REPLY BRIEF OF APPELLANTS

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The 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.

REPLY BRIEF OF APPELLANTS

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STATEMENT OF FACTS

Appellant adopts and incorporates by reference the Statement of Case and Facts presented in his Initial Brief. This appeal is brought pursuant to the dismissal by the circuit court of Appellants' Complaint against Respondents on March 10, 2020 and its denial of Appellants' Motion to Reconsider on July 14, 2020. Appellant has perfected his appeal and filed his Initial Brief on September 17, 2020. Respondent filed their Initial Brief on November 13, 2020.

ARGUMENTS

I.

THE CIRCUIT COURT ERRED IN NOT FINDING RESPONDENT BARBOUR WAIVED HIS RIGHT TO RAISE AFFIRMATIVE DEFENSES.

In their Initial Brief, Respondents contend the right to raise affirmative defense should only be entertained when the action has been commenced. (i.e. when Complaint has been filed and properly served within the statute of limitations, or within 120 days after the filing of the Complaint, when the same is not served within the statute of limitations. In other words, what Respondents assert is Rule 3 SCRCP should have been established first before Rule 12 SCRCP may be invoked. Appellants believe there is no hierarchy of importance in the provisions of the Rules of Court.

Firstly, Appellants maintain they have filed and served the Complaint within the reglementary period. Appellants had diligently performed all the acts that led to the service of the processes Respondents. Appellants should not be punished for the failure of the Post Office to forward the certified mail containing the processes on the day they were mailed. The negligence of the government entity is beyond Plaintiff's control.

It has long been held "in order to establish that service has been properly effected, the plaintiff need only show compliance with the civil rules on service of process." McCall v. IKON, 363 S.C. 646, 652, 611 S.E.2d 315, 317 (Ct. App. 2005); Moore v. Simpson, 322 S.C. 518, 523, 473 S.E.2d 64, 67 (Ct. App. 1996). When these rules are followed, there is a presumption of proper service. Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 211, 456 S.E.2d 897, 900 (1995). Appellants showed compliance with the rules, and therefore service was presumptively proper.

Secondly, Appellants have shown that Courts of various jurisdictions have entertained and acted upon Complaints that have been filed but not properly served. Two such cases are Pusey v. Dallas Corp., 938 F.2d 498, 500 (4th Cir.1990) and Unisun Insurance v. Hawkins, 342 S.C. 537 (2000).

In Pusey v. Dallas Corp., 938 F.2d 498, 500 (4th Cir.1990), William Pusey filed a complaint for negligence, strict liability, breach of warranty and loss of consortium against Dallas Corporation. Due to a mistake in the identity of the registered agent for Dallas Corporation, the process was returned unexecuted on October 3, 1998. On January 26, 1989, Pusey requested for the re-issuance of the summons for service upon foreign corporation Dallas Corporation. The clerk has received this request on February 3, 1989, over 120-days after the filing of the Complaint. A new process was served on Dallas on March 1, 1989, which included

the complaint stamped filed on September 3, 1988 and February 3, 1989. Dallas Corporation filed no pre-answer motion under Rule 12 but served an answer that raised the statute of limitations defense. Dallas Corporation made no objection to the service of process. Ten months after filing its Answer, Dallas moved for summary judgment on the grounds of statute of limitations. Pusey contended that the action was timely filed on September 30, 1988 and that Dallas Corporation has waived any objections to the untimeliness of the service of process by not raising the defense either in a pre-answer motion or its answer. The District Court dismissed Pusey's case finding service was not made within the 120-days. On appeal, the Fourth Circuit Court of Appeals ruled:

> The action as commenced when the Puseys filed their original complaint on September 30, 1998. Fed. R. Civ. P.3. Upon the expiration of 120 days from that date without service of process having been effected, the action was subject to dismissal without prejudice, either on motion of the defendant or on the court's own "initiative," Fed. R. Civ. P. 4(j), unless by its conduct Dallas could, and had, waived any right on its part or power on the court's part to have the action dismissed.

Pusey, *supra*.

In reserving the District Court's ruling, the Fourth Circuit Court of Appeals found Dallas waived its right to the affirmative defense of insufficiency of service of process when it failed to raise the same in its Answer. In so doing, the Dallas submitted itself to the personal jurisdiction of the Court. *Ibid.*

In the case of Unisun Insurance v. Hawkins, 342 S.C. 537 (2000), therein respondent Bruce Hawkins collided with a vehicle insured by Appellant Unisun Insurance. The accident occurred on October 8, 1994. Unisun was forced to pay the insured's losses under the uninsured motorist provision. Thereafter, Unisun filed a claim against Bruce Hawkins and his parents on October 3,

1997, for violation of the South Carolina Motor Vehicle Financial Responsibility Act. Unisun served the Hawkinses on October 4, 1997, four (4) days before the statute of limitations expired.

At the time of service, Bruce was no longer residing with his parents. In their Answer, the Hawkinses raised Unisun's failure to serve Bruce with the Complaint within the three (3)-year statute of limitations. The Hawkinses moved for summary judgment which the trial court granted. On appeal, Unisun asserted the trial court erred in finding that Bruce was not served within the statute of limitations period because he waived the right to contest the sufficiency of service of process by failing to properly challenge service under Rule 12(b)(5).

The Court of Appeals in *Unisun* ruled that the Hawkinses waived their right to assert affirmative defenses when they failed to properly object to the insufficiency of service of process. *Unisun*, supra., citing O'Brien v. R.J. O'Brien & Assocs., 998 F.2d 1394 (7th Cir. 1993). Furthermore, the Court deemed that Hawkinses' statute of limitations claim was inextricably tied to the attempt to serve the process, the doctrine laid down in the case of Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993), applies.

> In Garner v. Houck, 312 S.C. 481, 435 S.E.2d 847 (1993), our supreme court held that 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. *See also* James F. Flanagan, *South Carolina Civil Procedure* 100 (2d ed. 1996) ("The ... waiver provision affects not only the motion itself but any argument based on the alleged defect.").

Cited in *Unisun, supra.*

In *Unisun and Pusey,* as well as the case at bar, Appellants filed their respective complaints within the statute of limitations. In all three cases, Appellants attempted to serve Respondents with Summons and Complaint but failed, either due to Respondents' change of address (as in *Unisun* and the instant case), or due to a mistake (as in *Pusey*). While the service

of process was completed in both *Unisun* and *Pusey*, the processes were not received by the intended Respondents. In both cases, the Court held that due to Respondents' failure to object to the insufficiency of process in a timely manner, then Respondents could not successfully dismiss the case as they had waived such defense.

The ruling in Pusey sums up the principle in this matter: that the failure to serve process within the 120-day period does not automatically caused the dismissal of an action. The defendant must object and raise the affirmative defense of insufficiency of process in a responsive pleading or a motion, in a timely and proper manner. Barbour did not file an Answer nor his Motion to Dismiss within the 30-day period allowed to file a responsive pleading. Thus, he is deemed to have waived the right to dismiss the action based on the affirmative defense of insufficiency of service of process.

> "… a defendant's unexcused failure to raise the untimeliness of a service defense by motion or answer must be held to deprive the court of that power, since a waiver of this defense constitutes a submission to personal jurisdiction of the court." (citing Pardazi, 896 F.3e at 1316-17 & n.2)); see also id. At 501 n.4 ("[A] party's waiver operates not only to cut off his right to raise the defense, but the court's power to invoke it." Citing Pardazi, 896 F.2d at 1316 n.2)).

Tate v. Smith, 1:14cv125 (M.D.N.C. Aug. 23, 2016).

In the case of Leach v. BB & T Corp., 232 F.R.D. 545 (N.D.W. Va. 2005), the Court laid down the following principle:

> Effectuation of service is a precondition to a lawsuit, while waiver of insufficient service is the forfeiture of defense to that service. Jenkins v. City of Topeka, 136 F.3d 1274, 1275-76 (10th Cir. 1998). By failing to raise the defense of insufficient of service of process either in a pre-answer motion, or if no such motion is made, then in an answer, a defendant waives that defense and submits to the personal jurisdiction of the court, unless at the time of the service of the answer, the defendant did not know the defense was available. Pusey v. Dallas Corporation, 938 F.2d 498, 501 (4th Cir. 1991).

II.

THE CIRCUIT COURT MAY EXTEND TIME PROVIDED FOR PROPER SERVICE.

It has been generally established, the failure of a party to comply with procedural requirements does not affect the Court's subject matter. *Dove v. Gold Kist, Inc.*, 314 S.C. 235, 237-38, 442 S.E.2d 598, 600 (1994) (quoting *Bank of Babylon v. Quirk*, 192 Conn. 447, 472 A.2d 21, 22 (1984)), as cited in Skinner v. Westinghouse Elec. Corp., 380 S.C. 91 (S.C. 2008). Proceeding from this, Appellant submits since the Circuit Court has the power to hear and determine the case, it may exercise its discretion to allow Appellants to serve their processes beyond the 120-day period. While it is true that Rule 4(m) FCRCP does not have a corresponding provision in the state rules, there is no law prohibiting state judges from granting such extension.

Furthermore, courts in various jurisdictions have applied a less-stringent approach on the 120-day time period to serve processes. Summons and Complaints filed or served beyond the statutory period have survived upon a showing of good faith and reasonable efforts of service on the part of the Appellants.

In the case of *Brown v. Marriott International, Inc.,* the court held:

> The plaintiff's failure to properly serve the defendant was based on the mistake of the process server. In addition, the defendant has not shown prejudice resulting from granting the plaintiff an extension of time to serve the defendant. The plaintiff has offered a good faith and reasonable basis for failing to timely serve the defendant and dismissing the case would be an unfair result based on the lack of prejudice to the defendant. The Court holds that good cause exists to extend the time for service.

Brown v. Marriott International, Inc., Civil Action No. 2:04-2378-CWH (D.S.C. Mar. 7, 2007).

> "Good cause generally requires the Plaintiff to demonstrate that she exercised 'reasonable diligence in trying to effect service." *Gbane v. Capital One, NA,* No. PX-16-701, 2016 WL 3541281, at *1 (D. Md. June 29, 2016)(quoting *Jones v. Sears and Roebuck,* No. DKC-15-3092, 2016-WL 1696557, at *2 (D. Md. Apr. 28, 2016)). Thus, the Court may find good cause "where the plaintiff has taken some affirmative action to effectuate service of process upon defendant or ha[s] been prohibited, through no fault of his own, from taking such an affirmative action." Tenenbaum v. PNC Bank Nat'l Ass'n, No. DKC-10-2215, 2011 WL 2038550, at *4 (D. Md. May 24, 2011) (quoting *Vincent v. Reynolds Mem'l Hosp., Inc*., 141 F.R.D. 436, 437 (N.D. W. Va. 1992)).

Shilling v. Thomas, Case No.: PWG-16-2696 (D. Md. Mar. 16, 2017).

In recent cases, the Courts exercised their discretion to extend period of time to serve processes beyond the 120-day time period without showing good cause. Defendant Barbour was not prejudiced by the delay in service of the Summons and Complaint, since he was represented by the same counsel as Defendant Southland, his employer, as such, he has actual notice of the facts and circumstances of the case, as well as the causes of action against him. Henderson v. United States, 517 U.S. 654 (1996), Vantage, Inc. v. Vantage Travel Service, Inc., C.A. No. 6:08-2765-HMH (D.S.C. Mar. 20, 2009).

In *Vantage, Inc. v. Vantage Travel Service, Inc.,* Plaintiff Vantage filed a complaint for violation of Lanham Act, alleging Defendant infringed on its right to exclusive use of the VANTAGE mark. The action was filed on August 6, 2008. On December 22, 2008, 138 days after the filing of the action (18 days after the 120-day time period set forth in rule 4(m). Plaintiff alleged in its motion that it needed more time because the parties were engaged in settlement negotiations. The court granted the Plaintiff's motion and afforded the Plaintiff 60 days to effect service. The Plaintiff served the Defendant on January 30, 2009, within this time frame. Vantage, Inc. v. Vantage Travel Service, Inc., C.A. No. 6:08-2765-HMH (D.S.C. Mar. 20, 2009).

The instant case is akin to Vantage case. Appellants filed the Complaint within the statute of limitations. It entered into a settlement negotiation with Respondent's agent. After an unsuccessful attempt to settle, Appellants diligently performed all the acts that led to the service of the processes to Respondents. Appellants have given reasonable efforts in effecting service upon Respondents, even going beyond the duty by serving Respondent Barbour three times. Due diligence and reasonable efforts have been recognized by courts as "good cause" to permit an extension of time to serve process beyond the 120-days requirement.

In sum, the circuit court could have exercised its discretion to grant an extension of time for service of the Summons and Complaint as Appellants have demonstrated reasonable efforts to effect service on both Respondents, there was no prejudice to herein Respondents and considering the significant injuries sustained by Appellants.

III.

THE CIRCUIT COURT ABUSED ITS DISCRETION IN NOT FINDING EQUITABLE TOLLING WAS APPLICABLE IN THIS CASE.

Appellant maintains the statute of limitations should be tolled based on equitable tolling. In South Carolina, a statute of limitations may be tolled pursuant to statute or pursuant to the doctrine of equitable tolling. "[I]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." Hooper v. Ebenezer Sr. Services & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29 (2009).

Hooper court concluded "[t]he equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." Hooper quoting Hausman v. Hausman, 199 S.W.3d 38,

42 (Tex. App. 2006). Therefore, "equitable tolling may be applied where it is justified under all the circumstances … when the interests of justice compel its use." Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 687 S.E.2d 29 (S.C. 2009). (Emphasis added).

This case arose from an accident occurred on June 10, 2016. Appellants filed the instant case on June 7, 2019. They entered into negotiations with Defendant Southland's representative, Sentry Insurance (hereinafter referred as "Sentry"), on June 9, 2019. After a protracted negotiation, where Sentry delayed its response for various reasons, the two parties failed to reach an agreement. When the negotiations failed, Appellants served the Respondents copies of the Summons and Complaint. Defendant Southland Transportation's license to operate a business in South Carolina had been forfeited. Defendant Barbour's address at the time of the wreck was 130 Valentine Court, Martinsville, Virginia 24112. Both Respondents are considered out-of-state Respondents. As a result of the inaccurate addresses they gave, Appellants were unable to serve the individuals in a timely manner at their place of residence in a foreign state.

South Carolina enacted S.C. Code Ann. § 15-3-30 (1976) to address tortfeasors who caused personal injury in South Carolina, only to leave the state and put the ability of the victims to seek redress in jeopardy, particularly the ability to reach the Respondents to satisfy any judgments rendered against them. Appellants believe that this statute is applicable in the instant case. S.C. Code Ann. § 15-3-30 provides:

> If when a cause of action shall accrue against any person he shall be out of the State, such action may be commenced within the terms of this chapter respectively limited after the return of such person into this State. And if, after such cause of action shall have accrued, such person shall depart from and reside outside of this State or remain continuously absent therefrom for the space of one year or more, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.

In the case at hand, both individuals departed from this State and resided elsewhere, leaving no forwarding address with the SCDMV, and yet continued going about their business of transporting and going to and from South Carolina. This failure can only be seen as a willful and wanton attempt to escape the liability for their tortious actions. Appellants believe Respondents' successful withholding of their actual addresses caused the statute of limitations to be an issue. But for the invalid addresses, Appellants would have timely served them. Appellants have a right to seek the damages incurred as a result of South Carolina's gracious allowance of foreign drivers to traverse this State's highways.

The case of Meyer v. Paschal, 498 S.E.2d 635 (S.C. 1998) supports Appellants contention that the Statute of Limitations was tolled for each individual due to their continued departure from this State following the underlying wreck. Meyer v. Paschal held that "the period of limitations may be tolled when that information is not known to the plaintiff." The information relating to Respondents' whereabouts had not been provided to the State; and, therefore, not provided to Appellants. Defendant Barbour's location continues to be unknown to Appellants.

The tolling provision was created to prevent Appellants in this State from being unfairly damaged by foreigners without the chance to recover their damages. Appellants believe that they are the individuals for whom the tolling provision was created. The doctrine of equitable tolling should be applied in this case and can be summarized as:

> The time requirements in lawsuits between private litigants are customarily subject to equitable tolling if such tolling is necessary to prevent unfairness to a diligent plaintiff. However, equitable tolling, which allows a plaintiff to initiate an action beyond the statute of limitations deadline, is typically available only if the claimant was prevented in some extraordinary way from exercising his or her rights, or, in other words, if the relevant facts present

> sufficiently rare and exceptional circumstances that would warrant the application of the doctrine.
>
> Equitable tolling has been deemed available where—
>
> - Extraordinary circumstances prevented the plaintiff from filing despite his or her diligence.
> - The plaintiff actively pursued his or her judicial remedies by filing a defective pleading during the statutory period or the claimant has been induced or tricked by the defendant's misconduct into allowing the filing deadline to pass.
> - The plaintiff, despite all due diligence, is unable to obtain vital information bearing on the existence of his or her claim.
>
> It has been held that equitable tolling applies principally if the plaintiff is actively misled by the defendant about the cause of action or is prevented in some extraordinary way from asserting his or her rights. However, it has also been held that the equitable tolling doctrine does not require wrongful conduct on the part of the defendant, such as fraud or misrepresentation.

Pelzer v. State, (SC: Ct. App., 2008).

Taking into consideration the facts and circumstances of this case, Appellants submit that equitable tolling should be applied. First, Appellants had been diligent in pursuit of an amicable resolution by undertaking negotiations with Respondents. Respondents had been provided a demand for the purpose of settlement on June 7, 2019, wherein requests were made for the purpose of clarifications in same. After June 14, 2019, Respondents made no further requests relating to the demand, implying it was ready for evaluation. On July 25, 2019, the parties communicated once more regarding a potential offer to the demands made. Respondents indicated that an offer would be made the following week. An offer was finally received on August 8, 2019. The offer was not reasonable. Ultimately, Appellants advised counsel to pursue litigation.

In short, the doctrine of equitable estoppel applies in the instant case. Under South Carolina law

> A defendant may be estopped from claiming the statute of limitations as a defense if the delay that otherwise would give operation to the statute had been induced by the defendant's conduct. Such inducement may consist of an express representation that the claim will be settled without litigation or conduct that suggests a lawsuit is not necessary. The defendant's conduct may also involve inducing the plaintiff either to believe that an amicable adjustment of the claim will be made without suit or to forbear exercising the right to sue.

Kleckley v. Nw. Nat. Cas. Co., 338 S.C. 131, 136--137 (2000).

Second, Appellants had diligently performed all the acts that led to the service of the processes to herein Respondents. Appellants should not be punished for the failure of the Post Office to forward the certified mail containing the processes on the day they were mailed. The negligence of the government entity is beyond Plaintiff's control.

Appellants have certainly not slept on their rights but diligently attempted, in good faith, to enforce them. The interests of justice and fairness, as well as the purpose of the statute of limitations itself, favor allowing Appellants claim to proceed.

Third, as previously discussed, the tolling provision, S.C. Code Ann. § 15-3-30 and the doctrine laid down in Meyer v. Paschal, are applicable in this instant case.

CONCLUSION

Based on the foregoing, in addition to the arguments made in the opening brief, Appellant respectfully requests this Honorable Court to grant Appellant's appeal, and to remand the case to

the Circuit Court to allow Appellant to properly serve the Respondents and litigate the case.

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Date: January 18, 2021

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FORM 7
PROOF OF SERVICE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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 Appellant's Motion for Leave to File Out of Time Reply Brief of Appellants, the Reply Brief of Appellants and Proof of Service of same, 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

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January 18, 2021

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FORM 8
LETTER TO THE APPEALS COURT CLERK
FILING OF MOTION FOR LEAVE TO FILE OUT OF TIME
REPLY BRIEF OF APPELLANTS AND REPLY BRIEF OF APPELLANTS

January 18, 2021

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 Reply Brief of Appellants;
2. Reply Brief of Appellants; and,
3. Proof of Service of same.

Sincerely,

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