

**LETTER TO THE APPELLATE COURT CLERK
APPELLANT'S CITATION OF SUPPLEMENTAL AUTHORITY**

February 27, 2021

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

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SC Court of Appeals

RE: Luther Harris, et.al. vs. Perry W. Barbour and Southland Transportation, Co.
Appellate Case No. 2020-001110

Dear Ms. Kitchings:

Pursuant to South Carolina Rules of Appellate Procedure, Rule 208(7), Appellants provide the following supplemental citation:

Henneberry v. Borstein, 2012 NY Slip Op. 00235 [91 AD3d 493]

This case bears some similarity with the facts of this case. The Plaintiff in the above-cited case filed a legal malpractice and breach of fiduciary complaint against Defendant Attorneys and law firm by filing a summons with notice on November 19, 2007, well within the three-year statute of limitations. Plaintiff arranged for a licensed process server to serve Defendants on March 13, 2008, within 120 days of the filing of the summons with notice. Two affidavits of service were filed to the court. On April 19, 2008, Defendants submitted a notice of appearance and demanded for a copy of the complaint, which Plaintiff served upon them on April 28, 2008. Alleging defective service and lack of personal jurisdiction, Defendant sought to dismiss the case on November 7, 2008, while Plaintiff moved for an extension of time to effect proper service.

In her desire to protect her claims in the event the first complaint is terminated, Plaintiff filed a second complaint in 2009, which contained substantially the same claims. Defendants moved to dismiss the 2009 case raising identical action pending before the court.

Both cases were dismissed: the first case for improper service (dismissed without prejudice), and the 2009 action based on the pendency of another identical action. It should be noted that in the first case, while the court dismissed the complaint, the court granted Plaintiff's motion for extension of time to serve his complaint.

Plaintiff thereafter filed the third action on February 11, 2010, which was dismissed for untimeliness. Plaintiff appealed all three orders.

In ruling in favor of the Plaintiff, the Supreme Court in New York County applied the "interest of justice" in granting Plaintiff the opportunity to pursue her action. The Supreme Court took into consideration Plaintiff's attempt to serve Defendants by hiring process server within

the 120-day time requirement, Defendants knowledge/awareness of the action as soon after the filing of the complaint and that her complaint sets forth actionable claims.

Myers v. Secretary of the Department of the Treasury, 173 F.R. D. 44 (E.D.N.Y. 1997)

Plaintiff in the above-mentioned case, worked as a Tax Examiner at Internal Revenue Services in January 1988. In November 1990, he was assigned to work to the computer room in IRS located in Holtsville, New York. While working there, he filed a claim under the grievance proceedings of the IRS as well as 6 claims of discrimination, harassment and retaliation with EEOC. He was again re-assigned to a different Department as a Remittance/Perfection Clerk for alleged performance. When his administrative claims have been disposed of, Plaintiff filed the above-mentioned case on April 26, 1996. The Complaint alleged discrimination under the Age Discrimination in Employment Act (ADEA), 20 U.S.C. §621 et. seq. and the New York State Executive Law Section 296.

On May 2, 1996, Plaintiff served the Office of Regional Counsel of IRS but failed to serve the Attorney General, the United States Attorney for Eastern District of New York and the Secretary of Treasury as required by law. The Attorney for Eastern District of New York was provided a copy by the IRS Regional Counsel. Defendant filed an Answer on July 1, 1996, raising lack of personal jurisdiction and insufficiency of process. In November 1996, Plaintiff attempted to serve Amended Verified Complaint correctly naming Defendants. Defendants did not accept service alleging the 120-day period had expired.

The Court finding that Plaintiff performed at least partial service upon the Government and subsequently made a good faith effort to correct service. The Court ruled in favor of Plaintiffs, allowing him to serve the Summons and Complaint within thirty 30 days from date of the Order, noting that Defendants will not be prejudiced having known of Plaintiff's claims since 1990.

In both Henneberry and Myers, the New York Supreme Court ruled that even though Plaintiffs failed to show good cause for failure to serve their respective processes within the 120 days, using the "interest of justice" standard, it may grant Plaintiffs extension of time to serve where the statute of limitations had expired in order to avoid "harsh result" to the Plaintiffs.

Spence v. Spence, 386 S.C. 106 (S.C. 2006)

This case bolsters Appellant's arguments found in pages 12-17 that Appellants should have given an opportunity to effect proper service upon Defendants. While not addressing the issue of improper service, Spence resolves the effect of expiration of the statute of limitations in cases that were dismissed without prejudice. The pertinent declaration in Spence is as follows:

When a complaint is dismissed without prejudice and the plaintiff is given the opportunity to file and serve an amended complaint, but instead chooses to appeal, the plaintiff ordinarily waives the right to amend his complaint. The appellate court may affirm the dismissal with prejudice if it determines the lower court properly

dismissed the complaint. Brighton, 102 S.W.3d at 468; Swink v. Ernst Young, 908 S.W.2d 660, 663 (Ark. 1995) (when trial court dismisses complaint pursuant to Rule 12(b)(6) for failure to state facts upon which relief can be granted, dismissal is without prejudice; plaintiff then has the election to plead further or appeal). When a plaintiff is not given the opportunity to file and serve an amended complaint but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice.

When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint. An appellate court should follow this procedure when the plaintiff presents additional factual allegations or a different theory of recovery which, taken as true in a well-pleaded complaint, may state a claim upon which relief may be granted. (internal citation omitted).

Widener v. Fort Mill Ford, 381 S.C. 522, 524 (S.Ct. App. 2009)

This case supports Appellants arguments found in pages 12-17 that Courts have allowed parties to seek relief when their rights to their claims have been precluded by the stringent application of procedural rules. In Widener, the Supreme Court determined the dismissal of the case prejudiced therein Plaintiff because any future action will be barred by the statute of limitations. The Supreme Court reversed the decision of the trial court and remanded the case to the lower court to enter an Order staying action pending the outcome of arbitration proceedings.

Respectfully Submitted,

s/Donald L. Smith

Donald L. Smith, Esquire (SC Bar#6699)

Attorney for Appellant

122 N. Main Street

Anderson SC 29621

Telephone: (864) 642-9284

Facsimile: (864) 642-9285

attorneydonaldsmith@gmail.com

cc: David L. Moore, Esquire