FORM 13
INITIAL BRIEF OF APPELLANTS

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

RECEIVED
Sep 17 2020
SC Court of Appeals

J. Derham Cole, Judge

Case No. 2019-CP-42-02092
Appellate Case No. 2020-001110

Luther Harris, Donna Harris,
Bobby Leopard and Jerry White, Appellants,

v.

Perry W. Barbour and Southland Transportation, Co., Respondents.

INITIAL BRIEF OF APPELLANTS

---

s/Donald L. Smith
Donald L. Smith (SC Bar#6699)
122 N. Main Street
Anderson, SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellants

Anderson, South Carolina
Date: September 17, 2020

Other Counsel:

Mr. David L. Moore, Jr., Esquire
TURNER PADGET
Post Office Box 1509
Greenville, SC 29602
Attorney for Respondents

TABLE OF CONTENTS

Table of Authorities ………………………………………………………………………. ii

Statement of Issues on Appeal ..…………………………………………………………. 1

Statement of the Case ……………………………………………………………………. 1

Standard of Review ……………………………………………………………………. 5

Arguments ……………………………………………………………………….

I. THE LOWER COURT COMMITTED AN ERROR OF LAW IN NOT FINDING RESPONDENT BARBOUR WAIVED HIS AFFIRMATIVE DEFENSES………………………………………………………………. 6

II. THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO RECOGNIZE APPELLANTS HAVE SUBSTANTIALLY COMPLIED WITH THE RULES ON SERVICE OF PROCESS………………………... 9

III. THE LOWER COURT ABUSED ITS DISCRETION IN NOT EXTENDING THE TIME TO PERFECT THE SERVICE OF PROCESS UPON RESPONDENTS…………………………………………………… 12

IV. THE LOWER COURT ABUSED ITS DISCRETION IN NOT APPLYING EQUITABLE TOLLING IN THE CASE AT BAR…………. 17

Conclusion ………..……………………………………………………………………. 20

TABLE OF AUTHORITIES

CASES

Armco, Inc. v. Penrod-Stauffer Bldg. Sys. Inc., 733 F.2d 1087, 1089 (4th Cir. 1984)………. 11

Bonds v. Electrolux Home Products, Inc., C/A No. 8:06-1650-GRA-BHH
(D.S.C. Dec. 6, 2006)………………………………………………………….. 19

Choice Hotels v. Goodwin Boone, 11 F.3d 469 (4th Cir., 1993)……………………………. 13

Clyburn v. Champagne, C/A No. 6:10-1925-TMC (D.S.C. Sep. 28, 2012) ………………… 14

Elkins v. Broome, 213 F.R.D. 273, 275 (M.D.N.C. 2003), citing Plant Genetic Sys., N.V.
v. Ciba Seeds, 933 F. Supp. 519, 526 (M.D.N.C. 1996) …………………………… 5-6
and citing Karlsson v. Rabinowitz, 318 F.2d 666, 668-69 (4th Cir. 1963))………. 6

Ex Parte Gregory, 378 S.C. 430, 437, 663 S.E. 2d 46, 50 (2008) …………………………. 6

Gardner v. Newsome Chevrolet-Buick, Inc. 304 S.C. 328, 404 S.E.2d 200 (1991) ……….. 13
.
Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993) ……………………………………. 7

Gittens v. Equifax, 3:16-cv-00228-FDW-DSC (November 5, 2017) ………………………. 18

Henderson v. United States, 517 U.S. 654 (1996) ………………………………………….. 16

Hooper v. Ebenezer Sr. Services, 386 S.C. 108 (S.C. 2009) ……………………………….. 18

Martinez v. United States, 2013 WL 6858860, (D.Md. Dec. 26, 2013)……………………… 14

McClurg v. Deaton, 380 S.C. 563 (S. Ct. App. 2008) ………………………………………. 6

Mendez v. Elliot, 45 F.3d 75, 78 (4th Cir. 1995) ……………………………………………. 16

Pusey v. Dallas Corp., 938 F.2d. 498, 501 (4th Cir. 1991) ………………………………….. 5

Scott v. Md. State Dep't of Labor, 673 F. App'x 299, 306 (4th Cir. 2016) ………………….. 15

Unisun Insurance v. Hawkins, 342 S.C. 537 (S.C. 2000) …………………………………… 7

United States v. Brit, 170 F.R.D. 8, 9 (D. Md. 1996) ………………………………………. 6

Vantage, Inc. v. Vantage Travel Service, Inc., C.A. No. 6:08-2765-HMH
(D.S.C. Mar. 20, 2009) ……………………………………………………………… 17

STATUTES

SC Code Annotated

§15-3-30 4
§ 15-9-245 .... 3, 10
§15-3-530(5) 1, 8
§ 15-9-370 .... 3, 8
§15-9-380)... 8

SC Federal Rules of Civil Procedures

Rule 4(m) 13
Rule 12(b)(5) 5

SC Rules of Civil Procedures

Rule 3 4,12,18
Rule 4(d)(3) 10
Rule 4(d)(8) 11
Rule 8(c) 9
Rule 12(b)(2) 4, 7
Rule 12(b)((4) 4, 7
Rule 12(b)(5) 4, 7
Rule 12 (h)(1) 7, 9
Rule 53 8

STATEMENT OF ISSUES ON APPEAL

I. **WHETHER THE LOWER COURT COMMITTED AN ERROR OF LAW BY NOT FINDING RESPONDENT BARBOUR HAD WAIVED HIS AFFIRMATIVE DEFENSES.**

II. **WHETHER THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO RECOGNIZE APPELLANTS HAVE SUBSTANTIALLY COMPLIED WITH THE RULES ON SERVICE OF PROCESS.**

III. **WHETHER THE LOWER COURT ABUSED ITS DISCRETION IN NOT EXTENDING THE TIME TO PERFECT THE SERVICE OF PROCESS UPON RESPONDENTS.**

IV. **WHETHER THE LOWER COURT ABUSED ITS DISCRETION IN NOT APPLYING EQUITABLE TOLLING IN THE CASE AT BAR.**

STATEMENT OF THE CASE

On June 10, 2016, Appellants were traveling southbound on U.S. Interstate 85, when they came to a stop due to traffic which resulted from a motor vehicle accident further south on 85 in the County of Spartanburg, State of South Carolina. Respondent Barbour, driving a truck owned by Southland, was also traveling southbound on U.S. 85 at the time. Without warning, Barbour's truck smashed into the rear of Appellants' vehicle. The impact left all four (4) occupants knocked out and found by the trooper in the grass on the side of the road. As a result of Respondents' negligence, gross negligence, and reckless acts, Appellants sustained injuries necessitating medical attention. Appellants filed this action for damages for the injuries they sustained as a result of the wreck.

Appellants filed their complaint on June 7, 2019, three (3) days before the running of the three-year statute of limitations for personal injury. S.C. Code §15-3-530(5). Pursuant to South Carolina Rules on Civil Procedure, Plaintiff had 120 days after filing her complaint to serve process on the Respondents, or until October 5, 2019.

On June 7, 2019, Appellants sent a demand letter to Sentry. (Exhibit 1- Plaintiff's

Demand Letter). A modified demand letter was sent to Sentry on June 9, 2019. Sentry reviewed the demand and found a couple of instances where the copies were illegible. Appellants quickly complied with any issue surrounding the ability of Sentry to evaluate the claims in hopes of resolution prior to engaging in litigation. (Exhibit 2- Email Correspondence).

On June 13th and 14th, the carrier for the Respondents contacted counsel due to illegible aspects of the demand. Based on a lack of any further correspondence, it was believed the demand was complete, and the carrier was evaluating the individual claims.

On July 23, 2019, counsel left a phone message for the Sentry claims adjustor and inquired about the prospect of getting offers for the claims. The adjuster apologized for the delay in responding to the demand. He said the delay was based on the illegible documents (addressed in the middle of June), and the fact upper management had been "out of the office". Despite the fact the carrier had the demand for greater than five (5) weeks, he "hoped to get an answer out on both individual claims the following week.

Discussion between the adjuster and counsel continued for the next couple of days regarding the facts of the incident. Based on some clarity issues with the facts, counsel said he would depose the investigating trooper to clear up the understanding of the facts (if the case was in fact litigated).

The following morning, July 25, 2019, the adjuster asked whether he should have defense counsel file an answer to the Complaint. The reply was there had been no service, and there had been no offers. The adjuster understood and said he would be in touch the next week.

On August 8, 2019 (or two weeks later), Appellants received the offers from Sentry. (Exhibit 3-Letter of Sentry, dated August 8, 2019). Contrary to Sentry's declaration it was following up on its offer to resolve the claims, there was no such prior offer. It was believed

the offers were unacceptable. A discussion between Appellants and counsel confirmed this fact.

When it became apparent Sentry would not accede to Appellants' demands, Appellants served their previously filed Summons and Complaint. Appellants had to exert efforts to locate the Respondents since both provided addresses in the Accident Report were apparently no longer operational. Additionally, Appellants discovered Southland had long ago forfeited its standing in South Carolina.

On Friday October 4, 2019, Appellants served their Summons and Complaint on Southland by mailing a copy of same to the Secretary of State, pursuant to South Carolina Code Ann § 15-9-245; and by mailing a copy to Mr. RJ Cummings, who is the registered agent of service for Southland Transportation Company in North Carolina.

On the same date, Appellants served Barbour, by certified mail, at his last known address: 130 Valentine Court, Martinsville, VA 24112. On October 10, 2019, said certified mail was returned "undeliverable". After a diligent search, Appellants attempted to serve Barbour at another address: 272 Mary Hunter Dr., Bassett, VA 24055. This service was returned to sender as well.

Plaintiff thereafter served Barbour a copy of the processes, by and through the Office of the General Counsel of South Carolina Department of Motor Vehicle (hereinafter referred as SCDMV). Pursuant to SC Code Ann. § 15-9-370, if a foreign (or a non-resident) driver utilizes the roads of South Carolina, he or she agrees to allow the SCDMV to accept service in his/her stead. The SCDMV attempted to notice Mr. Barbour it accepted service on a lawsuit against him, it was returned to the sender. (Exhibit 4-Stamped Returned Envelope).

On November 8, 2019, Respondent Southland filed an Answer and a Motion to Dismiss, alleging Appellants failed to properly and timely file their Summons and Complaint.

Respondent Southland contended it was not served within the period required under Rule 3 of the SCRCP. Appellants opposed Respondent Southland's Motion to Dismiss on November 26, 2019, invoking good cause and equity consideration.

On November 26, 2019, the Court issued an Order Reference to Master in Equity after finding Barbour in default. The court found the need to hold hearing to ascertain damages.

On December 23, 2019, Respondent Barbour moved to dismiss the Complaint based on Rule 12(b)(1), (2), (4) and (5). He alleged Appellants failed to properly and timely serve the Summons and Complaint. On January 7, 2020, Appellants opposed said Motion, stating Respondent Barbour waived this defense by failing to file an Answer or any responsive pleading within thirty (30) days prescribed by law.

On January 8, 2020, Respondent Barbour moved to vacate the Order of Reference to Masters-in-Equity, while Appellants moved for entry of default upon Respondent Barbour. On January 17, 2020, the court issued Form 4 ruling the matter was not properly referred to Masters-in-Equity and ordered to remand the case to the circuit court as pleadings contained demands for jury trial which are not waived.

On February 24, 2020, Appellants filed an Addendum to their Opposition to Respondent's Motion to Dismiss, challenging Respondents failure to file a Joint Answer and invoked defense of lack of retention of counsel. On February 25, 2020, Appellants filed a Second Addendum invoking tolling of statute of limitations on causes of actions against out-of-state defendants under SC Code Ann. §15-3-30.

On March 10, 2020, the court denied the Motion to Dismiss based on Rule 12(b)(1) but granted the same based on Rule (12)(b)(2), (4) and (5). Appellants moved for reconsideration of the Order on March 20, 2020.

On April 6, 2020, Respondent Barbour filed his Opposition to the Motion for Reconsideration alleging there was no case at all since there was no proper and timely service of Complaint. He further contends since there was no viable case, the rule on defenses and tolling of statutes of limitations may not apply.

On April 10, 2020, Appellants filed their Response to the Opposition to Motion for reconsideration, citing a case where the court granted relief to plaintiff despite failure to timely served a defendant.

On May 5, 2020, Respondents filed their Supplemental Brief in Opposition to the Motion for Reconsideration, reiterating their contention there was no default on their part. Appellants submitted a Reply to the Supplemental Brief insisting the cases cited by Respondents were inapposite.

On July 14, 2020, the court issued its challenged Form 4/Order denying Appellants' Motion for Reconsideration. Appellants perfected their Appeal on August 3, 2020.

STANDARD OF REVIEW

A court may grant a motion to dismiss under Rule 12(b)(5) of the Federal Rules of Civil Procedure based on insufficiency of service of process. See Fed. R. Civ. P. 12(b)(5). To effectuate service, a plaintiff must comport with the requirements of the Federal Rules of Civil Procedure Rule 4. See Fed. R. Civ. P. 4(c). If a defendant claims service is defective, the defendant must raise this objection in the first responsive pleading. See Fed. R. Civ. P. 12; Pusey v. Dallas Corp., 938 F.2d. 498, 501 (4th Cir. 1991).

When a defendant challenges the manner or sufficiency of service of process, "[t]he plaintiff bears the burden of establishing service of process has been performed in accordance with the requirements of Federal Rule of Civil Procedure 4." Elkins v. Broome, 213 F.R.D. 273,

275 (M.D.N.C. 2003) (citing Plant Genetic Sys., N.V. v. Ciba Seeds, 933 F. Supp. 519, 526 (M.D.N.C. 1996)). "In determining whether the plaintiff has satisfied his burden, the technical requirements of service should be construed liberally as long as the defendant had actual notice of the pending suit." Id. (citing Karlsson v. Rabinowitz, 318 F.2d 666, 668-69 (4th Cir. 1963)).

In dismissing a cause of action due to the insufficiency of service of process, a court must dismiss the case “without prejudice.” See Fed. R. Civ. P. Rule 4(m). A dismissal “without prejudice” gives the plaintiff the right to refile the complaint as if the original had never been filed, but the new complaint will be subject to time defenses, such as the statute of limitations. Mendez v. Elliot, 45 F.3d 75, 78 (4th Cir. 1995); United States v. Brit, 170 F.R.D. 8, 9 (D. Md. 1996).

The trial court’s findings of fact regarding the validity of service of process are reviewed under an abuse of discretion standard. Ex Parte Gregory, 378 S.C. 430, 437, 663 S.E. 2d 46, 50 (2008). Thus, our standard of review limits this court to determining whether the trial court abused its discretion. An abuse of discretion arises where the judge issuing the order was controlled by an error of law or where the order is based on factual conclusions are without evidentiary support. McClurg v. Deaton, 380 S.C. 563 (S. Ct. App. 2008).

ARGUMENTS

I.

THE LOWER COURT COMMITTED AN ERROR OF LAW IN NOT FINDING RESPONDENT BARBOUR WAIVED HIS AFFIRMATIVE DEFENSES

A. The affirmative defenses of insufficiency or process and insufficiency of service of process must be raised by pleading or motion within 30 days of service of Complaint.

As a general rule, SCRCP require defendants to serve their answer within thirty (30) days after the service of the complaint upon him. (Rule 12 SCRCP). These rules require defendants to raise any defense to a cause of action in a responsive pleading or a motion to dismiss. (Rule 12(b) SCRCP). Rule 12(b) provides in pertinent part:

> Every defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, 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: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state facts sufficient to constitute a cause of action, (7) failure to join a party under Rule 19, (8) another action is pending between the same parties for the same claim. A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

The Civil Rules provide a violation of Rule 12 (h)(1) is fatal to these affirmative defenses:

> **(h) Waiver or Preservation of Certain Defenses.**
>
> **(1)** A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties for the same claim is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Thus, a violation of Rule 12(h)(1) is fatal to these affirmative defenses. In *Garner v. Houck*, our Supreme Court held a party who fails to properly raise the defense of insufficient service of process under Rule 12 waives any issues or defenses regarding service, including a statute of limitations defense. Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993), as cited in Unisun Insurance v. Hawkins, 342 S.C. 537 (S.C. 2000).

Appellants posit while Respondent Barbour filed a motion to dismiss alleging insufficiency of process and insufficiency of service of process, the same was filed outside the

timing requirements of the Civil Rules. Whether by pleading or motion, if defendants raised such affirmative defenses, they must do so with some specificity and within the permissible timeframe for filing an answer.

B. Respondent Barbour was in default.

For failure of Respondent Barbour to file an Answer, demurrer or other responsive pleading, the instant case was referred to the masters in Equity by Order, dated November 26, 2019. This Order was later vacated since it was not properly referred pursuant to Rule 53 of the SCRCP. Despite this procedural defect, this act by the lower court was recognition the 30-day period to file an answer or responsive pleading should have been computed from October 10, 2019. Respondent Barbour was in default, and as such, has waived his rights to allege any defense.

C. Respondent Barbour was dilatory in asserting a defense.

South Carolina provided for the procedure for service of processes on non-resident motorist. (SC Code Ann. §15-9-350, §15-9-370, §15-9-380). Pursuant to these laws, Appellants served the Director of the SCDMV with the Summons and Complaint, which was received on October 25, 2019. The Director thereafter mailed a copy of the processes to Respondent Barbour by open mail. On November 22, 2019, SCDMV forwarded the envelope stamped with "Return to Sender".

Based on this, Respondent Barbour moved to dismiss the Complaint against him on December 23, 2019, alleging failure to properly and timely serve the Summons and Complaint. Appellants argued service was effectuated on October 25, 2019, upon the acceptance of service by the Director of the SCDMV.

Appellants maintained Respondent Barbour was first served the processes on October 10,

2019. This service by and through the Director of SCDMV was the third attempt to serve him. In all three instances, Respondent Barbour failed to accept the mail-let alone, timely file an answer or a pre-answer motion. Since service with the SCDMV was executed on October 25, 2019, Respondent Barbour had until November 25, 2019 to file an answer or a motion. Respondent moved to dismiss the Complaint on December 23, 2019, more than fifty (50) days after the service of said Summons and Complaint. For failure to file an answer (or a pre-answer motion) on time, Respondent Barbour failed to challenge the sufficiency of process and sufficiency of service of process, and as such he is considered to have waived these affirmative defenses under Rule 8 (c), Rule 12(a), 12(b), and 12(h)(1) of the SCRCP.

It should be noted Respondents are represented by the same counsel. Thus, counsel had actual notice of a suit against the two Respondents as early as October 9, 2019. Instead of filing a Joint Answer or a Joint Motion to Dismiss, raising the above-mentioned affirmative defenses, counsel asserted the same on behalf of Barbour, on December 23, 2019. The failure to file joint pleadings brings into question whether defense counsel was ever retained by Defendant Barbour since he no longer works for Southland.

II.

THE LOWER COURT ABUSED ITS DISCRETION IN FAILING TO RECOGNIZE APPELLANTS HAD SUBSTANTIALLY COMPLIED WITH THE RULES ON SERVICE OF PROCESS.

A. Respondent Southland was properly served.

Under South Carolina laws, service on corporations may be effectuated by delivering a copy of the Summons and Complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the

defendant. (Rule 4(d)(3) of the SCRCP.

In compliance with this Rule, Appellants mailed a copy of the Summons and Complaint by certified mail/returned receipt, upon its registered agent of service in its Boonville, North Carolina office.

Since Respondent Southland had forfeited its standing in South Carolina, Appellants also effected service of its processes to the South Carolina Secretary of State, pursuant to S.C. Code Ann. §15-9-245.

Both services were made by certified mail/returned receipt and posted on October 4, 2019. However, the Post Office did not forward the mail until October 7, 2019. The certified mails were received by Respondent Southland and the Office of the Secretary of State on October 9, 2019, two (2) days beyond the 120-day period for service of processes (i.e. October 7, 2019 was the last day of the 120-day reglementary period). Had the Post Office actually forwarded the mailings on Friday, October 4, 2019, when it was deposited, the Secretary of State would have received the Summons and Complaint on Monday, October 7, 2019 and it would have been timely.

B. Respondent Barbour was properly served.

South Carolina law affords several options for service of process to an individual defendant, such as Respondent Barbour. Under Rule 4 of the SCRCP, an individual may be served processes by delivering a copy of the summons and complaint to him personally, by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process. (Rule 4(d) SCRCP). Service may also be accomplished through the sheriff, his deputy or mail, by commercial delivery or registered mail,

return receipt requested and delivery restricted to the addressee. (Rule 4(d)(8) SCRCP).

In this case, Appellants served Respondent Barbour with a copy of the Summons and Complaint by certified mail, addressed to his last known address at 130 Valentine Court, Martinsville, Virginia, 24112. The mail went out on October 4, 2019, well-within the 120-day period limitation for serving the Complaint.

The service by certified mail was returned to sender. Appellants then sent a copy of the processes by certified mail to an alternative address for Barbour at 272 Mary Hunter Dr., Bassett, VA 24055. Again, it was returned to sender. Appellants could not locate Barbour. After two (2) failed attempts, Appellants served him through SCDMV pursuant to §15-9-370. The processes were received on October 25, 2019.

South Carolina courts have expressed a strong preference for deciding cases on its merits and noted the rules of procedure are intended to allow the courts to reach the merits as opposed to disposition on technical niceties. In Armco, Inc. v. Penrod-Stauffer Bldg. Sys., Inc., the Court held Fourth Circuit Court held:

> When the process gives the defendant actual notice of the pendency of the action, the rules, in general, are entitled to a liberal construction. When there is actual notice, every technical violation of the rule or failure of strict compliance may not invalidate the service of process. But the rules are there to be followed, and plain requirements for the means of effecting service of processes may not be ignored.

Armco, Inc. v. Penrod-Stauffer Bldg. Sys. Inc., 733 F.2d 1087, 1089 (4th Cir. 1984).

Appellants submit they have substantially complied with the aforementioned rules on service of processes. That the Respondents failed to receive the processes on time due to the inadvertence or negligence of the post office should not discredit the substantial efforts by Appellants to serve the Respondents with the Summons and Complaint. In the end, Respondents

received copies of the processes, and had actual notice of the commencement of the action against them.

Appellants further assert Respondent Southland knew, or should have known of a pending action against it as early as June 7, 2019, when Appellants submitted their demand letter to its agent, Sentry Insurance Co. A copy of Appellants' Summons and Complaint was attached with the said demand letter, which Sentry acknowledged receipt of same in its June 13, 2019 email correspondence with Appellants' counsel. Appellants believe the insurer's general duty to advise and inform its insured about matters which may affect the insured's interests, rights and obligations necessitate Sentry relayed the existence of Appellants' pending action to its insured. As mentioned previously, Sentry acknowledged the Summons and Complaint and asked whether it should retain counsel to file an Answer to said Complaint on July 25, 2019. Therefore, Respondent Southland had both imputed and actual notice of the Complaint. Since Appellants had substantially complied with the service of process and Respondents had received actual notice of the suit against them, Appellants are entitled to the liberal construction of the law, and a finding service was sufficient.

III.

THE LOWER COURT ABUSED ITS DISCRETION IN NOT EXTENDING THE TIME TO PERFECT THE SERVICE OF PROCESS UPON RESPONDENTS.

South Carolina law requires Summons and Complaints must be served upon defendants within the statute of limitations or within 120 days after the filing of the complaint. (Rule 3 SCRCP). This Rule is not absolute. South Carolina courts have long adhered to the "sound public policy of deciding cases on their merits".

> As a result, we have long adhered to "the sound public policy of deciding cases on their merits," *Herbert v. Saffell,* 877 F.2d 267, 269 (4th Cir. 1989) (quotation

> omitted); *Davis v. Williams,* 588 F.2d 69, 70 (4th Cir. 1978); *Reizakis v. Loy,* 490 F.2d 1132, 1135 (4th Cir. 1974), and not "depriving . . . part[ies] of [their] `fair day in court.'" *Wilson v. Volkswagen of America, Inc.,* 561 F.2d 494, 504 (4th Cir. 1977) (quoting *Gill v. Stolow,* 240 F.2d 669, 670 (2d Cir. 1957) (Clark, J.)), *cert. denied,* 434 U.S. 1020, 98 S.Ct. 744, 54 L.Ed.2d 768 (1978). This policy of deciding cases on their merits is so strong that, when a plaintiff has committed a procedural error, we will allow a district court to impose on him the "harsh sanction" of prejudicial dismissal, *Herbert,* 877 F.2d at 269; *Chandler Leasing Corp. v. Lopez,* 669 F.2d 919, 920 (4th Cir. 1982), only in the "extreme cases," *McCargo v. Hedrick,* 545 F.2d 393, 396 (4th Cir. 1976); 9 Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure: Civil* § 2369, at 193 (1971), where the plaintiff has shown "a clear record of delay" or has engaged in "contumacious conduct." *Dove v. CODESCO,* 569 F.2d 807, 810 (4th Cir. 1978).

Choice Hotels v. Goodwin Boone, 11 F.3d 469 (4th Cir. 1993).

Rule 4 SCRCP sets forth the requirements for service of process. While there are no provisions in the SCRCP governing cases and/or instances where plaintiff fails to serve the summons and complaint within the 120-day reglementary period for service of process, the lower court "may look to the construction placed on the Federal Rules of Civil Procedure". Gardner v. Newsome Chevrolet-Buick, Inc. 304 S.C. 328, 404 S.E.2d 200 (1991).

Rule 4(m) of the Federal Rules of Civil Procedure (hereinafter referred as Fed. R. Civ. P.) provides:

> (m) Time Limit for Service. If a defendant is not served within 90 days after the complaint is filed, the **court**—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time.

Fed. R. Civ. P. Rule 4(m).

This rule has been interpreted by courts to contain two (2) standards which govern an extension of time to serve. They are the good cause standard and the judicial discretion standard.

Appellants believe they deserve an extension of time to perfect the service of processes on both standards.

A. Extension for Good Cause

Appellants submit they have shown good cause for the failure to timely serve the summons and complaint.

This good cause exception is discussed in the case of Martinez v. United States,

> "To establish good cause, the plaintiff generally must exercise reasonable diligence in trying to effect service." *Burns & Russell Co. of Blat. V. Oldcastle, Inc,* 166 F. Supp..2d 432, 439 n.9 (D.Md 2001). Good cause may be found, for example, where a defendant is evading service; where the plaintiff experienced difficulty in obtaining a defendant's proper address; where court staff misdirected a *pro se* plaintiff as to the appropriate procedure for service; or where a plaintiff was unaware of the defect in service until after the deadline expired." *Hoffman v. Balt. Police Dep't,* 379 F. Supp.2d 778, 786 (D.Md 2005). The common thread in all of these examples is that the interference of some outside factor prevented the otherwise-diligent plaintiff from complying with the rule. *See Burns,* 166 F. Supp.2d at 439n9.

Martinez v. United States, 2013 WL 6858860, (D.Md. Dec. 26, 2013).

South Carolina courts have held to find good cause, some unusual circumstances must have prevented timely service.

> To grant an extension of time for service for good cause the court must find that the plaintiff has made "reasonable and diligent efforts to effect service" within the time period prescribed by law. Courts typically find good cause to extend the Rule 4(m) time limit where '"external factors [ ] stifle a plaintiff's due diligence' in effecting service." *McCollum v. Genco Infrasructure Solutions,* No. 10-210, 2010 WL 5100495, *2 (E.D. Va. Dec. 7, 2010, (quoting *T ampersand S Rentals v. United States,* 164 F.R.D. 422, 425 (N.D. W.Va. 1996). In general, good cause is found to exist only when some outside factor, rather than inadvertence or negligence, prevented service. *Lepone-Dempsey v. Carroll County Comm'rs,* 476 F.3d 1277 (11th Cir. 2007).

Clyburn v. Champagne, C/A No. 6:10-1925-TMC (D.S.C. Sep. 28, 2012)

There can be no doubt as to Appellants efforts in attempting to serve both Respondents with the Summons and Complaint. Appellants made extensive inquiries after Respondent Barbour was not located in his last known address. Appellants caused the processes to be mailed prior to the expiration of 120-day period. They were unaware Respondents failed to receive the processes until after the deadline expired. Despite the expiration of the permissible timeframe for service, Appellants continued to exert efforts to notice the Respondents. Appellants believe they had good cause for the delay, and dismissal was unwarranted.

In the case of *Scott v. Md. State Department of Labor*, the Fourth Circuit Court examined possible factors to determine if good cause exists to excuse a plaintiff's failure to serve timely. Scott v. Md. State Dep't of Labor, 673 F. App'x 299, 306 (4th Cir. 2016). These factors include whether:

> 1) the delay in service was outside the plaintiff's control, 2) the defendant was evasive, 3) the plaintiff acted diligently or made reasonable efforts, 4) the plaintiff is pro se or in forma paurperis, 5) the defendant will be prejudiced, or 6) the plaintiff asked for an extension of time under Rule 6(b)(1)(A). *Scott v. Md. State Dep't of Labor*, 673 F. App'x 299, 306 (4th Cir. 2016); *see Beasley v. Bojangles' Rests., Inc.*, No. 1:17CV255, 2018 WL 4518693, at *1 (M.D.N.C. Sept. 20, 2018); *Martinez v. United States*, No. DKC 13-0237, 2013 WL 6858860, at *2 (D. Md. Dec. 26, 2013) ("The common thread in all of these examples is that the interference of some outside factor prevented the otherwise-diligent plaintiff from complying with the rule.").
>
> What constitutes good cause "necessarily is determined on a case-by-case basis within the discretion of the district court."

Ibid. at 306.

As to the first factor, Appellants indicated the delay in the receipt of the Summons and Complaint by Respondents was caused by the Post Office's failure to forward the mails on time, according to its traditional practice. This act was beyond Appellants' control.

Second, while there is no evidence Respondent Southland has been evasive, the difficulty in locating Respondent Barbour due to his ever-changing addresses may be indicative of a tendency to be evasive. Moreover, the mailings were simply returned to sender, indicating they were refused.

Third, as previously discussed, Appellants acted diligently and made reasonable efforts to effectuate service.

The Fourth factor is not applicable in this case since Appellants are represented by counsel.

Fifth, Appellants were unable to request for an extension of time under Rule 6(b) of the SCRCP since they have caused the mailing of the processes within the 120-day period.

As to the Sixth factor, Respondents were not prejudiced because they had actual notice of the action.

B. Extension by Court's Discretion

In 1995, the Fourth Circuit Court ruled courts may only grant extension of time for proper service upon establishing good cause. Mendez v. Elliot, 45 F.3d 79.

The following year, the Supreme Court, in the case of *Henderson v. United States,* concluded Rule 4(m) grants the courts the discretion to enlarge the 120-day period for service "even if there is no good cause shown." Henderson v. United States, 517 U.S. 654 (1996), quoting the Advisory Committee's Notes on the 1993 Amendments to Federal Rules Civil Procedure 4, 28 U.S.C. App., p. 654.

The Court in the case of *Vantage, Inc. v. Vantage Travel Service, Inc*., noted due to the *Henderson* ruling, along with other circuit court's express rejection of the *Mendez* ruling, ruled Mendez is no longer good law, and if given the opportunity, the Fourth Circuit perforce would

adopt the interpretation of Rule 4(m) held by the Supreme Court and the other circuit courts. Vantage, Inc. v. Vantage Travel Service, Inc., C.A. No. 6:08-2765-HMH (D.S.C. Mar. 20, 2009).

In sum, the lower court erred in dismissing the Complaint since Appellants demonstrated reasonable efforts to effect service on both Respondents. Upon Appellants showing of good cause for the delay in the receipt of processes by Respondents, the court, on its own, should have extended the period of service. Furthermore, even assuming Appellants failed to establish good cause exists, the court could have exercised its discretion to grant an extension of time for service, considering there was no prejudice to herein Respondents and the significant injuries sustained by Plaintiffs.

IV.

THE LOWER COURT ABUSED ITS DISCRETION IN NOT APPLYING EQUITABLE TOLLING IN THE CASE AT BAR.

Appellants submit this case is substantially similar to the case of Hooper v. Ebenezer Senior Services and Rehabilitation Services (hereinafter referred as "Ebenezer"). Hooper filed his Summons and Complaint on February 6, 2006. He attempted to effect service of same, initially upon the agent named by Ebenezer at the address it supplied to the Secretary of State. The service was unsuccessful. He then hired a private investigator who found the agent's personal address and caused the mailing the pleadings to Richland County Sheriff's Office for service. The Richland County Sheriff's Office returned the service to Hooper, stating the agent's address was not within its jurisdiction but of Lexington County's. Hooper's counsel thereafter forwarded the pleadings to the Lexington County Sheriff's Office for service. After the statute of limitations had run, Hooper's counsel received an Affidavit of Non-Service from Lexington County Sheriff's Office. Hooper's counsel thereafter hired a private investigator to serve Agape Rehabilitation of Rock Hill, which took over Ebenezer. The service was accepted

by Inkelaar, Agape's Administrator on June 15, 2006, one week past the 120-days of filing of summons and complaint. Ebenezer, thereafter, moved for dismissal of the action based on non-completion of service within the statute of limitations nor within the time limits of Rule 3(a)(2) of the SCRCP. Hooper v. Ebenezer Sr. Services, 386 S.C. 108 (S.C. 2009)

The Court in Hooper discussed the application of the doctrine of equitable tolling "in order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits". *Ibid.* It further provided , while the doctrine "typically applies in cases where a litigant was prevented from filing suit because of an extraordinary event beyond his or her control", "tolling has been applied in a variety of contexts and has developed differing parameters for its application". *Ibid. at 116.* The Court in Hooper ruled as follow:

> Thus, under the unique circumstances of this case, we conclude it is appropriate to equitably toll the statute of limitations for the time Hooper spent in pursuit of Ebenezer's nonexistent agent.
>
> Finally, we note that public policy and the interests of justice weigh heavily in favor of allowing Hooper's claim to proceed. The statute of limitations' purpose of protecting defendants from stale claims must give way to the public's interest in being able to rely on public records required by law.

Ibid. at 119.

In the same manner, the Fourth District Court applied equitable tolling in *Gittens vs. Equifax*. Gittens v. Equifax, 3:16-cv-00228-FDW-DSC (November 5, 2017). In Gittens, the complaint was dismissed without prejudice, upon showing plaintiff did not properly serve the process (i.e. plaintiff himself served the process and the summons was issued to a corporation without identifying the officer, director, managing agent or authorized agent to be served, in violation of Rule 4, N.C. Rules on Civil Procedures. *Ibid.*

In Gittens vs. Equifax, the Court opined:

> Equitable tolling is "a rare remedy to be applied in unusual circumstances, not a cure-all for an entirely common state of affairs." Wallace v. Kato, 549 U.S. 384, 396, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). The Fourth Circuit has stated that equitable tolling is available only in "those rare instances where—due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." Rouse v. Lee, 339 F.3d 238, 246 (4th Cir. 2003), (quoting Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000)). Equitable tolling is only appropriate where a plaintiff demonstrates "(1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time." Id.

In Gittens, the Court allowed the tolling of statute of limitations for thirty days from the issuance of the District Court's Order due to the unusual factors in the instant case, including the fact dismissal of the case would bar Plaintiff from re-filing his claims since the statute of limitations has prescribed. *Ibid.* Plaintiff was directed to file a new action reasserting the claims in this action not later than December 5, 2019 (i.e. 30 days from November 5, 2019, date the Court issued its Order).

In this case, even if Rule 4(m) is applied and the court dismissed the case without prejudice, the statute of limitations will bar the re-filing of this case.

The case of *Bonds v. Electrolux Home Products, Inc.,* reiterated the interpretation of the the Advisory Committee on Fed. R. Civ. P. Rule 4(m), stating "this section authorizes the court to relieve a plaintiff of the consequences of an application of this subdivision even if there is no good cause shown …Relief may be justified, for example, if the applicable statute of limitations would bar the refiled action." Bonds v. Electrolux Home Products, Inc., C/A No. 8:06-1650-GRA-BHH (D.S.C. Dec. 6, 2006).

The cases of Hooper, Gittens, Bonds and the present case called for the extension of time to serve process due to their peculiar circumstances.

Finally, Appellants submit the Court's ruling in Bonds applies to this case:

> Even if the Court applied state law here, it is not clear that the case was procedurally dead in state court. Under South Carolina Rule of Civil Procedure 3(a), an 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 in any manner 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." Under Rule 6, the time for service may be extended even after the 120 days has passed for good cause shown.

Bonds, supra.

CONCLUSION

For the foregoing reasons, the trial court's Order of dismissal should be reversed and the remand the case for further proceedings. In the alternative, Appellants pray they be granted an extension of time to refile the Complaint.

s/Donald L. Smith
Donald L. Smith (SC Bar #: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attomeydonaldsmith@gmail.com
Attorney for Appellants

Anderson, SC
September 17, 2020.

FORM 7
PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
Sep 17 2020
SC Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Judge

Case No. 2019-CP-42-02092
Appellate Case No. 2020-001110

Luther Harris, Donna Harris,
Bobby Leopard and Jerry White, Appellants,

v.

Perry W. Barbour and Southland Transportation, Co., Respondents.

PROOF OF SERVICE

Pursuant to Supreme Court of South Carolina's Amended Order 2020-05-29-02, I am filing a copy of the Initial Brief of Appellants and Designation of Matter to be Included on the Record on Appeal, upon the Honorable Jenny Abbott-Kitchings, Clerk of Court of South Carolina Court of Appeals through AIS system and serving a copy of the same upon Respondents, by and through Mr. David L. Moore, Esquire, by email through the following addresses:

Ms. Jenny Abbott-Kitchings ctappfilings@sccourts.org
Mr. David L. Moore, Esquire DMoore@turnerpadget.com

s/Donald L. Smith
Donald L. Smith, (Bar No.: 6699)
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com
Attorney for Appellant

Anderson, South Carolina
September 17, 2020

FORM 8
LETTER TO THE APPEALS COURT CLERK
FILING REPORT OF STATUS OF TRANSCRIPT REQUEST

September 17, 2020

RECEIVED
Sep 17 2020
SC Court of Appeals

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

RE: Luther Harris, Donna Harris and Bobby Leopard vs.
Perry Wendell Barbour and Southland Transportation Co.
C.A. No.: 2019-CP4202092
Appellate Case No. 2020-001110

Dear Ms. Kitchings:

Please find enclosed the following documents for filing in the above-captioned appealed case:

1. Appellants' Motion for Leave to File Out of Time Initial Brief of Appellants and Designation of Matter to be Included on Record on Appeal;
2. Initial Brief of the Appellants;
3. Designation of Matter to be Included on Record on Appeal; and,
4. Proof of Service of same.

Sincerely,

s/Donald L. Smith
Donald L. Smith, (Bar No. 6699)
Attorney for Appellant
122 N. Main Street
Anderson SC 29621
Telephone: (864) 642-9284
Facsimile: (864) 642-9285
attorneydonaldsmith@gmail.com

cc:

Mr. David L. Moore, Jr., Esquire