they had a right to
14 amend?

15 MR. ATKINSON: I will stipulate to that, Your Honor.
16 But the relation back doctrine doesn't create a new hundred
17 and twenty days because it can lead to a ridiculous logical
18 argument, which is: I file a complaint, I wait four years,
19 I amend it and then serve them and say, well, I've got a
20 hundred and twenty days from that. The clock runs from
21 filing the first complaint and relation back runs back to
22 that date.

23 THE COURT: All right. Let me hear you on one thing,
24 one quick moment on the service on Mr. Breeden.

25 MR. ATKINSON: Yes, Your Honor.

1 THE COURT: What I am understanding you to say is that
2 because strict compliance with Rule 4(d)(6) was not
3 complied with, that is ineffective service?

4 MR. ATKINSON: It's not exactly strict compliance,
5 because I'm aware of the Roberson case law and a line of
6 cases. I refer to the Devore against Simpson case, which
7 is cited in my brief and that is, you have to serve someone
8 who is empowered to accept service. The cases that say no
9 strict reliance required, Roberson one of them, is, "Yeah,
10 you didn't serve the registered agent, but you served an
11 officer of the company. An officer of the company can
12 always accept service on behalf of the company." Moore
13 versus Simpson is much more applicable to this case. In
14 that case, it was Judge Kimball's law firm, actually, right
15 before he became a judge and someone filed a suit against
16 the firm by delivering it to a secretary in the office and
17 the Court quashed service and it was upheld by the
18 Appellate Court saying service on a secretary is not good
19 enough. Service on the deputy administrator is like
20 serving a secretary, somebody who works in the office and
21 has contact with Ms. Hulse, but it is not good service on
22 Ms. Hulse.

23 Counties, I think, are a special breed because, in
24 effect, by bringing a summons and complaint against a
25 county, you're bringing a summons and complaint against

1 every citizen of Oconee County and only certain people can
2 receive that service and it is set by rule and it's
3 explicitly set. This isn't a case of hiding the ball and
4 oh, we were trying to trick them into serving the wrong
5 person. It appears that Ms. Hulse was at lunch when the
6 process server came. Had the process server waited for her
7 to come back from lunch, he could have handed her the
8 summons and complaint. Their hours are published. It's a
9 publically available office. You can't just leave it with
10 somebody in the office and have -- I'll give you a good
11 comparison, Your Honor. If I were to sue you, I can't
12 deliver a summons and complaint to your law clerk and say,
13 well, he got it to you, it's good enough. It's got to go
14 to you. If my firm were to be sued, you can't bring it to
15 a paralegal and leave it and say, well, they found out
16 about it. It's good enough. I agree that exacting
17 compliance with the rules is not required, but we're not in
18 the horseshoe, hand grenades, nuclear weapons rules of
19 service either, where close is good enough. You have to
20 give it to a designated person, a person with authority to
21 accept process on behalf of Oconee County.

22 And, frankly, Oconee County alerted the Plaintiff to
23 the objections it was going to raise to process from the
24 very beginning by filing its motion and action was not made
25 to correct it, but the rule is explicit and clear. This

1 isn't a case of trickery or somebody not accepting service
2 and just, "they came while she was at lunch." If they'd
3 come to any county council meeting, they could have gotten
4 her. So, I agree that in all cases exacting compliance is
5 not required, but I do think he had to get it to a
6 registered agent.

7 THE COURT: All right. Thank you, sir. Anything
8 further?

9 MR. ASMER: Yes, one thing. When they alerted us that
10 it was not proper to serve by certified mail, we did do
11 something. We attempted to serve personally. We had the
12 process server take the complaint to Ms. Hulse's office to
13 give it to her. She wasn't there. Mr. Breeden took it.
14 One other thing I did raise in the first hearing, and I'll
15 raise it again. Our service rules don't require any magic
16 language, none of this, you've been served when you hand
17 them the document. Mr. Breeden is over the age of
18 eighteen. He did hand the documents to Ms. Hulse. He
19 acknowledged that she got it. She received them. That's
20 service, also. The question is, did she personally get
21 them? She did personally get them within the hundred and
22 twenty days.

23 THE COURT: Well, the question would more properly be,
24 wouldn't it, whether or not Mr. Breeden had been empowered
25 by his principal to accept service, wouldn't it?

1 MR. ASMER: That is if you wish to rule that Mr.
2 Breeden, that service on Mr. Breeden was accepted. I would
3 argue that service on Ms. Hulse was effective when Mr.
4 Breeden gave her the documents. Anyone over the age of
5 eighteen can hand the complaint to the defendant and
6 they've been served. In this case, he's over the age of
7 eighteen, which he testified to. And he said, I did hand
8 them to her when she returned and she got them. Factually,
9 we know the county got them. We know Ms. Hulse got them.
10 That's all in the record. She's the one that's supposed to
11 personally get them and we know she personally got them
12 within the initial hundred and twenty days. We also know
13 she got them personally the second time.

14 THE COURT: The hundred and fifty-seven days?

15 MR. ASMER: Yes, Your Honor.

16 THE COURT: All right. Thank you, gentlemen. I'm
17 going to take this under advisement and I'll give you my
18 decision.

19 MR. ATKINSON: Thank you, Your Honor.

20 MR. ASMER: Thank you, Your Honor.

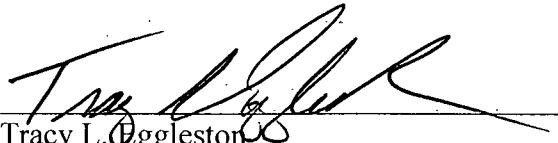
21 THE COURT: Yes, sir.

22 [END OF REQUESTED TRANSCRIPT OF RECORD]

CERTIFICATE OF COUNSEL

This is to certify that the Record on Appeal contains all material proposed to be included by any of the parties hereto and not any other material.

DATED this 26th day of September, 2013.


Tracy L. Eggleston

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