

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

Appellate Case No.: 2019-001198

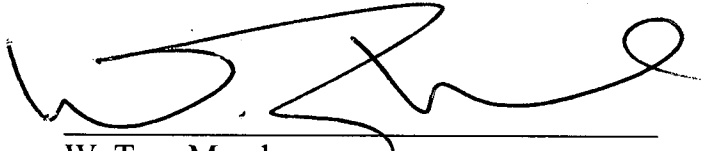
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SC Court of Appeals

Tasha Bostic, Individually, and as Parent
and Legal Guardian of P. Bostic Minor..... Appellants,

v.

Gregg Middle School, and
Dorchester County School District Two..... Respondents.

INITIAL BRIEF OF APPELLANT



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October 30, 2019

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STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL JUDGE ERR IN ALTERING OR AMENDING HIS FORM 4 ORDER BY A COMPLETE REVERSAL?
2. DID THE TRIAL JUDGE ERR BY RULING THE SERVICE OF PROCESS WAS INSUFFICIENT?
3. DID THE TRIAL JUDGE ERR BY DISMISSING THE ENTIRE CASE SINCE THERE REMAINS ADDITIONAL TIME IN WHICH TO PERFECT SERVICE AS TO THE MINOR'S CLAIM?

STATEMENT OF THE CASE

This appeal results from the dismissal of the Plaintiff's case by the Honorable Brian M. Gibbons on June 18, 2019, in the Dorchester County Court of Common Pleas, Civil Action Case No.: 2018-CP-18-01615.

Appellant asserts that Judge Gibbons erred in granting the Defendants' Motion to Dismiss, as more fully set out below.

FACTS

The Plaintiffs allege the Defendants were negligent in causing the minor Plaintiff's injuries because while the minor Plaintiff was playing football with her classmates, she was pushed and injured her foot on an inconspicuous metal pole located on the property of school/school district. The Plaintiff's mother was the named Plaintiff due to the minor involved and due to her payment of minor Plaintiff's medical bills.

On September 10, 2018, Plaintiffs filed a Summons and Complaint alleging negligence, gross negligence and the necessities doctrine. (*Summons & Complaint*) On November 26, 2018, Plaintiffs served the Summons and Complaint on William Wilson, the Principal for Gregg Middle School via United States Postal Service Certified Mail Return Receipt to his official address, 500 Green Wave Blvd., Summerville, South Carolina 29483. The Return Receipt card was signed and returned. On December 7, 2018, Plaintiffs also served the Summons and Complaint on Joseph R. Pye, the School Superintendent for Dorchester County School District Two via United States Postal Service Certified Mail Return Receipt to his official address, 115 Devon Road, Summerville, South Carolina 29483. Again, the Return Receipt card was signed and returned. Appellants contend that service was accomplished within 120 days pursuant to South Carolina Code Ann. §15-3-20 on January 8, 2019.

Defendants* filed an Answer on January 2, 2019 which contained a Rule 12(b)(6) defense that was scheduled as a Motion Hearing. (*Answer*) Defendants alleged the matter should be dismissed due to insufficiency of service of process, insufficiency of process and statute of limitations. Even though discovery requests have been served on Defendants herein (hereinafter "Defendants"), Defendants have not responded to discovery requests other than responding to initial Requests to Admit.

Defendants contend that service was not proper against the Defendant, Gregg Middle School because the Certified Mail Return Receipt card evidencing the letter sent to Mr. Wilson was signed by a student worker. Similarly, Defendants contend that service was not proper against the Defendant, Dorchester County School District Two because the Certified Mail Return Receipt card evidencing the letter sent to Mr. Pye was signed by a secretary in the personnel department at the school district.

A Motion Hearing was held before the Honorable Brian M. Gibbons at the Dorchester County Courthouse on May 28, 2019, and arguments were taken on behalf of all (remaining) parties to the lawsuit. Judge Gibbons then issued a Form 4 Order Denying Defendants' Motion to Dismiss on May 29, 2019. (*Form 4 Order of 5/29/19*) Defendants then immediately filed a Motion for Reconsideration on May 29, 2019 (*Motion for Reconsideration by Defendants*), and Judge Gibbons reversed his decision and signed a Form 4 Order Granting Defendants' Motion to Dismiss on June 18, 2019. (*Form 4 Order of 6/18/19*) Plaintiffs then filed a Motion for Reconsideration (*Motion for Reconsideration by Plaintiffs*), however Judge Gibbons signed a (Full 7-page) Order Granting Defendants' Motion to Dismiss on June 28, 2019. (*Order of 6/28/19*)

Arguments

1. THE TRIAL JUDGE ERRED BY ALTERING OR AMENDING HIS FORM 4 ORDER BY A COMPLETE REVERSAL.

After hearing arguments of counsel, Judge Gibbons made it clear at the Motion Hearing held on May 28, 2019 that he was going to consider both parties' memorandums, in addition to the oral arguments of each, and that he expected to issue a Form 4 Order in a short period of time. (*Transcript p. 11-12*) Judge Gibbons then issued a Form 4 Order denying the Motion to Dismiss the same day, being filed the following day. (*Form 4 Order of 5/29/19*) It appears clear that Judge Gibbons fully considered the matter and was convinced that the Plaintiffs should prevail on the motion. If not, Judge Gibbons would have, and should have, taken the matter under advisement until he reached a decision. This initial Form 4 Order was a Final Order.

Defendants then filed a Motion for Reconsideration under Rule 59(e), SCRPC, to reconsider, alter or amend the judgment. (*Motion for Reconsideration by Defendants*) This Motion states that the Rule 4 Order failed to include language to address nine (9) issues brought forward by Defendants, and requests clarification of the findings of fact and conclusions of law behind the ruling. Even though this Motion stated it "may be further supported by Memorandums, Affidavits, and the record, as well as the common and statutory law of the State of South Carolina", no additional filings were made, and thus there was no additional evidence presented for consideration.

Without additional evidence being presented or another hearing set, on June 18, 2019, Judge Gibbons issued a (new) Form 4 Order reversing his prior Order and stating that Defendants' Motion for Reconsideration is granted, therefore Defendants' Motion to Dismiss is granted "on procedural grounds for ineffective service of process. Attorneys are to submit an Order via E-Filing". (*Form 4 Order of 6/18/19*) Plaintiffs then filed a Motion for Reconsideration under SCRPC 59(e), however no ruling was ever made on this Motion. (*Motion for Reconsideration by Plaintiffs*) On June 28, 2019,

Judge Gibbons signed an Order Granting Defendants' Motion to Dismiss. (*Order of 6/28/19*)

In South Carolina, the trial judge's decision will not be disturbed absent a clear showing by the appellant of an abuse of discretion. See e.g. *Rochester v. Holiday Magic Inc.*, 253 S.C. 147, 169 S.E.2d 387 (1969). The South Carolina Supreme Court has held that an abuse of discretion arises in cases in which: (1) the judge issuing the order was controlled by some error of law; or (2) where the order, based upon factual, as distinguished from legal, conclusions, is without evidentiary support. *Ledford v. Pennsylvania Life Ins. Co.*, 267 S.C. 671, 230 S.E.2d 900 (1976).

It is unclear why Judge Gibbons reversed his decision, however the reversal was not proper because: (1) it was not based on the submission of additional evidence which persuaded him that the Defendants stance was the right one; and (2) it was outside the scope of the requested relief as contained in the Defendants' Motion for Reconsideration. Due to these factors, Judge Gibbons abused his discretion by reversing his decision.

It is a longstanding rule of law in South Carolina that normally, a party may not receive relief which was not requested in the pleadings. See *Wilson v. Walker*, 532 S.E.2d 19, 340 S.C. 531 (Ct. App. 2000) (Footnote 2 cites *Gainey v. Gainey*, 279 S.C. 68, 301 S.E.2d 763 (S.C. 1983)). It is clear from a review of Defendants Motion for Reconsideration that they did not request the relief that Judge Gibbons ordered. This is reversible error.

2. THE TRIAL JUDGE ERRED BY RULING THAT THE SERVICE OF PROCESS WAS INSUFFICIENT.

Rule 4 of the South Carolina Rules of Civil Procedure governs service of process in our state. The relevant sub-section of Rule 4 involved herein states as follows:

(d)(6) Governmental Subdivision. Upon a municipal corporation, county or other governmental or political subdivision subject to suit, by **delivering** a copy of the summons and complaint to the chief executive officer **or clerk thereof**, or by serving the summons and complaint in the manner prescribed by statute for the service of summons and complaint or any like process upon any such defendant. (emphasis added)

At the outset, please note that I have added emphasis to “**or clerk thereof**” to show that restricted delivery is not required under the Rule, and a person other than the named executive official is allowed. In addition, there is no clarification as to who can serve as a clerk, therefore it is plausible that essentially anyone who is allowed by the governmental entity to sign on behalf of the executive official is a “clerk thereof”.

There is no dispute that William Wilson was the Principal of Gregg Middle School, and he was the proper party for the delivery of the documents. There is also no dispute that the certified mailing was addressed to Mr. Wilson, however someone else signed for him and accepted the documents. The same goes for Mr. Pye, the executive official for Dorchester School District Two. Defendants argue that because someone other than Mr. Wilson accepted the documents on his behalf, service was not accomplished. Rule 4, SCRPC provides “or clerk thereof” as an alternate means of delivery which was accomplished herein.

There is also no dispute that Joseph R. Pye was the School Superintendent for Dorchester County School District Two, and he was the proper party for the delivery of the documents. Defendants argue that because someone other than Mr. Pye accepted the documents on his behalf, service was not accomplished. The Rule does not require delivery to the head of the political subdivision.

Defendants’ attorneys, prior to the Motion Hearing, submitted some documents in support of their Motion to Dismiss. (*Defendants’ Submissions*) Those submissions included four (4) Orders from other cases, however three (3) of the cases involved a state agency (SCDOT). Service of a state agency falls under a different section of Rule 4 of the South Carolina Rules of Civil Procedure, being set out as follows:

(d)(5) State Officer or Agency. Upon an officer or agency of the State by delivering a copy of the summons and complaint to such officer or agency and by sending a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia. If the agency is a corporation the copy shall be delivered as provided in paragraph (3) of this subdivision of this rule.

This Rule does not include delivery to the chief executive officer and does not include the “**or clerk thereof**” language as does Rule 4(d)(6) of the South Carolina Rules of Civil Procedure. Therefore, these three (3) cases can be distinguished from the present one. In addition, the fourth case that was submitted by Defendants’ counsel involved a school district, however it was a non-employee who accepted the certified mailing, therefore, for a different reason, service was not proper. This case can also be distinguished from the present one.

In *Roche v. Young Bros., Inc. of Florence*, 318 S.C. 207, 456 S.E.2d 897 (1994), the South Carolina Supreme Court stated as follows:

“Rule 4, SCRPC serves at least two purposes. It confers personal jurisdiction on the court and assures the defendant of reasonable notice of the action. We have never required exacting compliance with the rules to effect service of process. See *Foster v. Crawford*, 57 S.C. 551, 36 S.E. 5 (1900) (when officer's return defective as to time and place of service, it can be amended to state facts); *Saunders v.*

Bobo, 2 Bailey 492 (1831) (sheriff's incomplete return that was not sworn to may be amended); Miller v. Hall, 1 Speers 1 (1842). Rather, we inquire whether the plaintiff has sufficiently complied with the rules such that the court has personal jurisdiction of the defendant and the defendant has notice of the proceedings.”

Even though Rule 4 does not specifically state that a governmental subdivision can be served by certified mail, the service (based on delivery) involved herein was sufficient to confer personal jurisdiction over the defendant and give the defendants notice of the proceedings. The Defendants timely filed their Answer to the Complaint through counsel. In addition, Defendants cannot prove any prejudice therefrom.

The Defendants argue that they have proven that service was had on unauthorized persons herein, however there has never been clarification of the clause “**or clerk thereof**” as contained in Rule 4(d)(6), SCRPC. A review of South Carolina case-law yields allowance of the “unauthorized person” defense in two (2) distinct situations:

- (1) A motion to set aside a default - See e.g. Bage, LLC v. Southeastern Roofing, 646 S.E.2d 153, 373 S.C. 457 (Ct. App. 2007); and
 - (2) Service on a corporation under Rule 4(d)(3) and Rule 4(d)(8) of the SCRPC – See e.g. Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 456 S.E.2d 897, (1994).
3. THE TRIAL JUDGE ERRED BY DISMISSING THE ENTIRE CASE BECAUSE THERE REMAINS ADDITIONAL TIME IN WHICH TO PERFECT SERVICE AS TO THE MINOR’S CLAIM.

This lawsuit involves two (2) claims, one on behalf of the minor who suffered the injury and one by the minor’s parent under a necessities doctrine for medical expenses paid on behalf of the minor. The rulings by Judge Gibbons could only apply to the parent’s claim and not to the minor’s claim because the statute of limitations on the minor’s claim has not been reached yet. Even if Judge Gibbons believed that service of process was not accomplished properly, he should have issued a partial dismissal of the case instead of a complete dismissal.

Pursuant to Rule 3 of the South Carolina Rules of Civil Procedure, a civil action is commenced when the summons and complaint are filed with the clerk of court and the summons and complaint are served within the statute of limitations in any manner prescribed by law; or if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.

The incident alleged in the Complaint occurred on September 16, 2016. According to South Carolina Code Annotated §15-78-110, an action must be commenced within 2 years after the date of loss, or, if the claimant first filed a claim (tort claim form), the claimant must file an action within 3 years of the date of loss. A tort claim form was never filed, however this matter was filed in the Dorchester County Court of Common Pleas on September 10, 2018 which was within the two year statute of limitations.

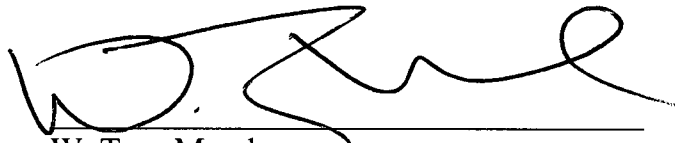
The minor was 13 years old when she was injured, and she is now 17 years old, being born on September 24, 2002. There remains additional time for service to be perfected as to her claim, therefore the Motion was premature as to the minor's claim, and the Order dismissing her claim was improperly granted.

CONCLUSION

It is not only the circumstances under which the Order was granted but also the substantive reasons behind the ruling that make it clear that the Defendants' Motion to Dismiss should not have been granted.

For the reasons set forth above, the Order granting said Motion to Dismiss should be reversed, and set aside, and the case should be remanded for trial.

October 30, 2019



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*Note: Initially, Dorchester County was also a named Defendant, however they were dismissed from the lawsuit.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM DORCHESTER COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No.: 2019-001198

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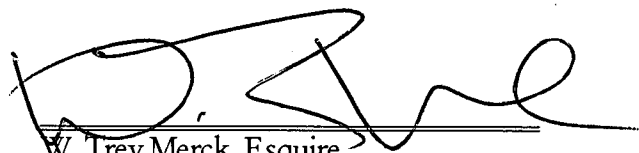
v.

Gregg Middle School; and
Dorchester County School District Two... Respondents.

PROOF OF SERVICE

I certify that I have served the Appellant's Initial Brief and Designation of Matter To be Included in the Record on Appeal on Respondents, Gregg Middle School and Dorchester County School District Two, by depositing a copy of it in the United States Mail, postage prepaid, on October 31, 2019, addressed to their attorney of record, Lisa A. Reynolds, Esquire and Wade Coleman Lawrimore, Esquire of Anderson Reynolds and Stephens, LLC, P.O. Box 87, Charleston, SC 29401.

October 31, 2019



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October 31, 2019

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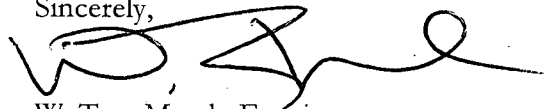
RE: Tasha Bostic, Individually and as Parent and Legal Guardian of P. Bostic, A
Minor, Appellants vs. Gregg Middle School and Dorchester County School
District Two, Respondents.
Case No.: 2019-001198

Dear Ms. Kitchings:

Enclosed please find the originals and two copies each of the Appellant's Initial Brief, Proof of Service and Designation of Matter to be Included in the Record on Appeal in the above referenced matter. Please return a clocked copy of the Brief, Proof of Service and Designation to me in the envelope I have enclosed for your convenience.

By copy of this letter I have provided same to counsel for the Respondents.

Sincerely,



W. Trey Merck, Esquire

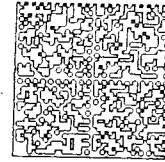
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cc: Lisa A. Reynolds, Esquire
Wade Coleman Lawrimore, Esquire

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