

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

MAY 17 2019

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 FINAL REPLY BRIEF

Eric M. Poulin
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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:

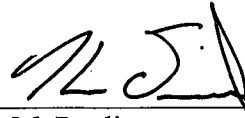
1. "The Defendant is a college student at Coastal Carolina University." Respondent's Initial Brief ("Brief"), p. 3 (citing Affidavit of Julian Neil Armstrong). **No such statement appears in the affidavit.** (R. pp. 82-84). The body of the affidavit is reproduced for reference below as Exhibit A.
2. 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.** (R. pp. 82-84). 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.** (R. pp. 82-84).
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"), (R. p. 302). **No such statement appears in the affidavit.** (R. pp. 82-84). **No such statement appears in the transcript.** (R. pp. 293-307). 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.** (R. pp. 82-84). 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.** (R. pp. 293-307). 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 (citing R. p. 302, lines 11-13; Transcript p. 10, lines 11-13). **No such statement appears in the transcript.** (R. pp. 293-307). 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.” (R. p. 57-58).
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).

[Signature on following page]



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May 15, 2019

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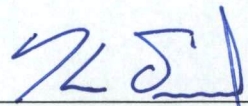
PROOF OF SERVICE

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 Final Reply Brief

Linda Weeks Gangi
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May 15, 2019



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