

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

ORIGINAL

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2013-002138

Thomas Free.....Appellant,

v.

Natena Buff.....Respondent.

RECORD ON APPEAL

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Post Office Box 3972
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803-739-1824 / fax 803-739-1888

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ATTORNEYS FOR APPELLANT

RECEIVED

MAR 12 2014

SC Court of Appeals

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

Thomas Free,

Plaintiff,

vs.

Natena Buff,

Defendant.

IN THE COURT OF COMMON PLEAS

DOCKET NUMBER: 12-CP-40-7842

ORDER OF DISMISSAL

JEANETTE W. MCBRIDE
J.C.P. & G.S.

2013 AUG 29 PM 1:50

RICHLAND COUNTY
FILED

This matter came before the Court on August 8, 2013, on the motion of the Defendant for dismissal of this action pursuant to Rules 12(b)(2) and 12(b)(5) of the *South Carolina Rules of Civil Procedure* on grounds that the lawsuit has not been properly commenced within the statute of limitations period and no proof of service has been filed with the Court in accordance with Rule 5(d). Frank A. Barton, Esquire, was present as counsel for Plaintiff and William H. Bowman, III, Esquire, was present as counsel for Defendant.

I. Facts

This lawsuit was filed on November 27, 2012, seeking damages for injuries sustained in an automobile accident on December 1, 2009. Plaintiff alleges he was a passenger in Defendant's motor vehicle when Defendant drove her vehicle off the roadway. Defendant denies Plaintiff's allegations and asserts that Plaintiff was driving Defendant's vehicle at the time of the accident.

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SCANNED

Plaintiff sent the Summons and Complaint to the South Carolina Department of Motor Vehicles ("SCDMV") on March 26, 2013, to have the Defendant served with process pursuant to S.C. Code Ann. § 15-9-370. Plaintiff provided the SCDMV with Defendant's "last known address" of 9711 Rose Commons Drive, Apt. 312, Huntersville, NC 28078. On April 9, 2013, the SCDMV forwarded the Summons and Complaint to Defendant via certified mail to the address provided.

The Summons and Complaint was returned to the SCDMV marked "unclaimed." Pursuant to S.C. Code Ann. § 15-9-380, the SCDMV sent the pleadings to Defendant by open mail. It appears that Defendant received the certified mail slip but did not get to the post office in time to claim it. She acknowledged getting the Summons and Complaint from the SCDMV in open mail but thought she received it in June 2013. A letter from the SCDMV indicates that it sent the Summons and Complaint by open mail on May 7, 2013.

Defendant filed an Answer on May 23, 2013, denying the allegations of Plaintiff's Complaint and alleging affirmative defenses for lack of personal jurisdiction, failure to timely commence the action as required by S.C. Code Ann. § 15-3-20, and failure to commence the action within the statute of limitations as required by S.C. Code Ann. § 15-3-530. Defendant filed this Motion to Dismiss on the same grounds on May 29, 2013.

II. Discussion

S.C. R. Civ. Proc. 3(a) provides that a civil action is commenced when the summons and complaint are filed with the clerk of court if (1) the summons and complaint are served within the statute of limitations prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred

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twenty days after filing. See also *Mims v. Babcock Center, Inc.*, 399 S.C. 341; 732 S.E.2d 395 (2012). S.C. Code Ann. § 15-3-20(B) likewise provides that “[a] civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing.” Finally, *S.C. R. Civ. Proc.* 5(d) provides that proof of service must be filed within ten (10) days after service of the summons and complaint and that failure to do so may result in dismissal of the lawsuit by the court on its own initiative or upon the application of any party.

No affidavit of service has been filed in this case by Plaintiff although the Complaint was filed over eight (8) months ago. The SCMDV first attempted service on Defendant on April 9, 2013, pursuant to S.C. Code Ann. § 15-9-370, which allows service of process upon the SCDMV as an agent of a nonresident driver. The statute provides that it “shall be sufficient service upon the nonresident if notice of the service and a copy of the process are forthwith sent by certified mail by the plaintiff or the Director of the Department of Motor Vehicles to the defendant and the defendant’s return receipt and the plaintiff’s affidavit of compliance herewith are appended to the summons”

The letter from the SCDMV enclosing the Summons and Complaint to Defendant was returned unclaimed. Where a defendant fails to accept and sign the receipt for certified mail from the SCDMV, as occurred in this case, S.C. Code Ann. § 15-9-380 provides that the pleadings shall be sent by open mail and an affidavit of mailing with the original unclaimed envelope shall be filed with the clerk of court. Once the affidavit of mailing is filed with the clerk, service is effected on the defendant.

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Service has not been effected on Defendant in this case because no affidavit of mailing with the original unclaimed envelope has been filed with the Clerk of Court as required by the statute.

S.C. Code Ann. § 15-3-530(5) provides a three (3) year statute of limitations for injury to a person. While the Summons and Complaint were filed on November 27, 2012, the statute of limitations on Plaintiff's negligence cause of action against Defendant expired on December 1, 2012, three years after the accident. In order to have properly commenced the action before the statute of limitations ran, Plaintiff was required to serve the Summons and Complaint on Defendant either by December 1, 2012, or 120 days after filing the Summons and Complaint, i.e. March 27, 2013. *See Mims v. Babcock Center, Inc.* at 346; 732 S.E.2d at 397-398 (an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, or if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days of filing); *Hooper v. Ebenezer Senior Services and Rehabilitation Center*, 377 S.C. 217, 659 S.E.2d 213 (Ct. App. 2008).

Plaintiff did not even send the Summons and Complaint to the SCDVM for service on Defendant until March 26, 2013, one day before the 120 day period from filing. Furthermore, according to S.C. Code Ann. § 15-9-380, service still has not been effected because the appropriate documentation has not been filed with the Clerk of Court.

To counter the statute of limitations, Plaintiff contends that his cause of action against Defendant is tolled by S.C. Code Ann. § 15-3-30 because Defendant left her residence in South Carolina on or about April 1, 2010, and moved to another state. The



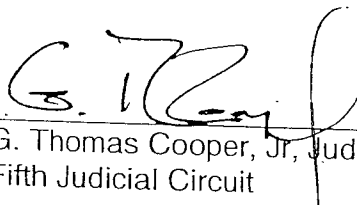
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party claiming the statute of limitations is tolled bears the burden of establishing sufficient facts to justify its use. *Lail v. Hartness*, 2012 U.S. Dist. Lexis 115926 (filed August 17, 2012). For the tolling statute to apply, the defendant must reside outside of the state and his or her location must not be known or could not be reasonably discovered by the plaintiff. *Lail; Rafsanjoni v. Doe*, 348 S.C. 251; 559 S.E.2d 841 (2002); *Tiralango v. Balfry*, 335 S.C. 359; 517 S.E.2d 430 (1999); *Myer v. Paschal*, 330 S.C. 175; 498 S.E.2d 635 (1998).

Plaintiff and Defendant were friends at the time of the accident and thereafter. Plaintiff knew where Defendant lived and visited Defendant at the apartment where service of process was sent. In fact, Plaintiff's counsel provided the SCDMV with Defendant's correct address for service. Thus, Plaintiff knew the location of Defendant and the tolling statute does not apply.

CONCLUSION

For the reasons set forth above, this lawsuit is dismissed pursuant to *S.C. R. Civ. Proc.* 12(b)(2), 12(b)(5) and 5(d).



G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

Columbia, South Carolina

August 29, 2013

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Thomas Free,)
)
Plaintiff,)
)
v.)
)
Natena Buff,)
)
Defendant,)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT

COMPLAINT
(Personal Injury)

JEANETTE W. MURPHY
C.C.P. & G.S.

2012 NOV 27 PM 12:08

RICHLAND COUNTY
FILED

The Plaintiff above named, complaining of the Defendant herein, would respectfully show unto the Court:

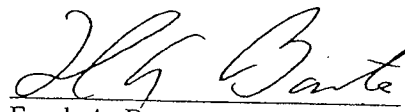
1. The Plaintiff and Defendant are both citizens and residents of the County of Richland, State of South Carolina.
2. On or about December 1, 2009, the Plaintiff was a passenger in a motor vehicle owned and operated by the Defendant which was involved in a collision on Lykes Lane in Columbia, South Carolina. The collision occurred when the Defendant drove her motor vehicle off of the roadway.
3. The aforementioned collision occurred as a direct and proximate result of the negligence and recklessness of the Defendant as follows:
 - a. In traveling too fast for conditions;
 - b. In driving off of the roadway;
 - c. In driving while intoxicated;
 - d. In failing to maintain proper control over her motor vehicle;
 - e. In failing to maintain a proper lookout.

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4. As a direct and proximate result of the negligence and recklessness of the Defendant, the Plaintiff suffered injuries as follows:
- a. Suffered severe, traumatic and permanent injury to his head, face, right eye, and other parts of his body;
 - b. Incurred substantial medical expenses and will continue to incur such expenses in the future;
 - c. Suffered severe pain and mental anguish and will continue to so suffer in the future;
 - d. Suffered a loss of wages and impairment in his ability to earn wages in the future;
 - e. Suffered an impairment in his ability to enjoy life.
5. As a direct and proximate result of the negligence and recklessness of the Defendant which injured the Plaintiff, the Plaintiff is informed and believes he is entitled to recover actual and punitive damages against the Defendant.

WHEREFORE, the Plaintiff prays for judgment against the Defendant in an amount in excess of One Hundred Thousand (\$100,000.00) Dollars, actual and punitive damages, for the costs of this action, and for such other and further relief as the Court may deem just and proper.

November 13, 2012
West Columbia, South Carolina



Frank A. Barton
ATTORNEY AT LAW
1611 Augusta Highway / P.O. Box 3972
West Columbia, SC 29171
(803) 739-1824 / fax (803) 739-1888

JURY TRIAL DEMANDED

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Thomas Free,

Plaintiff,

vs.

Natena Buff,

Defendant,

IN THE COURT OF COMMON PLEAS

DOCKET NUMBER: 12-CP-40-7842

ANSWER

(Jury Trial Demanded)

The Defendant answering the Complaint herein would respectfully allege:

FOR A FIRST DEFENSE

1. The Defendant denies each and every allegation of the Complaint not hereinafter specifically admitted.

2. The Defendant admits, upon information and belief, the allegations of Paragraph 1 of the Complaint.

3. Answering the allegations of Paragraphs 2, 3, 4 and 5 of the Complaint, the Defendant admits that on or about December 1, 2009, she was involved in an automobile accident at or near Columbia in Richland County; but the Defendant denies that she was negligent and reckless; denies that she was at fault or responsible for said accident; denies that the Plaintiff was injured or damaged as alleged in his Complaint; denies that she is indebted to the Plaintiff in any sum whatsoever; and therefore denies any and all other allegation of the Complaint.

FOR A SECOND DEFENSE

4. The Defendant alleges that any injuries or damages allegedly sustained by the Plaintiff were caused and occasioned by the Plaintiff's own negligence and

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recklessness which was greater than any alleged of the Defendant, which is denied, and which combined with and concurred in any alleged negligence and recklessness of the Defendant and acted as a proximate cause of the accident and any subsequent injuries or damages allegedly sustained and the Defendant pleads that the Plaintiff's own negligence and recklessness was greater than any alleged negligence and recklessness of the Defendant, which is denied, and as a complete bar to the Plaintiff's cause of action. Alternatively, should the Plaintiff be entitled to a recovery against the Defendant, which is denied, then in that event it is alleged that such recovery should be reduced in proportion to the Plaintiff's own negligence and recklessness as determined by the court.

FOR A THIRD DEFENSE

5. The Plaintiff is not entitled to recover punitive damages in this action because:

- (a) An award of punitive damages would violate the Eighth Amendment to the United States Constitution and Article I Section XV of the South Carolina Constitution in that any award of punitive damages would constitute excessive fine;
- (b) An award of punitive damages would violate both the Fourteenth Amendment to the United States Constitution and Article I Section III of the South Carolina Constitution in that the power of the court to award punitive damages in any amount it chooses would be wholly devoid of any meaningful standard and would be inconsistent with the guarantees of due process of law;

- (c) An award of punitive damages would violate the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I Section III of the South Carolina Constitution because even if a standard governing the imposition of punitive damages exists, that standard is void for vagueness;
- (d) An award of punitive damages would violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and Article I Section III of the South Carolina Constitution in that an award of punitive damages would be based in part on the wealth of the Defendant; and
- (e) An award of punitive damages would violate the Federal Doctrine of Separation of Powers and Article I Section VIII of the South Carolina Constitution because punitive damages are a creation of the judicial branch of government, the creation of which invades the province of the legislative branch.

FOR A FOURTH DEFENSE

6. The Defendant alleges that a verdict for the Plaintiff for punitive damages would deprive Defendant of property without due process of law and without equal protection of the laws:

- (a) If the award is based upon conduct that is not intentional or malicious, or conduct that was lawful at the time and place where the conduct occurred or had no impact upon the State of South Carolina or its residents;

- (b) If the amount awarded bears no reasonable relationship to the proven harm claimed by Plaintiff;
- (c) If the award is based upon other, dissimilar acts or omissions;
- (d) If the award is based upon other parties' hypothetical claims;
- (e) If the award is based upon economic rather than physical harm;
- (f) If the award is excessive in comparison to penalties imposed or authorized in comparable cases.

FOR A FIFTH DEFENSE

7. It is alleged, upon information and belief, that the Plaintiff voluntarily elected to ride in the Defendant's vehicle with full knowledge of any risk involved when there were no circumstances requiring him to do so; and having assumed said risk and having allegedly suffered injuries and damages therefrom, the Plaintiff is not entitled to any recovery from the defendant; and the Defendant pleads assumption of the risk as a complete bar to the Plaintiff's cause of action.

FOR A SIXTH DEFENSE

8. It is alleged, on information and belief, the Defendant has not yet been served with the Summons and Complaint herein so that the court lacks jurisdiction over the person of the Defendant which is pled pursuant to Rule 12(b)(2) of the *South Carolina Rules of Civil Procedure*.

FOR A SEVENTH DEFENSE

9. It is alleged on information and belief that the within action was not commenced within three (3) years after the cause of action accrued as required by *SC Code Ann. § 15-3-530, as amended*; and it is pled therefore that the action was not timely

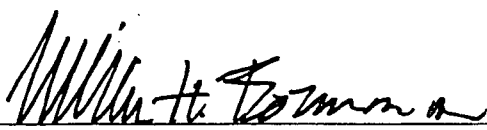
commenced within the Statute of Limitations which is pled pursuant to Rule 8(c) of the *South Carolina Rules of Civil Procedure*.

FOR AN EIGHTH DEFENSE


10. That the Plaintiff failed to serve the Defendant within 120 days as required by *SC Code Ann. §15-3-20*; that the suit has not been properly commenced and the Court lacks jurisdiction over the person of this Defendant which the Defendant alleges pursuant to Rules 12(b)(2) and 12(b)(5) of the *South Carolina Rules of Civil Procedure*.

WHEREFORE, having fully answered, the Defendant demands that the Complaint be dismissed with prejudice.

ROGERS TOWNSEND & THOMAS, PC

By: 
William H. Bowman, III
P. O. Box 100200, Columbia, SC 29202
(803)771-7900; bbowman@rtt-law.com
Attorney for Defendant

Columbia, South Carolina
May 20, 2013

CERTIFICATE OF MAILING
I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding May 20, 2013.
 21

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Thomas Free,

Plaintiff,

vs.

Natena Buff,

Defendant.

IN THE COURT OF COMMON PLEAS

DOCKET NUMBER: 12-CP-40-7842

NOTICE OF MOTION
AND
MOTION TO DISMISS

TO: FRANK A BARTON, ATTORNEY FOR PLAINTIFF:

PLEASE TAKE NOTICE that the Defendant, through her undersigned attorney, will move before the Judge, Court of Common Pleas for Richland County, Fifth Judicial Circuit, on the tenth (10) day after service hereof at 10:00 AM or as soon thereafter as counsel may be heard at the Richland County Judicial Center, Columbia, South Carolina, for an order, pursuant to Rules 12(b)(2) and 12(b)(5) of the *South Carolina Rules of Civil Procedure* dismissing this action against the Defendant, on the ground that the suit has not been properly commenced and the Court lacks jurisdiction over the person of this Defendant in that the Summons and Complaint were filed with the Clerk of Court on November 27, 2012, the Statute of Limitations on this claim expired on December 1, 2012 and, upon information and belief, this Defendant either has not been served to date or if she was served it was after March 25, 2013, which is in excess of 120 days as required by *SC Code Ann. §15-3-20* and *Mims v. Babcock Ctr., Inc.*, 399 SC 341, 732 SE2d 395 (2012).

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The undersigned attorney certifies, on information and belief, that consultation with opposing counsel in an effort to attempt a good faith resolution of the matter contained in the within Motion would serve no useful purpose.

ROGERS TOWNSEND & THOMAS, PC

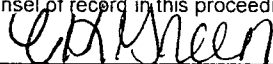
By: 

William H. Bowman, III
P. O. Box 100200, Columbia, SC 29202
(803)771-7900; bbowman@rtt-law.com
Attorney for Defendant

Columbia, South Carolina
May 29, 2013

CERTIFICATE OF MAILING

I hereby certify that a copy of the foregoing pleading was mailed to all counsel of record in this proceeding May 29, 2013.



COPY

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Thomas Free,

Plaintiff,

vs.

Natena Buff,

Defendant.

IN THE COURT OF COMMON PLEAS

DOCKET NUMBER: 12-CP-40-7842

MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS

Defendant submits this Memorandum in support of her Motion to Dismiss pursuant to Rules 12(b)(2) and 12(b)(5) of the *South Carolina Rules of Civil Procedure* on grounds that the lawsuit has not been properly commenced within the statute of limitations period and no proof of service has been filed with the Court.

FACTS

This lawsuit was filed on November 27, 2012, seeking damages for injuries sustained in an automobile accident on December 1, 2009, wherein Plaintiff alleges he was a passenger in Defendant's motor vehicle. [Complaint] Plaintiff attempted to serve Defendant with the Complaint by certified mail on April 9, 2013, through the South Carolina Department of Motor Vehicles, at her apartment located at 9711 Rose Commons Drive, Apt. 312, Huntersville, NC 28078. [Affidavit of Natena Buff at ¶¶ 3-4; Exhibit 1] Defendant received notice that she had a certified letter being held at the post office but when she went to the post office, the letter had been returned as unclaimed. [Affidavit of Natena Buff at ¶ 3] Defendant then received the Complaint in open mail somewhere near the beginning of June 2013. [Affidavit of Natena Buff at ¶ 4]

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Defendant filed an Answer on May 23, 2013, denying the allegations of Plaintiff's Complaint and alleging affirmative defenses for lack of personal jurisdiction, failure to timely commence the action as required by S.C. Code Ann. § 15-3-20, and failure to commence the action within the statute of limitations as required by S.C. Code Ann. § 15-3-530. Defendant filed this Motion to Dismiss on the same grounds on May 29, 2013.

APPLICABLE STANDARD

Pursuant to S.C. R. Civ. Proc. 12(b)(2) and (5), a complaint may be dismissed for lack of personal jurisdiction and insufficiency of service of process. Rule 12(b)(5) is the proper vehicle for challenging both the mode of delivery or the lack of delivery of the summons and complaint. *Unisun Insurance v. Hawkins*, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000).

Pursuant to S.C. R. Civ. Proc. 5(d), proof of service of the summons and complaint shall be filed within ten (10) days after service. Failure to file proof of service may result in dismissal by the court on the court's own initiative or upon application of any party.

ARGUMENT

S.C. R. Civ. Proc. 3(a) provides that a civil action is commenced when the summons and complaint are filed with the clerk of court if (1) the summons and complaint are served within the statute of limitations prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing. *See also Mims v. Babcock Center, Inc.*, 399 S.C. 341; 732 S.E.2d 395 (2012). S.C. Code Ann. § 15-3-20(B) likewise provides that "[a] civil action is commenced when the summons and complaint are filed with the clerk of court if actual service is accomplished within one hundred twenty days after filing." Finally, S.C. R. Civ.

Proc. 5(d) provides that proof of service must be filed within ten (10) days after service of the summons and complaint and that failure to do so may result in dismissal of the lawsuit by the court on its own initiative or upon the application of any party.

No affidavit of service has been filed in this case by Plaintiff although the Complaint was filed eight (8) months ago. The Affidavit of Natena Buff establishes that service was attempted on her on April 9, 2013, pursuant to S.C. Code Ann. § 15-9-370, which allows service of process upon the South Carolina Department of Motor Vehicles (“SCDMV”), as an agent of a nonresident driver. The statute provides that it “shall be sufficient service upon the nonresident if notice of the service and a copy of the process are forthwith sent by certified mail by the plaintiff or the Director of the Department of Motor Vehicles to the defendant and the defendant’s return receipt and the plaintiff’s affidavit of compliance are herewith appended to the summons”

The letter from the SCDMV to Defendant was returned unclaimed when Defendant did not get to the post office soon enough. [Affidavit of Natena Buff and Exhibit 1] Where a defendant fails to accept and sign the receipt for certified mail from the SCDMV, as occurred in this case, S.C. Code Ann. § 15-9-380 provides that the pleadings shall be sent by open mail and an affidavit of mailing shall be filed with the clerk of court. Once the affidavit of mailing is filed with the clerk, service is effected on the defendant.

Based on § 15-9-380, service was not effected on Defendant until the Summons and Complaint were sent to her in open mail sometime in June 2013. [Affidavit of Natena Buff at ¶ 4] Because Plaintiff has failed to file an affidavit of mailing, there is no exact date that service was effected in accordance with the statute.

S.C. Code Ann. § 15-3-530(5) provides a three (3) year statute of limitations for injury to a person. While the Summons and Complaint were filed on November 27, 2012, the statute of limitations on Plaintiff's negligence cause of action against Defendant expired on December 1, 2012, three years after the accident. In order to have properly commenced the action before the statute of limitations ran, Plaintiff was required to serve the Summons and Complaint on Defendant either by December 1, 2012, or 120 days after filing the Summons and Complaint, i.e. March 27, 2013. See *Mims v. Babcock Center, Inc.* at 346; 732 S.E.2d at 397-398 (an action is commenced upon filing the summons and complaint, if service is made within the statute of limitations, or if filing but not service is accomplished within the statute of limitations, then service must be made within 120 days of filing); *Hooper v. Ebenezer Senior Services and Rehabilitation Center*, 377 S.C. 217; 659 S.E.2d 213 (Ct. App. 2008). Plaintiff did not even attempt to serve Defendant until April 9, 2013, according to the letter from the SCDMV, and did not effect service until sometime in June 2013. Plaintiff has thus failed to commence the action within the statute of limitations period.

Plaintiff and Defendant were friends at the time of the accident and thereafter. Plaintiff knew where Defendant lived and had visited Defendant at the apartment where service by mail was attempted and finally effected. [Affidavit of Natena Buff at ¶¶ 5-7] Even though Plaintiff knew where Defendant lived, he still failed to serve her in a timely manner and failed to file an affidavit of service. The statute of limitations on his claim has expired and as a result, this action should be dismissed.

CONCLUSION

For the reasons set forth above, this lawsuit should be dismissed pursuant to S.C. R. Civ. Proc. 12(b)(2) and 12(b)(5) for lack of service and resulting expiration of the statute of limitations and S.C. R. Civ. Proc. 5(d) for failure to file proof of service.

ROGERS TOWNSEND & THOMAS, PC

By: William H. Bowman III
William H. Bowman, III
P. O. Box 100200, Columbia, SC 29202
(803)771-7900; bbowman@rtt-law.com
Attorney for Defendant

Columbia, South Carolina
July 29, 2013

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Thomas Free,

Plaintiff,

vs.

Natena Buff,

Defendant.

IN THE COURT OF COMMON PLEAS

DOCKET NUMBER: 12-CP-40-7842

AFFIDAVIT OF NATENA BUFF

PERSONALLY APPEARED BEFORE ME, Natena Buff, who being duly sworn deposes and states the following:

1. My name Natena Buff and I am the named defendant in the above entitled action.

2. On December 1, 2009, I was involved in an automobile accident on Lykes Lane in Columbia, South Carolina. The Plaintiff in the above entitled action, Thomas Free, alleges he was a passenger in the vehicle owned by me at the time of the accident. The accident report alleges that the Plaintiff was the driver of the vehicle. I have no recollection of the accident due to the severity of my injuries which included a fracture of the C2 vertebra.

3. I received notice in my mailbox located at 9711 Rose Commons Drive, Apt. 312, Huntersville, NC 28078 that I had a certified letter being held at the Post Office. By the time I was able to make it to the Post Office, the letter had been returned as unclaimed.

4. I then received the Summons and Complaint in the above entitled action somewhere near the beginning of June 2013 in the open mail that was delivered to my

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apartment located at 9711 Rose Commons Drive, Apt. 312, Huntersville, NC 28078. The Summons and Complaint included a letter from the Department of Motor Vehicles dated April 9, 2013. A copy of the Department of Motor Vehicle letter dated April 9, 2013 is attached hereto as Exhibit A and incorporated herein by reference.

5. At the time of the accident I was a citizen and resident of the State of South Carolina and was friends with the Plaintiff.

6. I moved to the Charlotte, North Carolina area about April 1, 2010. The Plaintiff and I remained in contact and stayed in touch since my move out of state. I have resided in three locations in the area from April 1, 2010 to the present. The Plaintiff has visited me in at least two of my residences.

7. I moved my apartment located at 9711 Rose Commons Drive, Apt. 312, Huntersville, NC 28078 in February of 2012 and he visited me at this location not long after I moved in. I have remained at this address since February of 2012.

FURTHER AFFIANT SAYETH NOT.

Natena Buff

Natena Buff

SWORN TO AND SUBSCRIBED
before me this 30 day of July 2013.

Jannai V. Cannon

Notary Public for North Carolina
My Commission Expires: 2-6-2016





S. C. DEPARTMENT OF
MOTOR VEHICLES

OFFICE OF GENERAL COUNSEL

P.O. Box 1498, Blythewood, S.C. 29016; (803) 896-9900, Fax: (803) 896-9901

April 9, 2013

Natena Buff
9711 Rose Commons Drive, Apartment 312
Huntersville, North Carolina 28078

Re: Thomas Free vs. Natena Buff
Case No. 12-CP-40-7842; DMV-13-121

Dear Mr. Buff:

In accordance with the provisions of Section 15-9-350 or 15-9-360 of the Code of Laws of South Carolina (1976), this office has received the enclosed Summons and Complaint in the above-entitled action on March 26, 2013. Under South Carolina law, this has the same legal effect as if you had been served with these documents personally.

Section 15-9-350 of the 1976 Code of Laws of South Carolina, as amended, provides that:

"The acceptance by a nonresident of the rights and privileges conferred by the laws in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways, the streets of any incorporated municipality or the public roads of this State or anywhere within this State, or the operation by such nonresident of a motor vehicle on any such public highways, streets, or public roads or anywhere within this State other than as so permitted or regulated shall be deemed equivalent to the appointment by such nonresident of the Director of the Department of Motor Vehicles or of his successor in office to be his true and lawful attorney upon whom may be served all summons or other lawful process in any action or proceeding against him growing out of any accident or collision in which such nonresident may be involved by reason of the operation by him, for him or under his control or direction, express or implied, of a motor vehicle on such public highways, streets, or public roads or anywhere within this State. Such acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally."

Section 15-9-360 of the 1976 Code of Laws of South Carolina, as amended, provides that:

"The acceptance by a nonresident motor carrier of the rights and privileges conferred by the laws now or hereafter in force in this State, permitting the operation of motor vehicles as evidenced by the operation of a motor vehicle by such nonresident either personally or through an agent or employee on the public highways in this State, or the operation of such nonresident either personally or through an agent, lessee, or employee, of a motor vehicle on the public highways of this State other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident motor carrier of the Director of the Department of Motor Vehicles, or his successor in office, to be his true and lawful attorney and the attorney of his executor or administrator, upon whom may be served all summonses or other lawful process or notice in any action, assessment proceeding, or other proceeding against him or his executor or administrator, arising out of or by reason of any provisions in Chapter 31 of Title 12 relating to such vehicle or relating to the liability for tax with respect to operation of such vehicle on the highways of this State. Acceptance or operation shall be a signification by such nonresident motor carrier of his agreement that any such process against or notice to him or his executor or administrator shall be of the same legal force and validity as if served on him personally or on his executor or administrator. All of the provisions of Sections 15-9-370, 15-9-380, and 15-9-350 shall be applicable with respect to the service of process or notice pursuant to this section."

Sincerely,

Kristy Corley, Paralegal, For: Director, South Carolina Department of Motor Vehicles

Enclosure

cc: Frank A. Barton, Esquire
Post Office Box 3972
West Columbia, SC 29171

000022



STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)
)
Thomas Free,)
)
Plaintiff,)
)
v.)
)
Natena Buff,)
)
Defendant,)
)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
2012-CP-40-7842

MEMORANDUM OF PLAINTIFF

2013 AUG 19 PM 12:25
COURT OF COMMON PLEAS
FIFTH JUDICIAL CIRCUIT

Pursuant to the directions of the Court this Memorandum is submitted in opposition to the Defendant's Motion to Dismiss which was heard by the Court on August 13, 2013.

Initially, Plaintiff has attached copies of documentation that were provided to the Court at the time of the hearing showing the Defendant was served pursuant to S.C. Code Section 15-9-370 by delivery of the Summons and Complaint to the Director of the South Carolina Department of Motor Vehicles on March 26, 2013. The Affidavit furnished by the Department of Motor Vehicles has now been filed with the Court. Plaintiff would further show the failure to file the Affidavit of Service from the Department of Motor Vehicles pursuant to Rule 5(d) of the South Carolina Rules of Civil Procedure does not effect the actual date of service. This is true even in cases where the Defendant has been held to be in default even though the proof of service was not filed. Beckham v. Durant, 300 S.C. 329, 387 S.E. 2d 701 (Ct. App. 1989). (Copy of case attached.)

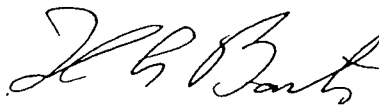
The current action was filed on November 13, 2012, which was within the three years statute of limitations asserted by the Defendant. The Summons and Complaint were then served on the Director of S.C. Department of Motor Vehicles on March 26, 2013, which was within the 120 day period specified in Rule 4 of the South Carolina

Rules of Civil Procedure. The Plaintiff respectfully submits the Director of the Department of Motor Vehicles is a statutory agent for service for the Defendant and service was completed within the statute of limitations when the Summons and Complaint were delivered to the Department of Motor Vehicles on March 26, 2013. The Department's letter of April 9, 2013, which was subsequently sent to the Defendant, clearly states the pleadings were received on March 26, 2013, and had the effect as if she had personally been served.

Plaintiff would further submit the statute of limitations in this matter was tolled pursuant to S.C. Section 15-3-30 when the Defendant moved out of the State. The Affidavit of Defendant submitted in support of the Motion to Dismiss shows the Defendant moved at least three times subsequent to leaving the State and there has been no showing the Plaintiff knew or should have known her actual resident address during the entire time she removed herself from South Carolina. Whether or not the Plaintiff should have known of her exact address during the entire time she moved from South Carolina is a jury issue and the Defendant is not entitled to have the action dismissed.

For all of the above reasons the Plaintiff would respectfully submit the Defendant's Motion should be denied.

Respectfully submitted,



Frank A. Barton
Post Office Box 3972
West Columbia, South Carolina 29171
803-739-1824 / fax 803-739-1888
Attorney for the Plaintiff

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C

Effective:[See Text Amendments]Code of Laws of South Carolina 1976 Annotated Currentness

Title 15. Civil Remedies and Procedures

Chapter 9. Summonses, Orders of Publication and Service of Papers Generally

Article 3. Personal or Substitute Service in State

→ → § 15-9-370. Service on nonresident motor vehicle drivers and motor carriers.

Service of process upon the Director of the Department of Motor Vehicles, as agent of a: (a) nonresident driver under the provisions of Section 15-9-350; (b) resident driver who subsequently becomes a nonresident; (c) nonresident motor carrier under the provisions of Section 15-9-360; or (d) nonresident unregulated motor carriers engaged in transporting persons, hauling farm or dairy products, hauling any other perishable products or haulers of lumber or logs, shall be made by leaving a copy thereof, with an appropriate fee, in the hands of the Director of the Department of Motor Vehicles or his office and such service shall be sufficient service upon the nonresident if notice of the service and a copy of the process are forthwith sent by certified mail by the plaintiff or the Director of the Department of Motor Vehicles to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with the summons, complaint, and other papers in the cause. The Director of the Department of Motor Vehicles shall keep a record of all processes which shall show the day and hour of service upon him. When the certified return receipt shall be returned to the Director of the Department of Motor Vehicles, he shall deliver it to the plaintiff on request and keep a record showing the date of its receipt by him and its delivery to the plaintiff.

CREDIT(S)

HISTORY: 1962 Code § 10-431; 1952 Code § 10-431; 1949 (46) 342; 1959 (51) 54; 1962 (52) 2309; 1965 (54) 77; 1993 Act No. 181, § 266; 1996 Act No. 459, § 28.

EDITOR'S NOTE

2003 Act No. 51, § 18 directed the Code Commissioner to substitute "Department of Motor Vehicles" for "Department of Public Safety".

CROSS REFERENCES

Appointment of local representative for a deceased nonresident motor vehicle operator causing death or injury

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STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

AFFIDAVIT

JAB

PERSONALLY appeared before me, Kristy Corley, who, first being duly sworn, deposes and says that:

This Affidavit is made in compliance with Section 15-9-380 of the Code of Laws of South Carolina;

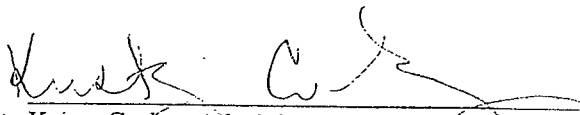
That she is the designated representative of the Director of the South Carolina Department of Motor Vehicles;

That on March 26, 2013, in accordance with the provisions of Sections 15-9-350 or 15-9-60 of the 1976 Code of Laws of South Carolina, the Summons and Complaint in an action styled, Thomas Free vs. Natena Buff; Case No. 12-CP-40-7842 was received by the South Carolina Department of Motor Vehicles;

That on April 9, 2013, a copy of the Summons and Complaint was sent to Defendant, Natena Buff by certified mail, at the address furnished by Plaintiff's attorney, that is, 9711 Rose Commons Drive, Apartment 312, Huntersville, North Carolina 28078;

That said copy of the Summons and Complaint was returned to the South Carolina Department of Motor Vehicles by the Post Office Department marked "Unclaimed," and is attached hereto;

That a copy of the Summons and Complaint was sent to Defendants, Natena Buff by open mail to the same address with sufficient postage attached thereto.



Kristy Corley, Administrative Specialist
For: Director, S.C. Department of Motor Vehicles

Sworn to and subscribed before me this
7th day of May 2013

Aurda A. Grece
Notary Public of South Carolina
My Commission Expires: April 2, 2023

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT OF THE RETURN ADDRESS AND ADDRESS LINE

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Natena Buff
9711 Rose Commons Drive, Apartment 312
Huntersville, North Carolina 28078

DMV-13-121

2. Article Number

(Transfer from sender)

7006 2150 0003 5558 1354

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X

Agent

Addressee

B. Received by (*Printed Name*)

C. Date of Delivery

D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No

3. Service Type

Certified Mail

Express Mail

Registered

Return Receipt for Merchandise

Insured Mail

C.O.D.

4. Restricted Delivery? (*Extra Fee*)

Yes

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South Carolina Department

P.O. Box 1498
Blythewood, S.C. 29016

Form 103

Forwarding Service Requested

CERTIFIED MAIL

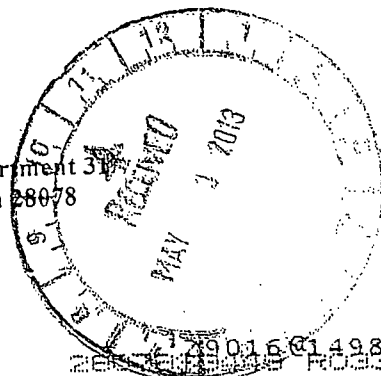


7006 2150 0003 5558 1354

GC



Natena Buff,
9711 Rose Commons Drive, Apartment 311
Huntersville, North Carolina 28078

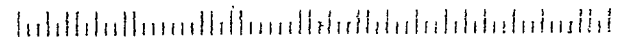


1st NOTICE 4-11
2nd NOTICE 4-23
RETURNED 4-26

NIXIE 282 DE 1 00 05/01/13

RETURN TO SENDER
UNCLAIMED
UNABLE TO FORWARD

BC: 29016149898 *1880-04006-01-21





**S. C. DEPARTMENT OF
MOTOR VEHICLES**

OFFICE OF GENERAL COUNSEL

P.O. Box 1498, Blythewood, S.C. 29016: (803) 896-9900, Fax: 896-9901

May 7, 2013

Frank A. Barton, Esquire
Post Office Box 3972
West Columbia, SC 29171

**Re: Thomas Free vs. Natena Buff
Case No. 12-CP-40-7842; DMV-13-121**

Dear Mr. Barton:

The notice of service and copy of the Summons and Complaint in the above-entitled action were sent certified mail on April 9, 2013, to defendant Natena Buff and returned to this office marked "Unclaimed."

In accordance with the provisions of Section 15-9-380 of the 1976 Code of Laws, as amended, I am today sending notice of service and a copy of the Summons and Complaint to defendant Natena Buff by open mail. Enclosed are the Affidavit of the mailing, the original envelope, and the unsigned return receipt card for filing by you with the Clerk of Court.

If you have any questions, please contact me at 803-896-9904.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kristy Corley".

Kristy Corley

Administrative Specialist

For: Director, South Carolina Department of Motor Vehicles

Enclosures

000029



S. C. DEPARTMENT OF
MOTOR VEHICLES

OFFICE OF GENERAL COUNSEL

P.O. Box 1498, Blythewood, S.C. 29016: (803) 896-9900, Fax: (803) 896-9901

April 9, 2013

Natena Buff
9711 Rose Commons Drive, Apartment 312
Huntersville, North Carolina 28078

Re: Thomas Free vs. Natena Buff
Case No. 12-CP-40-7842; DMV-13-121

Dear Mr. Buff:

In accordance with the provisions of Section 15-9-350 or 15-9-360 of the Code of Laws of South Carolina (1976), this office has received the enclosed Summons and Complaint in the above-entitled action on March 26, 2013. Under South Carolina law, this has the same legal effect as if you had been served with these documents personally.

Section 15-9-350 of the 1976 Code of Laws of South Carolina, as amended, provides that:

"The acceptance by a nonresident of the rights and privileges conferred by the laws in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways, the streets of any incorporated municipality or the public roads of this State or anywhere within this State, or the operation by such nonresident of a motor vehicle on any such public highways, streets, or public roads or anywhere within this State other than as so permitted or regulated shall be deemed equivalent to the appointment by such nonresident of the Director of the Department of Motor Vehicles or of his successor in office to be his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against him growing out of any accident or collision in which such nonresident may be involved by reason of the operation by him, for him or under his control or direction, express or implied, of a motor vehicle on such public highways, Streets, or public roads or anywhere within this State. Such acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally."

Section 15-9-360 of the 1976 Code of Laws of South Carolina, as amended, provides that:

"The acceptance by a nonresident motor carrier of the rights and privileges conferred by the laws now or hereafter in force in this State, permitting the operation of motor vehicles as evidenced by the operation of a motor vehicle by such nonresident either personally or through an agent or employee on the public highways in this State, or the operation of such nonresident either personally or through an agent, lessee, or employee, of a motor vehicle on the public highways of this State other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident motor carrier of the Director of the Department of Motor Vehicles, or his successor in office, to be his true and lawful attorney and the attorney of his executor or administrator, upon whom may be served all summonses or other lawful process or notice in any action, assessment proceeding, or other proceeding against him or his executor or administrator, arising out of or by reason of any provisions in Chapter 31 of Title 12 relating to such vehicle or relating to the liability for tax with respect to operation of such vehicle on the highways of this State. Acceptance or operation shall be a signification by such nonresident motor carrier of his agreement that any such process against or notice to him or his executor or administrator shall be of the same legal force and validity as if served on him personally or on his executor or administrator. All of the provisions of Sections 15-9-370, 15-9-380, and 15-9-350 shall be applicable with respect to the service of process or notice pursuant to this section."

Sincerely,

Kristy Corley, Paralegal, For: Director, South Carolina Department of Motor Vehicles

Enclosure

cc: Frank A. Barton, Esquire
Post Office Box 3972
West Columbia, SC 29171

000030

FRANK A. BARTON
Attorney at Law, P.A.
P.O. Box 3972 / 1611 Augusta Highway
West Columbia, South Carolina 29171
Of Counsel: H. Wayne Floyd Law Office, P.A.
(803) 739-1824 / fax (803) 739-1888

March 26, 2013

Office of General Counsel
SC Department of Motor Vehicles
10311 Wilson Blvd.
Blackwood, South Carolina 29072

RE: Thomas Free v. Natena Buff
2012-CP-40-7842

Dear Office of General Counsel:

Pursuant to S.C. Code Section 15-9-370 enclosed please find two copies of a Summons and Complaint for service upon the Defendant Natena Buff. The last known address for the Defendant is 9711 Rose Commons Drive, Apartment 312, Huntersville, North Carolina 28078. I have also enclosed a check in the amount of \$40.00 for the service fee.



Truly Yours,

A handwritten signature in black ink, appearing to read "F. A. Barton".

Frank A. Barton

FAB/lfm

000031

C

Court of Appeals of South Carolina.
Catherine L. BECKHAM, Respondent.

v.

S.J. DURANT, Appellant.

No. 1436.

Heard Nov. 13, 1989.

Decided Dec. 18, 1989.

Appeal was taken from default judgment entered by the Common Pleas Court, Richland County, Thomas L. Hughston, Jr., J., in teacher's action against student's parent for libel and slander. The Court of Appeals, Shaw, J., held that: (1) service of process was sufficient to support entry of default judgment; (2) failure to file proof of service within ten days after service of summons and complaint did not entitle defendant to enlargement of time to answer; and (3) award of \$2,500 to teacher was not excessive.

Affirmed.

West Headnotes

[1] Judgment 228 ⚡ **138(1)**

228 Judgment

228IV By Default

228IV(B) Opening or Setting Aside Default

228k138 Right to Relief in General

228k138(1) k. In General. Most Cited

Cases

Entry of default is official recognition of failure to appear or otherwise respond, but is not judgment by default; judgment by default is not properly entered until damages are determined. Rules Civ.Proc., Rule

55(c).

[2] Libel and Slander 237 ⚡ **78**

237 Libel and Slander

237IV Actions

237IV(B) Parties, Preliminary Proceedings, and Pleading

237k78 k. Process and Appearance. Most Cited Cases

Service of process was sufficient to support entry of default judgment in action for libel and slander, where defendant knew service was being attempted and purposely avoided and refused to accept service. Rules Civ.Proc., Rule 55(c).

[3] Process 313 ⚡ **153**

313 Process

313III Defects, Objections, and Amendment

313k153 k. Defects and Irregularities in Service or Return or Proof Thereof. Most Cited Cases

Failure to file proof of service within ten days after service of summons and complaint in proceeding for libel and slander did not entitle defendant enlargement of time to answer and did not form basis for denying motion for entry of default. Rules Civ.Proc., Rules 4(g), 5(d), 6(b).

[4] Libel and Slander 237 ⚡ **90.1**

237 Libel and Slander

237IV Actions

237IV(B) Parties, Preliminary Proceedings, and Pleading

237k90 Plea or Answer

237k90.1 k. In General. Most Cited

000032

Cases

(Formerly 237k90)

Defendant in action for libel and slander was not entitled to file responsive pleading within 15 days after court ruled on sufficiency of service of process; rather, such defense was required to be made either by responsive pleading or motion within 30-day answering period. Rules Civ.Proc., Rule 12(a), (b)(5).

[5] Libel and Slander 237 121(.5)

237 Libel and Slander

237IV Actions

237IV(D) Damages

237k121 Amount Awarded

237k121(.5) k. In General. Most Cited

Cases

(Formerly 237k121)

Award of \$2,500 to teacher in her libel and slander action against a student's parent was not excessive; award included damages for counseling bills, medication and mental suffering.

****702 *330** Andreee Glover Freeman, Columbia, for appellant.

Ronald A. Barrett, of Lourie, Curlee, Barrett & Popowski, Columbia, for respondent.

SHAW, Judge:

Respondent, Catherine L. Beckham, sued appellant, S.J. Durant, alleging libel and slander. Following various motions and hearings, the trial court entered a default judgment against Dr. Durant and awarded \$2,500 in damages to Ms. Beckham. Dr. Durant appeals. We affirm.

This appeal encompasses a complicated procedural history. Ms. Beckham, a school teacher, filed a summons and complaint on August 12, 1987 alleging

she was libeled and slandered by Dr. Durant, the parent of one of Ms. Beckham's students. According to the testimony of a process server, the pleadings were served on Dr. Durant on October 19, 1987. On November 20, 1987, Ms. Beckham filed proof of service, an affidavit of default, and a motion for default judgment. On December 15, 1987, Dr. Durant appeared at the default hearing before Judge Jonathan Z. McKown and challenged the sufficiency of service. On January 18, 1988, Judge McKown issued his order finding service effective and directed a hearing to be set on Ms. Beckham's motion for default judgment. A hearing was scheduled on this motion for February 1, 1988.

331** On January 28, 1988, Dr. Durant filed a motion for continuance and enlargement of time to answer. On February 1, 1988, Judge Owens T. Cobb heard both this motion and the motion for default judgment. On February 8, 1988, Judge Cobb issued his order denying Dr. Durant's motion and held Ms. Beckham was entitled to entry of default. Specifically, Judge Cobb found Dr. Durant failed to show good cause entitling her to an enlargement of time to answer under Rule 6 S.C.R.C.P. or good cause entitling her to set aside entry of *703** default under Rule 55(c) S.C.R.C.P.^{FN1} Judge Cobb further ordered a hearing on the issue of damages.

^{FN1} There is no evidence Dr. Durant made a Rule 55(c) motion at this stage of the proceedings, nor is it likely she did given that there was no entry of default until the issuance of Judge Cobb's order. Nevertheless, Judge Cobb found Dr. Durant failed to show good cause sufficient to set aside entry of default under Rule 55(c).

[1] On February 2, 1988, Dr. Durant filed a motion to amend the order of Judge McKown. On February 17, 1988, she filed a motion to set aside the default judgment^{FN2} and for enlargement of time to answer. On May 25, 1988, Judge Thomas L. Hughston

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heard these motions and took testimony on the issue of damages. On June 6, 1988, Judge Hughston issued his order denying Dr. Durant's motions and awarded Ms. Beckham \$2,500 plus costs.

FN2. A reading of the record shows the parties and the court confused the terms "entry of default" and "entry of default judgment". In reality, Judge Cobb's order granted Ms. Beckham an entry of default. The entry of default is an official recognition of the failure to appear or otherwise respond, but is not a judgment by default. Judgment by default is not properly entered until damages are determined. See Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535 (Ct.App.1987) citing H. Lightsey, J. Flanagan, South Carolina Civil Procedure, 77 (2nd Ed.1985).

[2] Dr. Durant appeals from each of the three trial judges' orders. FN3 She first takes issue with the finding of sufficiency of service of process in Judge McKown's order. She argues the evidence presented on this issue shows this was not a case where the defendant knew service was being attempted and wilfully refused to accept. She points to specific testimony of the process server in support of her position, however, no such evidence is contained in the record *332 before us. In fact, the record contains no transcript of the hearing before Judge McKown. FN4 Contrary to Dr. Durant's assertions, Judge McKown's order notes evidence showing Dr. Durant knew service was being attempted and purposely avoided and refused to accept the same. Accordingly, the finding of sufficiency of service of process must be affirmed.

FN3. Although the issue of the proper time for appeal under Rule 72 S.C.R.C.P. was initially argued in respondent's brief, this argument was withdrawn at oral argument and is therefore not addressed by this court.

FN4. Dr. Durant failed to appeal the order settling the record ruling against the inclusion of this transcript.

[3] Dr. Durant next takes issue with the order of Judge Cobb. First, she contends Rule 5(d) S.C.R.C.P. requires proof of service be filed within ten days after service of the summons and complaint and failure to file such proof of service deprives a defendant of notice that service of process has been alleged. Although it is unclear from Judge Cobb's order as to whether Rule 5(d) was even raised before him, it appears from Dr. Durant's argument she relies on this rule as showing good cause entitling her to an enlargement of time to answer or as a basis for denying Ms. Beckham's motion for entry of default. We disagree.

Rule 5(d) S.C.R.C.P. provides, in part, "Proof of service shall be filed within ten (10) days after service of the summons and complaint." However, it goes on to state, "Rule 5(d) encompasses present Circuit Rule 68 and former Rule 75, as well as Code § 15-9-1000. It is a more concise statement and *provides more specific sanctions in the court's discretion.*" (emphasis added). Nowhere does the rule provide failure to file proof of service within the ten day period nullifies the service or extends the period of time for a defendant to answer. Rule 5(d) only provides for dismissal of an action for failure to serve the summons and complaint. Rule 4(g) S.C.R.C.P. specifically states, "Failure to make proof of service does not affect the validity of the service." Thus, failure to make proof of service within a ten day period of service, likewise, would not affect the validity of service. While Judge Cobb may have considered this argument as an attempt to show good cause for allowing Dr. Durant an enlargement of time to answer, such is within the discretion of the trial judge. See Rule 6(b) S.C.R.C.P. We find no abuse of that discretion. Further, **704 while this court expresses no opinion as to whether a Rule 55(c) motion to set *333 aside entry of default was properly before Judge Cobb, we find no

000034

abuse in his finding that Dr. Durant failed to make a showing of good cause. [See Ammons v. Hood, 288 S.C. 278, 341 S.E.2d 816 (Ct.App.1986). Relief from default is solely within the sound discretion of the trial judge. This court cannot substitute its judgment for that of the trial judge absent a clear showing of abuse of discretion.]

[4] Dr. Durant also contends Judge Cobb erred in failing to find her entitled to file her responsive pleading within fifteen days after the court's action in ruling on the sufficiency of service of process. She contends at the December 15, 1987 hearing challenging sufficiency of process, she presented a motion pursuant to Rule 12(b)(5) S.C.R.C.P. and under Rule 12(a)(1) S.C.R.C.P., she was entitled to fifteen days after notice of the court's action on the matter to answer. We disagree.

Rule 12(a) provides in part:

A defendant shall serve his answer within 30 days after the service of the complaint upon him, unless the Court directs otherwise when service of process is made pursuant to Rule 4(e).... The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the Court: (1) if the Court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 15-days after notice of the Court's action ...

However, Rule 12(b) goes on to state:
Every defense, in law or fact, to a cause of action in any pleading ... shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: ... (5) insufficiency of service of process ... A motion making any of these defenses *shall be made before pleading* if a further pleading is permitted. (emphasis added).

Thus, under Rule 12(a) and (b), such a defense as insufficiency of process must be made either by responsive pleading or motion within the time period allowed for responding. *334 Had Dr. Durant made such a motion prior to expiration of the thirty day answering period, she would have had fifteen days from the date of notice of the court's ruling on the matter within which to respond.

[5] Finally, Dr. Durant contends Judge Hughston erred in awarding damages in excess of that supported by the record. We disagree. Judge Hughston's award included damages for counseling bills, medication and mental suffering. Under the facts of this case, we find ample evidence in the record to support the \$2,500 award.

All other issues raised by Dr. Durant are manifestly without merit and therefore affirmed. S.C.Code Ann. § 14-8-250 (Supp.1988).

AFFIRMED.

BELL and CURETON, JJ., concur.

S.C.App., 1989.
Beckham v. Durant
300 S.C. 329, 387 S.E.2d 701, 58 Ed. Law Rep. 366

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

COURT OF COMMON PLEAS

THOMAS FREE,)
PLAINTIFF,)
V.)
NATENA BUFF,)
DEFENDANT.)

TRANSCRIPT
OF
RECORD
2012-CP-40-7842

January 15th, 2013
Columbia, South Carolina

B E F O R E:

THE HONORABLE THOMAS G. COOPER, Judge.

A P P E A R A N C E S:

FRANK ANTHONY BARTON
ESQ.
Attorney for the Plaintiff

WILLIAM H. BOWMAN, III
ESQ.
Attorney for the Defendant

KAREN E. AMBROZIAK
CIRCUIT COURT REPORTER

Transcribed by Pamela E. Green, Circuit Court Reporter

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I N D E X

(There was no testimony taken or exhibits marked during this hearing.)

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P R O C E E D I N G S

THE COURT: Thomas Free versus Natena Buff.

MR. BOWMAN: Yes, Your Honor.

May it please the Court?

THE COURT: Let me see what you got there.

You're trying to get back in again?

MR. BOWMAN: No, sir. Actually this is the defendant's motion to dismiss, Your Honor.

THE COURT: Okay. So, you're in?

MR. BOWMAN: I mean -- I filed an action. I don't think they're -- I don't think they have effected service on the defendant and properly and adequately filed proof of service.

I'll give you a little chronology. This is a motor vehicle accident that occurred December the 1st, 2009, and I did send you and Mr. Barton a short memo, a copy of the affidavit of my client---

THE COURT: Okay.

MR. BOWMAN: -- Thomas Free and Natena Buff. The police report said Free was driving, he was drunk, and Ms. Buff was a passenger. That's not before you, and has nothing to do with it, but that would be a matter to be taken up here after, Your Honor, on my motion.

But the wreck was December the 1st, 2009, and suit was

1 filed December -- November the 27th, 2012, four days before
2 the Statute of Limitations expired.

3 THE COURT: Sliding into home.

4 MR. BOWMAN: Sliding into home.

5 And on March the 26th, 2013, Mr. Barton sent a copy of
6 the pleadings to the Department of Motor Vehicles, March the
7 26th, 2013. That was 119 days after he filed the case.
8 That was staffed in, Your Honor, as having been received
9 March 26th.

10 We believe that -- we don't think the service has been
11 adequately accomplished and suit after -- and the suit
12 properly commenced, and I'll get into that. But with regard
13 to the law as we believe it to be, as cited in our brief, in
14 order to commence an action, you have to serve it -- you
15 have to file it before the Statute of Limitation runs, Your
16 Honor, which, in this case, would of been December the 1st,
17 2012. And once you file it, for the statute to run, you
18 have to serve it within 120 days of filing.

19 So, the question is, in the case, I guess the pivotal
20 question did Mr. Barton get service of my client with the
21 Long Arm Statute through the DMV, which I'll get into,
22 within 120 days or at any time. Our contention is the case
23 has not been properly served, has not been filed. Proof of
24 service has not been filed.

25 THE COURT: No proof of service?

1 MR. BOWMAN: No proof of service has been filed in the
2 court records.

3 Rule 5(d) requires that proof of service be filed
4 within ten days of service or the case is to be dismissed.
5 That would be one argument that we would make in the case,
6 that no proof of service has been filed with the Court
7 within ten days under Rule 5(d), and it should be dismissed
8 for that reason.

9 However, Your Honor, we do not believe that this suit
10 was served within 120 days. The---

11 THE COURT: When was it filed with the DMV?

12 MR. BOWMAN: It was filed -- the, the papers -- the
13 summons and complaint was submitted to DMV on March the
14 26th, 2013, and they stamped receipt. Now, that's 119 days
15 after the filing. There's been on proof of this. Frank
16 gave me -- recently sent me the lady -- Christy Corley's
17 letter to the defendant and his letter to her of March the
18 26th, but the concern that we have is, Your Honor, that the
19 operative date that service is complete is outside the 120
20 day period required by law.

21 THE COURT: What is that -- what is that date?

22 MR. BOWMAN: That date would -- we don't think it's
23 been properly served because nothing has been filed.

24 THE COURT: All right.

25 MR. BOWMAN: But if there were a date, if there were a

1 date it was served, Your Honor, we believe that would fall
2 under rule -- section 15-9-380 of the code.

3 To give you a little bit more, on April the 9th, 2013,
4 the Department sent the summons and complaint to Ms. Buff by
5 certified mail, April the 9th, 2013. That was returned
6 unclaimed. On May the 7th, 2013, DMV sent the summons and
7 complaint by open mail. On May the 7th, 2013, Christy
8 Corley at DMV sent Mr. Barton a letter with her affidavit
9 attached. So, she, she proceeded correctly to this point
10 with her affidavit attached, and the original envelope and
11 unsigned receipt, and in that letter to Mr. Barton she said
12 for filing by you with the Clerk of Court pursuant to Rule
13 15-9-380 of the statute 15-9-380. In her letter to
14 Mr. Barton May 7th, she said here it is, is the unsigned
15 letter -- here's the unsigned certified mail, here's the
16 undelivered letter, and here's my affidavit that I've done
17 what I did.

18 15-9-380 says that service is complete if the summons
19 confuses or doesn't accept the summons and complaint in its
20 return, and then the service by open mail is found. The
21 original envelope shall be retained, and a notice and copy
22 of the summons shall be sent by open mail, and the envelope,
23 that is the envelope, Your Honor, under 15-9-380, which was
24 the certified letter, unsigned certified envelope, that
25 envelope and her affidavit, Ms. Corley's affidavit at DMV

1 stating what she did, shall have the same -- shall be filed
2 with the Clerk of Court, and she said that in the letter.
3 We can pass it up if Mr. Barton wants to.

4 MR. BARTON: Yeah, I'll pass it up to that Judge.
5 That's fine.

6 MR. BOWMAN: But 15-9-380, she says this in her letter,
7 the envelope affidavit mailing shall be filed with the Clerk
8 of Court, and upon filing thereof, shall have the same force
9 and legal effect as if such process has been personally
10 served on such defendant.

11 Now, nothing, nothing has been filed. So, we don't
12 have a real operative date of when service was perfected. I
13 think Mr. Barton is going to take the position that service
14 on the defendant is perfected on March the 26th, 2013, when
15 it was delivered to the Highway Department.

16 THE COURT: Just out of curiosity, how did you get
17 here?

18 MR. BOWMAN: I got here -- how did I get notice of it?

19 THE COURT: Why are you on this case if the defendant
20 was never served?

21 MR. BOWMAN: Well, we made a motion to dismiss because
22 the defendant was not served. The Court did not have
23 jurisdiction.

24 THE COURT: Who do you represent?

25 MR. BOWMAN: The defendant. I'm sorry. I represent --

1 our -- my motion is to dismiss the---

2 THE COURT: So---

3 MR. BOWMAN: The suit hasn't been properly commenced,
4 and that's the nature of my motion.

5 THE COURT: Are you, are you --.

6 MR. BOWMAN: And we're asking for it to be dismissed.

7 THE COURT: I see that.

8 MR. BOWMAN: Yes, sir.

9 THE COURT: Something had to be served on somebody for
10 you to be here.

11 MR. BOWMAN: I, I don't know -- I know that, according
12 to the affidavit---

13 THE COURT: Who hired you?

14 MR. BOWMAN: Geico.

15 THE COURT: How did Geico get notice of any suit if
16 your client was never served or are you just saying it was
17 never served properly?

18 MR. BOWMAN: It's never been served properly. They,
19 they first sent to it her --.

20 THE COURT: So, eventually she got it?

21 MR. BOWMAN: Eventually she got it by open mail.

22 Now---

23 THE COURT: All right.

24 MR. BOWMAN: She is a close friend, close friend of
25 Mr. Buff, the defendant. She lives in Charlotte, North

1 Carolina. She's filed an affidavit that he has visited her
2 on numerous occasions in North Carolina.

3 THE COURT: Mr. Buff?

4 MR. BOWMAN: Mr. Free. Ms. Buff's -- I'm sorry.
5 Ms. Buff's affidavit, she and Mr. Free are friends. They
6 were in a car together. The car wrecked. The police report
7 said he was driving. That's in dispute. That's down the
8 road. But they're friends. They continue to see each
-9 other. According to her affidavit, she moved to her current
10 address in February of 2012 before any of this occurred, and
11 that he visited her at that location, Mr. Buff.

12 THE COURT: Mr. Free.

13 MR. BOWMAN: I beg your pardon, Judge. I'm stuck,
14 stuck on Buff. I'm sorry.

15 Mr. Free visited her there on that location. So, he
16 knew where she was, and, you know, whether they talked --
17 you asked me a question I can't answer. Unless she received
18 it, unless she later received it when they sent it back
19 by---

20 THE COURT: Open mail.

21 MR. BOWMAN: ---open mail---

22 THE COURT: And then she sent it to her carrier.

23 MR. BOWMAN: But that was to -- service has not been
24 perfected.

25 THE COURT: I understand---

1 MR. BOWMAN: Yes, sir.

2 THE COURT: ---your point.

3 MR. BOWMAN: Yes, sir, I don't know what happened, no,
4 sir.

5 THE COURT: Huh?

6 MR. BOWMAN: I don't know what happened like this.

7 THE COURT: You got here from somewhere and you've
8 explained it.

9 MR. BOWMAN: And that may be -- that may be it. That'd
10 be my guess. They remained friends. He knew where -- she
11 visited -- he visited her numerous times in Charlotte, knew
12 where she last lived when all of this happened. In fact,
13 they've been served---

14 THE COURT: Cozy arrangements.

15 MR. BOWMAN: Sir?

16 THE COURT: Cozy arrangements.

17 MR. BOWMAN: A cozy arrangement.

18 There's no exact date of service because the Statute,
19 15-9-308, has not been complied with to effectuate service.
20 There's been no affidavit of mailing. So, we really don't
21 know the exact date of service. I think that takes place
22 and it's our position that takes place, under 15-9-380, when
23 the DMV, in March or April, excuse me, April the 9th of 2013
24 wrote Mr. Barton and told him that, what they had done and
25 set it out in an affidavit.

1 It was actually May the 7th, Judge, 2013, that the
2 Department wrote Mr. Barton, May the 7th, 2013, Christy
3 Corley.

4 Enclosed are the affidavit of the mailing the original
5 envelope and the unsigned return receipt card for filing by
6 you with the Clerk of Court. That's a letter of May 7th.
7 And if I can pass up -- there's nothing in the file. Frank
8 did send me this yesterday. This was her letter of May 7th
9 with her affidavit. I had not seen it until he gave it to
10 me.

11 THE COURT: All right.

12 MR. BARTON: But clearly, under 15-9-380, Your Honor,
13 service is not perfected until the requisite forms are filed
14 with the Clerk. Nothing has been filed with the Clerk. The
15 case should be dismissed for lack of service, the expiration
16 of the statute, and failure, failure to file proof of
17 service.

18 THE COURT: All right. Mr. Barton.

19 MR. BARTON: Your Honor, Rule 5(d) does not effect --
20 there's a case law that clearly says that the fact that you
21 don't file the affidavit of service doesn't mean it wasn't
22 timely served.

23 Now, we filed the lawsuit. We knew she'd moved out of
24 state. We tried to serve her by certified mail and couldn't
25 get her. We actually dismissed -- the first summons and

1 complaint we filed, refiled it in November to give us some
2 more time.

3 Now, he had known where she was, and I believe he had a
4 home phone call and a cell phone number, and, and I don't
5 have this in an affidavit, but I'm just gonna tell you,
6 explain what I was doing, and I don't think you need it to
7 make a decision on this anyway.

8 But the home phone number was disconnected. I was --
9 you know, you can do a lot of things over the Internet now.
10 I could not find her address on the Internet, and the only
11 thing I had left was the place where she worked, and I was
12 actually getting ready to go try and find her in Charlotte
13 to see if I could catch her at work and get somebody to hand
14 her the summons and complaint.

15 I was aware, at that time, with the provisions for
16 serving the head of the Department of Motor Vehicles as an
17 agent of service. But when I read the, read the statutes, I
18 was concerned that unless I got the registered receipt back
19 that it was not final, and since I hadn't been able to get a
20 receipt back from her anyway, I didn't think the Department
21 of Motor Vehicles was gonna have any success in doing that.

22 Now, when I looked at the statute, there's a final
23 statute that says, even if they refuse to pick up certified
24 mail that was sent by open mail, okay, and, so, at that
25 point I decided that I could serve it on the director of the

1 Department of Motor Vehicles.

2 Let me back -- let me start with something that I think
3 makes it simple. The Court is aware of 15-3-30 that states
4 when a person is involved in an accident in-state and moves
5 out-of-state for over a year, it stating it tolls the
6 Statute of Limitations. Now, they give us an affidavit
7 saying that she moved out-of-state, and she moved three
8 times after she moved out-of-state.

9 It's our position the Statute of Limitations tolled
10 during that time, and there is case law saying if you know
11 where she is, then you can avail yourself of substitute
12 service. But she moved three times.

13 In her affidavit she does not say that my client knew
14 where she was the entire time she moved. The case law says
15 that's an issue of fact. They have not shown that he knew
16 where she was the entire time she was in North Carolina.
17 And, so, it's our position that the Statute of Limitations
18 was tolled, and it hadn't run, at this point, until they
19 could show that she actually knew she, where she was for
20 each time, and the times that he didn't know, and that time
21 wasn't running against the Statute of Limitations.

22 Now -- so, I think their motion is improper. I think
23 their motion should be denied on that basis.

24 All right. Now, the, the documentation that
25 Mr. Bowman's referring to, and I'm gonna hand these up --

1 I've given copies as I got them, stapled them together as
2 one, as one document, which I'd like to enter as an exhibit
3 at this time, shows that the summons and complaint were
4 delivered to the South Carolina Department of Motor
5 Vehicles, obviously general counsel, which where -- is where
6 they say they delivered it, on March 26th of 2013. That was
7 within like -- that is -- opposing counsel said that's 119
8 days after the summons and complaint were filed. And, so,
9 if the Statute of Limitations was not tolled, that would
10 have been properly or timely commenced.

11 Now, there are letters from the Department of Motor
12 Vehicles showing that the summons and complaint were
13 received on March 26th, 2013, and he was referring to, to
14 their language that says under South Carolina law, this has
15 the same legal effect as if you had been served with these
16 documents personally. And, Your Honor, I'm gonna, I'm gonna
17 hand these up to you. Opposing counsel has a copy.

18 MR. BOWMAN: Here you can have this.

19 MR. BARTON: Aside from the tolling of the Statute of
20 Limitations, it's our position that, under the statute --
21 and the statute that I cited initially was -- I believe it
22 was, it was 15-9-370.

23 would you like a copy of that for quick reference?

24 THE COURT: Okay.

25 MR. BARTON: They're the agent of service for Natena

1 Buff. It's our position that as soon as the summons and
2 complaint was delivered to them, to the Department of Motor
3 Vehicles, service was perfected.

4 Now, there's some other things -- because they're the
5 agent. They're not -- you know, they're not some, some --
6 it's not like you send it to them -- well, let me -- it's
7 our position they're the agent. If you serve on them
8 they're served. Just the same as if it was an agent for a
9 corporation or something. So, it's our position that it was
10 served when they got it.

11 Now, they're other things that they have to do. Again,
12 I would think if I was trying to hold them in default for
13 not timely replying to this thing within 30-days of
14 March 26th, I think that might be a problem because I think
15 she's entitled to more notice than that. But insofar as
16 commencing the action, I think it's, I think it's timely. I
17 think it stops there, and I'll be glad to answer --.

18 THE COURT: well, he says you ought to follow the
19 instructions of Christa Corley and file this with the Clerk
20 of Court.

21 MR. BARTON: well, Your Honor, it can be filed. Now,
22 the fact that it wasn't filed within ten days does not, does
23 not make service ineffective, and there's case law about --
24 under Rule 5 about this.

25 THE COURT: All right.

1 MR. BARTON: That, that gives you proof of service.
2 that has no effect on whether service was accomplished,
3 service was perfected.

4 Okay. There's two different concepts. One is
5 perfection of service. It's our position service was
6 effective on March 26th when they received it.

7 THE COURT: All right.

8 MR. BARTON: Now, in order to get proof of service,
9 they got to go through the rest of it under the statute,
10 which they did. They complied with the statute stating --
11 the statute doesn't say if I file it within ten days after
12 getting it that service is ineffective. But even so, I
13 think you still have to -- the statute is tolling. So, they
14 haven't shown the statute's even run at this point.

15 MR. BOWMAN: Can I speak real briefly on that?

16 THE COURT: Absolutely.

17 MR. BOWMAN: With regard to service again, as you
18 pointed out, Ms. Corley sent the materials to Mr. Barton and
19 told him to file them with the clerk. So, the law is
20 15-9-380, not what a clerical person may of said, and, in
21 fact, if you look at her affidavit, Ms. Corley's affidavit,
22 she said this affidavit is made in compliance with Section
23 15-9-380. She's the designated representative, and that she
24 received the summons and complaint on March 26th, 2013, in
25 her affidavit.

1 she says further that it was sent April the 9th by
2 certified mail, it was returned unclaimed, and that's what
3 she's required to do and what's required to be filed in the
4 case in order to perfect service, that -- her affidavit,
5 along with the, with the unclaimed letter, that she sent
6 him.

7 So, clearly she comprehended she had not accepted
8 service, and I don't think any Court -- I don't think the
9 Court would rule that to admit delivery to a clerk at the
10 Department of Motor Vehicles is, is service, is good
11 service, and 30 days from that day the defendant has to
12 answer that's she in default because 380 says the envelope
13 and affidavit of mailing, with sufficient postage, with such
14 open letter, shall be filed with the clerk of Court in which
15 an action is pending, and upon the filing thereof, shall
16 have the same force and legal effect as if such process had
17 been personally served upon the defendant.

18 And that's what Ms. Corley -- that's why she gave her
19 affidavit to Mr. Barton saying that, in Paragraph 3, this
20 was received by the Department on March 26th. So, if she
21 says she received, she accepted service, she can't do it and
22 it's just -- this is not -- this is not -- this action is
23 not been served and jurisdiction has not been acquired over
24 the, over the defendant, and nothing, nothing regarding
25 anything has been -- regarding service has been filed since

1 this suit was filed in November of last year, November the
2 27th, 2012, when suit was filed, and nothing, nothing
3 evidencing any type of attempted service has been filed with
4 the Court. I came over and looked at the file and finally
5 found out I couldn't find nothing.

6 with regard to the tolling, they're two cases on it,
7 Your Honor, and I think the affidavit of Ms. Buff speaks to
8 this, and I can get these to you. Khalill Rafsanjoni versus
9 John Doe, which is 559 S.E.2d 841. Mr. Barton was involved
10 in this case, and the Supreme Court stated, interpreting
11 Mayer, as required objective test of knowledge, the statute
12 is tolled when plaintiff did not and could not have
13 reasonably known the whereabouts of the defendants. On the
14 facts before it, Rafsanjoni was not reasonably required to
15 have known or could get the address, but, in this case, as I
16 see the rule laid down by the Court, it's tolled only when
17 the plaintiff did not or could not reasonably have known the
18 whereabouts of the defendant.

19 There's no affidavit from the plaintiff, Your Honor,
20 that contradicts what Ms. Buff really says in her affidavit
21 that they were in contact, throughout this whole period of
22 time, and were, up until she moved to her last address in
23 February of 2012, that's the only evidence before the Court,
24 and he visited her there at that location where she moved
25 February the 12th -- February the -- in February of 2012.

1 That was before the action was filed. So, he clearly knew.

2 There's another case which is even clearer, which is
3 Meyer, which is 498 S.E.2d 635, tolling of the statute is
4 inapplicable when the nonresident of the defendant is
5 amenable to personal service of process and the defendant
6 can be brought within the personal jurisdiction of our
7 Courts. Our holding is limited to, to situations similar to
8 the implication which the name---

9 COURT REPORTER: I'm sorry. You're talking so fast I
10 can't understand what you're saying.

11 MR. BOWMAN: We find tolling the statute is
12 inapplicable when the nonresident of defendant, of defendant
13 is amenable to service, personal service of process, and the
14 defendant can be brought within the personal jurisdiction of
15 our Courts. Our holding is limited to situations similar to
16 the incident case in which the name and location of the
17 defendant is known to the plaintiff. It appeared that the
18 limitations may be tolled when that information is not known
19 to the plaintiff when there's nothing in the record in the
20 case, Your Honor, that contradicts what Ms. Buff says that
21 she, they did remain friends and he knew exactly where she
22 was.

23 So, I don't think, under the cases cited, that there's
24 any tolling of any statute because of a nonresident
25 defendant as long as he knew or reasonably knew where she

1 was and he did. That's the only thing in this record.

2 MR. BARTON: Your Honor, the affidavit of Natena Buff
3 does not say that he knew her residence the entire time she
4 was gone. If, if it did I might have a problem at this
5 point, but it doesn't say that. It becomes an issue of
6 fact. Rafsanjoni was my case. I'm well aware of it, and I
7 think it's a factual issue.

8 THE COURT: All right. Let me---

9 MR. BARTON: Like I say, we did not know, during the
10 time I was trying to serve her, where she -- whether she was
11 still at her current address or not.

12 THE COURT: All right. What do you do about the fact
13 that there's just -- there's nothing in this file evidencing
14 service of process?

15 MR. BARTON: Your Honor, the, the fact that it wasn't
16 filed within ten days does not make service ineffective. I
17 was, I was slack in filing it, but the Court has it now,
18 and it's our position and under---

19 THE COURT: It's still not filed.

20 MR. BARTON: Well, I'll be glad to take and file it as
21 soon as this is done. I was gonna make it a Court's Exhibit
22 or my exhibit and then it will be filed. But---

23 THE COURT: All right. Well, you got the letter on
24 May the 7th.

25 MR. BARTON: Yes, sir.

1 THE COURT: All right. Today's August the 8th. I mean
2 it's just basic that you file your notice and evidence of
3 service of process.

4 MR. BARTON: Yes, sir.

5 THE COURT: Whatever -- by whatever means. By
6 affidavit or anything else.

7 MR. BARTON: Well, a lot of times, you know, service
8 isn't an issue. You get the -- you get a call from an
9 attorney and they're served an answer, and it's just not
10 that big of a problem. In this case I should have done it.

11 But, Your Honor, the Department of Motor Vehicles isn't
12 accepting service. They are the agents of service, for
13 service. So, when they receive it, service is complete, and
14 that's what the letter dated April 9th, 2013, says, and you
15 still have the tolling when she moved out-of-state.

16 THE COURT: I'm not even sure you get to the Statute of
17 Limitations.

18 MR. BARTON: If there's any direct question you'd like
19 to ask, I'll be glad to try to answer it for you.

20 THE COURT: All right. I don't know of any. If you
21 plan to submit something -- I've got a memorandum from the
22 defendant. I don't have anything from you --

23 MR. BARTON: Yes, sir.

24 THE COURT: -- to refer to it. I'll give you an
25 opportunity to, to file a memorandum and let me consider it,

1 but on the face of it, I'm not -- I'll go back and look at
2 it. As I say, there's nothing in the file to indicate
3 service some eight months after the complaint was filed.
4 You know, most of the time the Clerk of Court will dismiss
5 these things for failure to file a proof of service. I
6 forget what their number is, 30-days or something. They're
7 supposed to dismiss it.

8 Anyway---

9 MR. BARTON: But they -- they'll ask you for---

10 THE COURT: Sir?

11 I didn't hear you.

12 MR. BARTON: They will -- if, if service has not -- you
13 haven't filed an affidavit of service because of some reason
14 it hasn't been filed, they'll write you and ask you, you
15 know, you need to do something, tell us what you're doing.
16 They, they generally don't automatically dismiss them. But
17 I've been in that situation also---

18 THE COURT: Yes, sir.

19 MR. BARTON: ---where I never could find the people to
20 serve it.

21 THE COURT: All right. Yeah, that's -- I mean that's
22 why it's there.

23 MR. BARTON: Yes, sir.

24 THE COURT: So the cases won't just be sitting on the
25 docket where nobody has ever been served.

1 All right. I'll give you ten days to --.

2 MR. BARTON: All right.

3 THE COURT: If you want to supplement a proposed order
4 with your memorandum, I'll be glad to take a look at it.

5 Mr. Bowman, I guess you're going to send me a proposed
6 order?

7 MR. BOWMAN: Yes, sir.

8 THE COURT: All right. Within ten days?

9 MR. BOWMAN: Yes, sir.

10 THE COURT: All right. Thank you very much.

11 MR. BARTON: Thank you, Judge.

12 (WHEREUPON, no exhibit was given to the court reporter
13 to be marked.)

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16 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2013-002138

Thomas Free.....Appellant,

v.

Natena Buff.....Respondent.

PROOF OF SERVICE

The undersigned does hereby certify three copies of the **RECORD ON APPEAL** was served in the foregoing action by depositing the same in the United States mail, with sufficient postage affixed thereon and return address clearly visible on February 20, 2014, addressed to the following:

William H. Bowman, Esquire
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West Columbia, South Carolina
February 20, 2014



Frank A. Barton
Attorney for Appellant

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FEB 21 2014

SC Court of Appeals

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No.: 2013-002138

Thomas Free.....Appellant,


v.

Natena Buff.....Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel does hereby certify the Record on Appeal contains all material designated by both parties and no other materials.

West Columbia, South Carolina
February 20, 2014



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SC Court of Appeals