

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

RECEIVED

APR 02 2019

SC Court of Appeals

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

Bobby Foster,..... Appellant,

v.

Julian Neil Armstrong,..... Respondent,

APPELLANT'S INITIAL REPLY BRIEF

Eric M. Poulin
S.C. Bar No.: 100209
Roy T. Willey, IV
S.C. Bar No.: 101010
Lane D. Jefferies
S.C. Bar No.: 101764
Kenneth T. David
S.C. Bar No.: 103434
Anastopoulo Law Firm, LLC
32 Ann Street
Charleston, SC 29403
(843) 614-8888

Attorneys for Appellant

ARGUMENT IN REPLY

Respondent's argument relies on purported facts for which no evidence appears in the record. Without these purported facts, Respondent cannot prevail. Specifically, the record does not contain any evidence of the following purported facts:

1. "The Defendant is a college student at Coastal Carolina University." Respondent's Initial Brief ("Brief"), p. 3 (citing Affidavit of Julian Neil Armstrong). **No such statement appears in the affidavit.** The body of the affidavit is reproduced for reference below as Exhibit A.
2. Plaintiff's "location could have been determined by called the cell number." Brief, p.4 (citing Affidavit of Julian Neil Armstrong). **No such statement appears in the affidavit.** Defendant says only that he would have answered his phone. He does not say that if asked "Where do you live, we'd like to come sue you?" he would have provided his location. Indeed, such a response would be against the great weight of experience of process servers.
3. "North Myrtle Beach Times . . . is not a daily newspaper of general circulation in Horry County." Brief, p. 8 (citing Affidavit of Julian Neil Armstrong). **No such statement appears in the affidavit.**
4. "No effort whatsoever was made by the Plaintiff or his representatives to contact the Defendant or find out where he had moved to." Brief, p. 3 (citing Affidavit of Julian Neil Armstrong and Transcript of October 17, 2016 Hearing ("Transcript"), p. 10. **No such statement appears in the affidavit. No such statement appears in the transcript.** Transcript simply says that Plaintiff's counsel did not personally call Defendant, and then describes the actions that counsel did take.
5. "The Affidavit reflects that at the time of the accident, the Defendant lived at 186 Williamsburg Road, Little River, South Carolina." Brief, p. 8 (citing Affidavit of Julian Neil Armstrong). **No such statement appears in the affidavit.** Defendant gives a date on which he moved. It does not name all the places he lived before that.
6. Calling Defendant's cell phone "was never done." Brief, p. 10 (citing Transcript p. 10, lines 11-13). **No such statement appears in the transcript.** Transcript simply indicates that Plaintiff's counsel did not personally call Defendant. There's no evidence that Sherriff's office or others did not call Defendant.
7. "The Plaintiff did nothing to locate the Defendant before obtaining the Order for Publication." Brief, p. 10 10 (citing Transcript p. 10, lines 11-13). **No such statement appears in the transcript.** Transcript simply says that Plaintiff's counsel did not call Defendant, and then describes the actions that counsel did take.
8. "The Affidavit of Nonservice clearly reflects that the Defendant had moved". Brief, p. 9. No personal knowledge of affiant is stated as to Defendant moving. Instead, Affidavit of

Nonservice merely refers to a **hearsay statement of an unidentified person** that “neighbor advised that subject has moved.”

9. “The Defendant lives with his parents.” Brief, p. 3. **No citation to the record provided by Respondent, and no evidence of such is apparent.**

10. “North Myrtle Beach Times . . . is not a daily newspaper.” Brief, p. 4. **No citation to the record provided by Respondent, and no evidence of such is apparent.**

11. “The North Myrtle Beach Times is not a daily newspaper.” Brief, pp. 8-9. **No citation to the record provided by Respondent, and no evidence of such is apparent.**

12. The North Myrtle Beach Times “is not a newspaper of general circulation.” Brief, p. 9. **No citation to the record provided by Respondent, and no evidence of such is apparent.**

13. The North Myrtle Beach Times is “not a newspaper most likely to give notice to the Defendant at his address in Little River . . .” Brief, p. 9. **No citation to the record provided by Respondent, and no evidence of such is apparent.**

14. “The only effort necessary to locate the Defendant was calling his cell phone.” Brief, p. 10. **No citation to the record provided by Respondent, and no evidence of such is apparent.**

15. “The North Myrtle Beach Times is a weekly newspaper with a circulation of 7,300. <https://nmbtimes.com>.” **No citation to the record provided by Respondent, and no evidence of such is apparent.**

If the above statements were made at all to the trial court, they were made only as arguments of counsel. It is axiomatic that arguments of counsel are not evidence. See *McManus v. Bank of Greenwood*, 171 S.C. 84, 89, 171 S.E. 473, 475 (1933) (“This court has repeatedly held that statements of fact appearing only in argument of counsel will not be considered.”)

Moreover, Respondent boldly citing documents for statements that they simply and clearly do not contain (e.g. “Defendant is a college student . . .”) calls the credibility and reasoning of Respondent’s entire argument into question. It is like “hearing the thirteenth stroke of a clock, which not only is itself discredited but casts a shade of doubt over all previous assertions.” *Nestler v. Fields*, 2019 WL 361651 (S.C. Ct. App. 2019), Advance Sheet No. 5, January 30, 2019 (internal quotations and citations omitted).

Exhibit A – Affidavit of Julian Neil Armstrong which Respondent cites.

I, Julian Neil Armstrong, first being duly sworn depose and state as follows:

1. I am the Defendant in the above-captioned action.
2. My date of birth is August 5, 1995.
3. I never received notice of this lawsuit until I was contacted by my attorney, Linda Weeks Gangi, in August of 2016.
4. In August of 2015, my family and I moved from 186 Williamsburg Road, Little River, South Carolina to 4153 Horseshoe Road, Little River, South Carolina. I have never lived in North Myrtle Beach, South Carolina. I never received any correspondence from Plaintiff's counsel forwarding to me the Summons and Complaint. I never received notice through publication that this lawsuit was pending against me and being served on me.
5. My cellphone number, 843-504-0638, appears on the Accident Report. That cellphone number has been my cellphone number since prior to the automobile accident which is the subject matter of this action and continues to be my correct cellphone number as of the signing of this Affidavit. I could have been readily contacted by calling my cellphone.

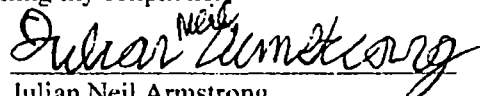
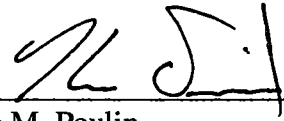

Julian Neil Armstrong

Exhibit B – Page 10, lines 11-13 of October, 17, 2016 hearing transcript which Respondent cites.

11 || trying to find the defendant. His cell phone was
12 || listed on the police report and, no, we did not call
13 || it, but what we did do is we enlisted the services of



Eric M. Poulin
S.C. Bar No.: 100209
Roy T. Willey, IV
S.C. Bar No.: 101010
Lane D. Jefferies
S.C. Bar No.: 101764
Kenneth T. David
S.C. Bar No.: 103434
Anastopoulo Law Firm, LLC
32 Ann Street
Charleston, SC 29403
(843) 614-8888

Attorneys for Appellant

Charleston, South Carolina
March 29, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

RECEIVED
APR 02 2019
SC Court of Appeals

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

Bobby Foster,..... Appellant,

v.

Julian Neil Armstrong,..... Respondent,


PROOF OF SERVICE

I, the undersigned employee of Anastopoulo Law Firm, LLC, do hereby certify that I have caused the below referenced documents to be served Via U.S. Mail, postage prepaid, to all parties of record at the address shown below:

Appellant's Initial Reply Brief

Linda Weeks Gangi
Thompson & Henry, PA
PO Box 1740
Conway, SC 29528

March 29, 2019



Kenneth T. David, Esq.
Attorney for Appellant

TOLL FREE: 1 (800) 313-2546
FACSIMILE: (843) 494-5536

REPLY TO ANN STREET OFFICE
KENNETH@AKIMLAWFIRM.COM

ANASTOPOULO LAW FIRM

AKIM A. ANASTOPOULO (SC)
ERIC M. POULIN (SC)(NC)(GA)(CA)
ROY T. WILLEY, IV (SC)

JONATHAN N. ALKIS (SC)
CONSTANCE ANASTOPOULO (SC)*
GUS ANASTOPOULO (SC)
GARRETT L. BROWN (SC)
KENNETH T. DAVID (SC)
STEFAN B. FEIDLER (SC)(GA)
HERB F. GLASS (SC)
J. CAMDEN HODGE (SC)
LANE D. JEFFERIES (SC)
THOMAS D. KANDLER, II (NC)
BYRON V. LEARY, II (SC)
BENJAMIN W. LEE (SC)
ALEXIS W. McCUMBER (SC)
MATTHEW L. NALL (SC)(KY)
INDIA D. SHAW (DC)
SAMANTHA SUTTON (SC)(NC)
CASEY VAN VALKENBURGH (SC)(IL)(MO)
P. HEATH WARD (SC)
DANNY LEE WILLARD, JR. (SC)
L. CRAYTON WILLIAMS (SC)

Sent Via U.S. Mail

The Honorable Jenny Abbott Kitchings
Clerk, SC Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: Bobby Foster v. Julian Neil Armstrong
Appellate Case No.: 2018-0001497

RECEIVED

APR 02 2019

SC Court of Appeals

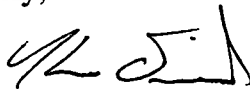
*OF COUNSEL

Dear Ms. Kitchings:

Enclosed for filing with your office is Appellant Bobby Foster's Reply Brief to Respondent's Initial Brief.

By copy of this letter and the enclosed proof of service, I am serving a copy of this brief on counsel for Respondent.

Sincerely,



Kenneth T. David, Esq.

Enclosures as stated

cc: Linda Weeks Gangi (Sent Via U.S. Mail)

MAILING: 32 Ann Street, Charleston, South Carolina 29403

North Charleston: 2170 Ashley Phosphate Road, 3rd Floor, North Charleston, South Carolina 29406 * **Greenville:** 418 River Street, Greenville, SC 29601

Florence: 150 W. Evans Street, Florence, South Carolina 29501 * **Myrtle Beach:** 2411 N. Oak Street, Suite 407, Myrtle Beach, South Carolina 29577

Columbia: 1201 Main Street, Suite 1100, Columbia, South Carolina 29201 * **Raleigh, NC:** 8801 Fast Park Drive, Suite 301, Raleigh, NC 27617

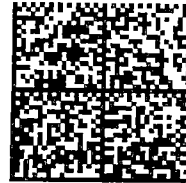
Wilmington, NC: Appointment Only

ANASTOPOULO
LAW FIRM

32 Ann Street
Charleston, SC 29403

RECEIVED
APR 02 2019
SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk of Court, S.C. Court of Appeals
Post Office Box 11629
Columbia, SC 29211



US POSTAGE
\$ 00.65
First-Class

Mailed From 29403
03/29/2019
032A 0061821351