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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

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

Unpublished Opinion No. 2021-UP-336 (S.C. Ct. App. Filed September 22, 2021)

Bobby Foster,……. Petitioner,

v.

Julian Neil Armstrong,…… Respondent,

PETITION FOR WRIT OF CERTIORARI

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s/ Matthew T. Foss
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CERTIFICATE OF COUNSEL

Counsel for the petitioners certifies that his Petition for Rehearing was made and finally ruled on by the South Carolina Court of Appeals on October 12, 2021. (R., p. 410)

QUESTIONS PRESENTED

I. **Did the Court of Appeals, and thus the Trial Court, err 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?"**

II. **Did the Court of Appeals err in affirming the holding of the Circuit Court 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?"**

III. **Did the Court of Appeals err in affirming the holding of the Circuit Court 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?"**

IV. **Did the Court of Appeals err in affirming the holding of the Circuit Court that service by publication was ineffective on the basis that the Petitioner failed "to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. § 15-9-740?"**

V. **Did the Court of Appeals err in affirming the holding of the Circuit Court in granting summary judgment insofar as the sole basis for doing so was the Court's prior erroneous invalidation of Petitioner's service by publication?**

STATEMENT OF THE CASE

This appeal arises out of the October 26, 2016, Order of the Honorable Benjamin H. Culbertson, granting Respondent's Motion Setting Aside Order for Publication and Setting Aside Order for Entry of Default and for Referral on Damages; and the July 12, 2018, Order of the Honorable Larry B. Hyman, granting Summary Judgment and Dismissing Action with Prejudice.

On April 8, 2013, Respondent rear-ended Petitioner. Petitioner suffered significant personal injury and property damage as a result. On July 27, 2015, Petitioner filed a Summons and Complaint in Horry County. Petitioner attempted to serve Respondent personally without

success, although the sheriff's office "made a diligent search." Petitioner then secured an Order for Publication. (R., p. 1).

The publication ran during the weeks of December 24 and 31, 2015, and January 7, 2016. On March 2, 2016, Petitioner moved for entry default against Respondent (R., p. 60) which was entered on March 8, 2016. (R., p. 19).

In July 2016, Respondent's counsel appeared in this matter. (R., p. 75). In September 2016, Respondent filed a Motion to Set Aside Order for Entry of Default and Order for Publication. (R., p. 77). Respondent's motion was granted on October 21, 2016. (R., p. 20).

On November 10, 2016, Petitioner filed a Motion to Reconsider pursuant to Rule 59, SCRCP (R., p. 253). The Court denied Petitioner's motion by order dated March 16, 2017. (R., p. 38). Respondent filed a Motion for Summary Judgment on March 31, 2017 (R., p. 118).

Form 4 granting Respondent's Motion for Summary Judgment was signed by the Court on April 24, 2017. (R., p. 28). It stated that a formal order would follow. (R., p. 28). On July 7, 2017 Petitioner filed a Motion to Alter or Amend. (R., p. 253). The Motion was denied. On July 12, 2018, the final order was entered. (R., p. 42). Petitioner timely filed and served a Notice of Appeal on August 13, 2018. (R., p. 280).

STATEMENT OF THE FACTS

On April 8, 2013, Petitioner, driving a 2000 Dodge, had stopped for traffic on S.C. 90 when Respondent, driving a 1995 Lexis, rear-ended him. Law enforcement was called, and the two men provided information that was used on an accident report. The accident report described it this way:

> [RESPONDENT] AND [PETITIONER] WERE TRAVELING EAST ON SC 90. [PETITIONER] STOPPED FOR TRAFFIC. [RESPONDENT] STRUCK [PETITIONER]. [RESPONDENT] WAS DRIVING TOO FAST

FOR CONDITIONS.

Petitioner later complained of "serious and painful personal injuries[,] including, but not limited to, pain and suffering, and injuries to his back and shoulder." Petitioner allegedly missed work and suffered "loss of enjoyment of life and change in his personality," among other listed maladies.

On July 27, 2015, Petitioner filed a summons and complaint against Respondent. On August 13, counsel for Petitioner mailed a copy of the summons to Respondent at the address listed for Respondent on the incident report. On August 31, sixteen days after a postal service notice was left at the address, USPS annotated the summons as "Unclaimed/Max Hold Time Expired" and returned it.

The Horry County Sheriff's Office attempted service at the same address. In an affidavit dated October 26, the deputy stated that he "made a diligent search, but was unable to locate" Respondent. The bottom of the affidavit states: "UNABLE TO LOCATE. NEIGHBOR ADVISED THAT SUBJECT HAS MOVED." The identity of the neighbor was not given.

On November 23, Petitioner filed a petition with the Horry County Court of Common Pleas to order a summons by publication. The following day, the clerk of court filed an order "find[ing] that it is appropriate and necessary to serve the Defendant via publication in the daily newspaper of Defendant's last known residence," which the order listed as the address on the accident report.

On December 24 and December 31 of 2015, and January 7 of 2016, a summons appeared in the North Myrtle Beach Times. On March 8, 2016, Petitioner filed a motion for an entry of default. The same day, the clerk of court ordered the entry of default and required a hearing to be scheduled on damages.

However, on July 19, attorney Linda Weeks Gangi filed a notice of appearance on behalf of Respondent. On September 21, Respondent filed a "Motion to Set Aside Order for Entry of Default and Order for Publication." Respondent argued that (1) the summons did not comply with Rule 4(b), SCRCP, because it "d[id] not notify the Defendant that if he fails to appear and defend[,] a judgment by default will be rendered against him"; (2) the summons in the newspaper did not include the date the initial complaint had been filed; (3) the North Myrtle Beach Times was not an appropriate newspaper for the notice; and (4) Petitioner should have attempted to contact Respondent by telephone.

Petitioner countered that both the initial summons and the published summons alerted Respondent that (1) default judgment was a possibility; (2) "the North Myrtle Beach Times is the closest general circulation paper to [Respondent's] last known address[;] and [(3)] the Summons' missing date is not fatal to the publication." Further, Petitioner argued that Respondent offered no "good cause" for his motion, as required by Rule 55(c), SCRCP.

The Honorable Benjamin H. Culbertson held a hearing October 17. On October 21, the court signed Respondent's proposed order setting aside the entry of default. The order stated "that this [c]ourt has no personal jurisdiction over [Respondent] and that service of the Summons and Complaint was not properly perfected on [Respondent]." The court filed the order on October 26.

On November 10, Petitioner filed a motion to reconsider, asking for the court to "clarify its opinion on this matter [regarding personal jurisdiction] to address the issue of the statute of limitations." In an order filed March 23, 2017, the court reiterated that it had "no personal jurisdiction over [Respondent]" and denied Petitioner's motion.

On March 31, 2017, Respondent filed a motion for summary judgment. Respondent argued: "The Summons to date has never been amended. No Acceptance of Service was ever

provided to [Respondent's] attorney." Respondent claimed the statute of limitations operated to block Petitioner's suit. In his memorandum of law in opposition to the motion, Petitioner reiterated "his assertion that [Respondent] was properly served by publication and his cause of action was properly commenced within the statute of limitations period[.]" Petitioner further argued that Respondent had waived the statute of limitations and that public policy called for a full trial.

On April 24, the Honorable Larry B. Hyman filed a Form 4 judgment granting Respondent's motion. On July 7, 2017, Petitioner filed a motion to reconsider. The court denied the motion. On March 27, 2018, the court filed a Form 4 judgment. A formal order followed on April 9.

ARGUMENT

In affirming the Trial Court's grant of Respondent's motion to set aside default and motion for summary judgment, the Court of Appeals erred in holding that, although the statute no longer serves its purpose and does not contain the requirement for a "date", the publication of the summons was ineffective.

I. The Court of Appeals erred in affirming the Trial Court's decision 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." (R., p. 24).

In the present action, the Court of Appeals erred in affirming the trial court 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.

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.

While following strict compliance would effectively eviscerate service by publication, strict compliance has never actually been followed. 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

[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

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 – the Court of Appeals, 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).

Petitioner, in oral arguments before the Court of Appeals, argued the published summons does 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 Petitioner'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.

To be sure, there are circumstances where a lawsuit's date of filing is relevant to due process notice requirements. Dates of filing are relevant in divorce proceedings, mortgage foreclosures, or even probate actions. With all three of these examples, the date of filing is relevant to the matter because statutes provide specific timelines for interested parties to appear and take part in the litigation through hearings or public filings; however, this matter is different as it is a personal injury civil lawsuit based on a motor vehicle accident which is known to have occurred on April 8, 2013. Respondent, who was unable to be located until his counsel appeared, did not lose any constitutional right to object by being unaware of this lawsuit's filing date. In this circumstance, the only dates that are germane to this analysis are the dates on which the publication ran in the *North Myrtle Beach Times*, which ran December 24 and 31, 2015, and January 7, 2016. Therefore, the thirty days for Respondent to respond to Petitioner's Complaint began running on January 7, 2016, the last day of publication.

In the present matter, 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 Petitioner's service of process because Petitioner failed to do something that never existed or no longer serves any useful purpose - impermissibly elevates form over substance. The Order of the trial court should be reversed and the matter remanded for a trial on the merits.

II. The Court of Appeals erred in affirming the Trial Court's 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." (R., pp. 23-24).

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

The Court of Appeals and thus the trial Court's holding is in direct conflict with binding precedent, as 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).

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 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

[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.")

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, and therefore the Court of Appeals' holding to the contrary is an error or law which this Court can and should correct. The Order of the trial court should be reversed and the matter remanded for a trial on the merits.

III. The Court of Appeals erred in affirming the Trial Court's 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." (R., p. 24).

Although this Court did not specifically address this issue, Petitioner 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" (R., p. 24).[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 circulation or frequency of publication of the North Myrtle Beach Times. Nor did the trial Court purport to take judicial notice of the same.

[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 .

Instead, all that supports the trial Court's holding are Defendant'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, and the subsequent affirming by the Court of Appeals, with respect to the North Myrtle Beach Times is an abuse of discretion, as it is wholly without evidentiary support. The Order of the trial court should be reversed and the matter remanded for a trial on the merits.

IV. The Court of Appeals erred in affirming the Trial Court's holding that service by publication was ineffective on the basis that the Petitioner failed "to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. § 15-9-740." (R., p. 25).

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

The trial Court, and therefore the Court of Appeals, erred because whether or not Petitioner 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).

Simply, 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). "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.").

As stated herein, Respondent's argument and thereafter the trial Court's ruling that Petitioner failed "to use reasonable diligence in locating the Defendant as required by S.C. Code Ann. § 15-9-740" was wholly without evidentiary support. The Order of the trial court should be reversed and the matter remanded for a trial on the merits.

[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)

V. The Court of Appeals erred in affirming the Trial Court's grant of summary judgment insofar as the sole basis for doing so was the Trial Court's prior erroneous invalidation of Petitioner's service by publication

Petitioner 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 Petitioner's service by publication. By the time the trial Court invalidated service, the statute of 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. The Order of the trial court should be reversed and the matter remanded for a trial on the merits.

CONCLUSION

Petitioner respectfully submits that this case is appropriate for review by the Supreme Court. These issues are nearly certain to appear again and again before our lower courts and, with no direction from the Supreme Court, are subject to inconsistent rulings.

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 the Court of Appeals should have corrected; however, the issues were not corrected. *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, and therefore the Court of Appeals erred in failing to directly address and subsequently overturn. *Id.*

For the reasons stated above, and those set forth in the briefs and initial arguments, the Trial Court erred by erroneously not recognizing the inconsistent statutory language and intent

behind the statute governing service by publication. The Court of Appeals erred in affirming the Trial Court's grant of summary judgment and motion to set aside default, and the matters should be reversed and remanded to the Trial Court for a full trial by jury.

Respectfully Submitted,

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Dated: November 10, 2021