

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

CASE NO.: 2017-CP-10-4947
APPELLATE CASE NO.: 2019-001843

Dana and John Stortz.....Appellants,

v.

The State of South Carolina, City of North Charleston, County of Charleston, Department of Health and Environmental Control, South Carolina Department of Transportation, John Doe (Engineering Firm/Engineer), Coosaw Creek Owners' Association, Inc., Defendants.

Of which State of South Carolina, City of North Charleston, County of Charleston, Department of Health and Environmental Control, South Carolina Department of Transportation, and Coosaw Creek Owners' Association, Inc. are..... Respondents.

INITIAL BRIEF OF RESPONDENTS DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION

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February 4, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 1

ARGUMENTS..... 1

CONCLUSION..... 3

TABLE OF AUTHORITIES

CASES

BB&T v. Taylor, 369 S.C. 548, 552 (2006)..... 1

Fassett v. Evans, 364 S.C. 42, 47 (Ct. App. 2005)..... 1

Moore v. Simpson, 322 S.C. 518, 523 (Ct. App. 1996) 1

Richardson v. P.V., Inc., 383 S.C. 610, 615 (2009)..... 1

Roche v. Young Bros., 318 S.C. 207, 209 (1995)..... 1

STATEMENT OF ISSUES ON APPEAL

The Circuit Court did not err in granting the Motions to Dismiss filed by Respondents SCDOT and DHEC pursuant to Rule 12(b)(1), (4), and (5), SCRCP; Appellants admitted not serving SCDOT and DHEC according to Rule 4(d)(5), SCRCP.

STATEMENT OF THE CASE

This matter arises from Appellants' allegations of the defective design and construction of Palmetto Commerce Parkway, resulting in flooding and damage to Appellant's home. Appellants brought this action in the Court of Common Pleas for the County of Charleston on September 27, 2017 by filing the Summons and Complaint and sending "a copy of the summons and complaint by registered or certified mail to the Attorney General at Columbia(...)" Rule 4(d)(5), SCRCP. However, Plaintiffs failed to deliver a copy to an officer or agency of the state.

Based upon the failure to serve SCDOT and DHEC, Respondents moved to dismiss the action under 12(b)(1), (4), and (5). The Honorable Edward W. Miller heard the Respondents motions to dismiss on October 24, 2018 and issued an order granting both motions on December 7, 2018.

ARGUMENT

The purpose and intent of Rule 4, SCRCP are twofold and require substantial compliance with the Rules: to put SCDOT and DHEC on notice and to confer personal jurisdiction. *Richardson v. P.V., Inc.*, 383 S.C. 610, 615 (2009); *BB&T v. Taylor*, 369 S.C. 548, 552 (2006); *Roche v. Young Bros.*, 318 S.C. 207, 209 (1995); *Moore v. Simpson*, 322 S.C. 518, 523 (Ct. App. 1996). It is the Plaintiff's burden to show that the court has personal jurisdiction over the defendants. *Fassett v. Evans*, 364 S.C. 42, 47 (Ct. App. 2005).

Appellant inaccurately represents that the sole issue before the court as a motion to consolidate the case currently before this Court with the 42 cases consolidated under case number

2017-CP-10-4820 and caption *Sarah Sharper et al v. the State of South Carolina, City of North Charleston, County of Charleston, South Carolina Department of Health and Environmental Control, South Carolina Department of Transportation et al.* On August 23, 2018, both SCDOT and DHEC filed motions to dismiss the action pursuant to Rule 12(b)(1),(4), and (5) SCRPC. (ROA: ___, Motions to Dismiss). Upon presentation of the Motions to Dismiss by counsel for SCDOT and DHEC, the attorney for the Appellants admitted to the failure of service on SCDOT and DHEC; the Appellant sought to dismiss the current case (2017-CP-10-4947) and then properly serve SCDOT and DHEC with new pleading (2018-CP-10-4691). The two sets of pleadings are "... the exact same lawsuit." (ROA ___, Tr. p. 14, lines 6-7).

During the hearing, the Court asked the attorney for SCDOT and DHEC how the service was improper. In reply, the following exchange took place between Mr. Anderson, attorney for SCDOT and DHEC, the Court, and Ms. Hanewicz, attorney for Appellants:

Mr. Anderson: They served the Attorney General by certified mail and have not served either DHEC or SCDOT.

The Court: Okay

Ms. Hanewicz: Yes, Your Honor, and that is our admission which is what gave rise to the second filing. So we are still within the timeframe under [case #: 2018-CP-10-]4691 to serve those two entities which we intend to do.

The Court: Is that right? How did we get here if - -

Mr. Anderson: I don't know anything about [2018-CP-10-]4691. I have no idea what that is, Your Honor.

Ms. Hanewicz: Your Honor, it was - - it is the exact same lawsuit. It was just filed again on 9/28[2018] and we have not served anyone in that case. However we do intend to serve all defendants for within the requisite timeframe.

The Court: So - -

Mr. Anderson: Your Honor, the one that is in front of me, I sure would like to get out of it, if I can.

The Court: Okay. And which one is that?

Mr. Anderson: That is - - that is 2017[-CP-10]-4947.

The Court: All right. And why shouldn't I cut him loose on that? If you are - - why not just dismiss - - let him - - dismiss him and you can reserve him in the new law - - why don't you clean the whole thing up, get one - -

Ms. Hanewicz: Yes, Your Honor, that is our intention here today.

The Court: All right. So I am going to grant your motion. You are out.

Mr. Anderson: Thank you, Your Honor.

(ROA __, Tr. page 13, lines 21 -25, page 14 lines 1 – 23)

The above exchange during the hearing makes plain to this Court that Appellants made no attempt to argue or prove service of the summons and complaint upon SCDOT or DHEC and even admitted Appellants failure to effect service on SCDOT and DHEC.

CONCLUSION

Based upon the above evidence and argument, it is clear that the dismissal of the actions against Respondents SCDOT and DHEC were not the result of a *sua sponte* ruling by the Circuit Court. The order granting Respondents SCDOT and DHEC motions to dismiss should be affirmed.

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February 4, 2020
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Edward W. Miller, Circuit Court Judge

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SC Court of Appeals

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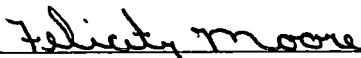
**RESPONDENTS DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL
AND SOUTH CAROLINA DEPARTMENT OF TRANSPORTATION'S PROOF OF
SERVICE OF INITIAL BRIEF**

I hereby certify that on February 4, 2020, I served a copy of Respondents' Initial Brief on the following:

<p>Jarrel L. Wigger 8086 Rivers Avenue North Charleston, South Carolina 29406 <i>Attorney for Appellant</i></p>	<p>Phillip Ferderigos 288 Meeting Street, Suite 200 Charleston SC 29401 <i>Attorney for City of North Charleston</i></p>
<p>Hugh W. Buyck G. Wade Cooper H. Lucius Laffitte, III 305 Wingo Way (29464) P.O. Box 2424 Mt. Pleasant, SC 29465-2424</p> <p>And</p> <p>Catherine H. Chase Duke R. Highfield 25 Calhoun St, Ste 400 (29401) PO Box 993 Charleston, SC 29402 <i>Attorneys for State of South Carolina and County of Charleston</i></p>	<p>Neil S. Haldrup Thomas B. Boger 145 King Street, Ste 300 (29401) PO Box 1200 Charleston, SC 29402 <i>Attorneys for Coosaw Creek Owners' Association, Inc.</i></p>

by placing a copy of said documents in the United States mail with sufficient postage thereon.

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SC Court of Appeals

February 4, 2020

VIA US MAIL

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
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RE: Dana and John Stortz v. The State of South Carolina, City of North Charleston, County of Charleston, Department of Health and Environmental Control, South Carolina Department of Transportation, John Doe (Engineering Firm/Engineer), Coosaw Creek Owners' Association, Inc., Defendants

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Appellate Case Number: 2019-001843

Dear Ms. Kitchings:

Please find enclosed the originals and two (2) copies each of the following:

- 1) Respondents Department of Health and Environmental Control and South Carolina Department of Transportation's Designation of Matter to be included in the Record on Appeal;
- 2) Proof of Service of Respondents' Designation of Matter to be included in the Record on Appeal;
- 3) Respondents Department of Health and Environmental Control and South Carolina Department of Transportation's Initial Brief; and
- 4) Proof of Service of Respondents' Initial Brief.

Mr. Wigger and I are currently in discussion to remove Department of Health and Environmental Control and South Carolina Department of Transportation from this appeal.

Please contact me if you require additional information at this time. I am

The Honorable Jenny Kitchings
Page 2 of 2
February 4, 2020

Sincerely yours,



J.J. Anderson

JJA/fjm
Enclosures

Via US mail

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Hugh W. Buyck, Esquire
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