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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2018-001497
Civil Action No. 2015-CP-26-05633

Bobby Foster……. Appellant,

v.

Julian Neil Armstrong…… Respondent,

PETITION FOR REHEARING

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LEGAL ARGUMENTS IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING

Appellant hereby moves and petitions, pursuant to Rule 221 and 240 SCACR, as well as other applicable law, for an Order granting a rehearing in this case and would respectfully show that the Court overlooked or misapprehended certain points. Specifically, the Court's ruling essentially supports nullifying a valid claim and an injured party's case because of an obsolete procedural hiccup. Our Courts have continuously held that "Rule 55(c) should be liberally construed to ***promote justice and dispose of cases on the merits***." *Melton v. Olenik*, 379 S.C. 45, 664 S.E.2d 487, 492 (2008) (emphasis added).

ARGUMENT

I. This Court overlooked or misapprehended the issue that the trial court erred in holding that service by publication was ineffective on the basis that the "publication of the Summons in this case does not state the date of the filing of the Summons [in violation of] S.C. Code Ann. § 15-9-740."

The statute that provides for service by publication, S.C. Code Ann. § 15-9-740, is old. It was first enacted in 1870, which means that it predates not only e-filing, the online public index, and the Internet, but also the cellphone, fax machine, computer, photocopier, land-line telephone,[1] and mechanical Bates numbering machine.[2] It even predates the light bulb. Odds are that the statute was first written by hand, as the typewriter had been invented just two years prior.[3] It's an old statute.

[1] Technology Timeline, available at https://www.explainthatstuff.com/timeline.html . Last visited January 1, 2019.
[2] The Thomas Edison Papers, available at http://edison.rutgers.edu/NamesSearch/glocpage.php?gloc=CK300& Last visited January 1, 2019.
[3] By Christopher Latham Sholes. Encyclopedia Brittannica, available at https://www.britannica.com/biography/Christopher-Latham-Sholes

While following strict compliance would effectively eviscerate service by publication, strict compliance has never actually been followed, and thus, this Court, misapprehended or overlooked the clear reason for the statue. This Court, like the Circuit Court, erred because (a) our courts have never required strict compliance with this portion of the statute, (b) even if they had, the reason for doing so has long since passed; and (c) the statute dictates a "time" not "date" as the trial court's Order erroneously states.

This issue highlights the tension between two long-standing and well-known precedents. One precedent is our courts' historical insistence on "strict compliance with publication statutes." *Caldwell v. Wiquist*, 402 S.C. 565, 572, 741 S.E.2d 583, 587 (Ct. App. 2013). The other is that historically, "courts of this State have refused to elevate form over substance," *(Paschal v. Price*, 380 S.C. 419, 442, 670 S.E.2d 374, 387 (Ct. App. 2008), and have not required litigants to do useless things. *Newton v. Progressive Nw. Ins. Co.*, 347 S.C. 271, 274, 554 S.E.2d 437, 439 (Ct. App. 2001) (Goolsby, J.) ("The law requires a lot of things, but doing a useless act is not one of them."). Here, requiring truly strict compliance would elevate form over substance.

Accordingly, it is not surprising that some of the items found in the statute were necessary back then but are no longer necessary now. If they are no longer necessary, then they are no longer necessary. *See Rhett v. Gray*, 401 S.C. 478, 496, 736 S.E.2d 873, 883 (Ct. App. 2012) ("[w]hen the reason does not exist, the rule does not apply."); *Amerson v. F. C. X. Co-op. Serv.*, 227 S.C. 520, 525, 88 S.E.2d 605, 608 (1955) ("It is well settled that when the reason of the rule fails the rule does not apply."); *Richardson v. Blalock*, 118 S.C. 438, 110 S.E. 678, 678 (1922) ("When the reason of the rule is not applicable, the rule does not apply.").

Which brings us to the alleged deficiency at issue here – this Court, like the trial Court held that the publication in this case violates S.C. Code Ann. § 15-9-740 because it "does not state the ***date*** of the filing of the summons." (October 2016 ORDER, p. 2) (emphasis added).

As an initial matter, the statute does not require the ***date***. What the statute actually says is that "the summons, as published, must state the ***time*** and place of such filing." S.C. Code Ann. § 15-9-740 (emphasis added). Obviously, our courts have never insisted on strict compliance with this section of the statute, as rare indeed is the published summons that states the ***time*** at which it was filed. Thus, while strict compliance may be the general rule, historically it has not been the rule for this specific part of the statute. Moreover, it has long been recognized that the "rule that the statutory requirements as to constructive service by publication must be strictly carried out does not mean that any irregularity, however slight, is fatal." *Du Bose v. Du Bose*, 90 S.C. 87, 72 S.E. 645, 646 (1911).

Appellant, in oral arguments, argued the published summons <u>does</u> contain the date – of publication. It reads, "12/24, 31, 1/7" all which are the *only* date (or time) that governs the measure in which the Respondent had to Answer Appellant's Complaint. Additionally, the date is found within the caption – being the year, the first four digits – something also not required by the statute but adopted by courts as a method of searching. The date of the filed Complaint is wholly irrelevant and not within the meaning of the statute as Respondent argues he never had notice of the filed summons to begin with. Notwithstanding, the filed summons contained both the date and time, and could have just as easily been be accessed with the click of the mouse.

Even if the date of filing had been required in the past, it is no longer required. The reason for the date back before the online public index is fairly obvious – i.e., if one saw his name in a summons in the newspaper, he had to trek over to the county seat to look up the Complaint in order

to learn what he had been sued for. With the records being kept in chronological order, knowing the date of filing was essential unless one had the time to look one-by-one at every single file in the courthouse. So, knowing when the action was filed was necessary back before the online public index came into being. It's not necessary now.

Now, if one sees his name in a summons in the newspaper he need only visit www.sccourts.org and follow the links to look up his case by his name or by the civil action number. Accordingly, the reason for the rule – which was never strictly followed to begin with – no longer applies. As a result, the rule no longer applies. *Rhett v. Gray*, 401 S.C. 478, 496, 736 S.E.2d 873, 883 (Ct. App. 2012).

Not only is the date not required for the reasons above, but also the time is not necessary in our modern age, it also serves no purpose. Simply, the time for a responsive pleading is due prior to the stroke of midnight, the running dates of publication tell the responding party all the information it is required to know.

To invalidate Appellant's service of process because Appellant failed to do something that never existed or no longer serves any useful purpose - impermissibly elevates form over substance.

II. This Court overlooked or misapprehended the issue that trial court erred in holding that the Summons in this action was ineffective on the basis that it "does not notify the Defendant that if he fails to appear and defend a judgment by default will be rendered against him."

Although this Court did not specifically address this issue, Appellant restates his argument out of caution and in order to preserve the record.

The language used in the Summons in this case is substantively identical to the language approved by the Court of Appeals almost thirty years ago in *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 463, 381 S.E.2d 499, 500–01 (Ct. App. 1989). Simply, the trial court erroneously found that the Appellant's Summons was ineffective, and its holding was unprecedented.

The Summons in *Wham* said:

> **"[I]f you fail to answer the complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint."**

The Summons here said:

> **"[I]f you fail to answer the Complaint within the time aforesaid, Plaintiff will apply to the court for the relief demanded in the Complaint."**

But for four superfluous words, the language is identical.[4]

The *Wham* Court began by observing that this language "is almost the same as that suggested by Dean Lightsey and Professor Flanagan in their 'summons' form," and went on to "deem the summons sufficiently accurate to provide proper notice to [defendant]. It tells [defendant] that its failure to respond within the prescribed period will result in [plaintiff's] demanding from the court the relief sought in his complaint, which is another way of saying that judgment by default will be taken against [defendant] should it fail to appear and defend the action." *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 464, 381 S.E.2d 499, 501 (Ct. App. 1989).[5]

In the thirty years since *Wham*, its holding has not been overturned. It has not even been called into question. And this is consistent with South Carolina's general body of case law concerning service of process, as magic words are not required to effect service of process. *See*

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[4] Here, the summons said ". . . plaintiff will apply . . ." whereas in Wham the summons said ". . . ***the*** plaintiff ***in this action*** will apply . . ." (emphasis added to superfluous words).

[5] Moreover, the omission of the word "default" is harmless in any event, as Defendant claims that he "never received notice of this lawsuit until August of 2016" – ***five months after*** he was held in default. (Defendant's Motion to Set Aside Order for Entry of Default and Order for Publication, p.2). Accordingly, the absence of the word "default" could not have caused Defendant's failure to appear and defend the action. *See Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 464, 381 S.E.2d 499, 501 (Ct. App. 1989) ("In any case, the omission of the language from the summons was harmless. The omission had nothing whatever to do with Shearson Lehman's failure to appear and defend the action and it neither confused nor misled Shearson Lehman."); *see also McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) (Sanders, C.J.) ("[W]hatever doesn't make any difference, doesn't matter.")

Roche v. Young Bros., Inc. of Florence, 318 S.C. 207, 209–10, 456 S.E.2d 897, 899 (1995) (South Carolina has "never required exacting compliance with the rules to effect service of process."). Rather, the proper inquiry is "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." *Id.* at 210, 456 S.E.2d at 899. According to *Wham*, the language in the Summons at issue is sufficient. The trial Court holding to the contrary is an error or law which this Court can and should correct.

III. This Court overlooked or misapprehended the issue that the trial court erred in holding that service by publication was ineffective on the basis that the North Myrtle Beach Times is not a "daily newspaper of the defendant's last known address, 186 Williamsburg Road, Little River, South Carolina" and is "not a newspaper of general circulation in Horry County."

Although this Court did not specifically address this issue, Appellant restates his argument out of caution and in order to preserve the record.

"An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." *State v. Pittman*, 373 S.C. 527, 570, 647 S.E.2d 144, 166–67 (2007). Here, there is no evidentiary support for the trial Court's holding that the North Myrtle Beach Times is not a "daily newspaper of the defendant's last known address, 186 Williamsburg Road, Little River, South Carolina" and is "not a newspaper of general circulation in Horry County" (October 2016 ORDER, p. 2).[6]

The record does not contain any affidavits, deposition transcripts, authenticated documents, discovery responses, business records, or any other type of evidence with respect to

[6] Although it is the lack of evidentiary support for the trial Court's holding – rather than its inaccuracy – that is at issue here, it is worth noting that the trial Court's holding is both unsupported ***and*** inaccurate. Contrary to the trial Court's unsupported holding, the North Myrtle Beach Times does indeed serve Little River and the rest of Horry County according to its Circulation Report available at http://nmbtimes.com/wp-content/uploads/2018/12/NMB_circulation_report.pdf .

circulation or frequency of publication of the North Myrtle Beach Times. Nor did the trial Court purport to take judicial notice of the same.

Instead, all that supports the trial Court's holding are Respondent's memorandum and arguments of counsel, neither of which are evidence. *State v. Manning*, 418 S.C. 38, 47, 791 S.E.2d 148, 152 (2016) (Pleicones, C.J., dissenting) ("It is axiomatic that arguments of counsel are not evidence."); *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 390 S.C. 275, 701 S.E.2d 742 (2010) (Hearn, J., dissenting) (Memorandum in support of a motion is not evidence).

The trial Court's holding with respect to the North Myrtle Beach Times is an abuse of discretion, as it is wholly without evidentiary support.

IV. This Court overlooked or misapprehended the issue that the trial court erred in holding that service by publication was ineffective on the basis that the Plaintiff failed "to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. § 15-9-740."

Although this Court did not specifically address this issue, Appellant restates his argument out of caution and in order to preserve the record.

This Court overlooked or misapprehended that the trial Court cannot second-guess an issuing officer's Order. *See Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 428–29, 535 S.E.2d 128, 130 (2000). Specifically, this Court, like the trial Court, erred because whether or not Plaintiff actually used due diligence is not a decision that the trial Court is empowered to make under these circumstances. Rather, where, as here, "a party contests the validity of an order of publication based on a lack of diligence in attempting to locate the party . . . the trial court is without authority to overrule the finding of the clerk of court." *Caldwell v. Wiquist*, 402 S.C. 565, 569, 741 S.E.2d 583, 585–86 (Ct. App. 2013) (internal quotations and citations omitted).

"An order for service by publication may be issued pursuant to S.C. Code Ann. § 15–9–710 (Supp.1999) when an affidavit, ***satisfactory to the issuing officer***, is made stating that the

defendant, a resident of the state, cannot, after the exercise of due diligence, be found, and that a cause of action exists against him." *Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 428–29, 535 S.E.2d 128, 130 (2000) (emphasis added). "When the issuing officer is satisfied by the affidavit, ***his decision to order service by publication is final*** absent fraud or collusion." *Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 428–29, 535 S.E.2d 128, 130 (2000) (emphasis added) (citing *Yarbrough v. Collins,* 293 S.C. 290, 360 S.E.2d 300 (1987); *Ingle v. Whitlock,* 282 S.C. 391, 318 S.E.2d 367 (1984); *Gibson v. Everett,* 41 S.C. 22, 19 S.E. 286 (1894); *Yates v. Gridley,* 16 S.C. 496 (1882)). "The act does not specify the character of the facts and circumstances which must be stated in the affidavit, or the quantity of evidence necessary to satisfy the officer, before ordering publication." *Yates v. Gridley*, 16 S.C. 496, 499–500 (1882).

Here, the record does not contain any allegations of fraud or collusion.[7] "Since there were neither allegations nor proof of fraud or collusion before the [trial court]," the trial Court committed reversible error by second-guessing the issuing officer. *See Wachovia Bank of S.C., N.A. v. Player*, 341 S.C. 424, 428–29, 535 S.E.2d 128, 130 (2000) ("Since there were neither allegations nor proof of fraud or collusion before the master, he correctly refused to set aside service.").

V. The trial Court erred in granting summary judgment insofar as the sole basis for doing so was the Court's prior erroneous invalidation of Appellant's service by publication.

Appellant raises this issue only out of an abundance of caution. The grant of summary judgement was error insofar as its sole basis was the trial Court's prior error in invalidating Appellant's service by publication. By the time the trial Court invalidated service, the statute of

[7] Nor any allegation that the affidavit was facially defective. Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray, 419 S.C. 605, 616, 799 S.E.2d 310, 315 (Ct. App. 2017), reh'g denied (May 26, 2017), cert. denied (Mar. 7, 2018)

limitations had already run. All Responded needed to do at that point (and immediately did) was move for summary judgment on his statute of limitations defense. As a result, invalidation of service of process functioned as a *de facto* dismissal with prejudice.

CONCLUSION

The trial Court's errors described in Section I, II, and IV above each result from errors of law. Accordingly, each represents an abuse of discretion that this Court can and should have corrected; however, the issues were misapprehended and overlooked. *BB & T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502–03 (2006)**.** The trial Court's error described in Section III resulted from the trial Court having issued an order "based on factual conclusions that are without evidentiary support," and therefore it also constitutes an abuse of discretion. *Id.*

For the reasons stated above, and those set forth in the briefs and initial arguments, Appellants respectfully pray for a rehearing on this matter.

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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing via AIS email on October 5, 2021, addressed to Respondent's attorney of record, Linda Weeks Gangi of Thompson & Henry, P.A. at lgangi@thompsonlaw.com

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